

Contracts (Lefstin) Outline
Fall 2003 First Semester
Covering Pages 1-457 of Barnett, *Contracts 3rd Edition*

1. Nature & History of Contract

- A. **Contract** = a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some ways recognizes as a duty (Restatement §1)
1. Rights and duties created by the individuals by the contract; as opposed to Torts, which are violations of rights and obligations imposed on all
 2. *Restatement Second §1: Contract:*
 - (1) Contract is an agreement to exchange promises or to exchange a promise for a performance
 - (a) **Bi-lateral contract** = exchange a promise for a promise
 - (b) **Unilateral K** = exchange a promise for a performance (?)
 3. *Restatement Second §4: How Promise Made:*
 - (1) Promise may be made in writing or orally, or may be inferred in part or whole from conduct
 4. Assumpsit = failure to perform a contractual obligation (common law cause of action)
 5. Not all promises are enforceable
 - (1) Mere promise does not give rise to an action; but promise for a promise does give rise to an action, because one had suffered a detriment by having one's freedom of action fettered
 - (2) Promises & Performances against public policy are not enforceable
 - (3) Promises that were not bargained /contracted for, or which were not part of an exchange, are not enforceable
 - (a) Doctrine of consideration – must be an exchange, something given by both parties to make an enforceable contract
- B. Uniform Commercial Code (UCC)
1. Covers sales of goods – BINDING LAW
 2. Two goals
 - (1) Uniformity across states in transactions for goods
 - (2) Bring law in agreement with the actual practices of merchants
 3. UCC enacted by state legislatures to become law, otherwise simply a guideline
- C. Restatement (Second) of Law of Contracts
1. Ideal version of the law, only has persuasive power (not law), but very influential. Over time it has become embodied in case law as Judges rely on it in decisions
- D. 2 Sources of binding law:
1. Case law (common law), which often embodies Restatement positions
 2. UCC

Promisor: Party that makes the promise and breaches

Promisee: Party that was to benefit the promise and suffers from the breach

2. Freedom of Contract & Public Policy

- A. An otherwise valid contract is rarely invalidated because it is against public policy, but it can be; if a contract is against public policy it is not enforceable, and thereby limits a person's freedom of contract
1. Contracts can be voided as unenforceable for violating public policy concerns b/c:
 - (1) Substantive: weigh freedom of contract with other rights and liberties
 - (2) Procedural: whether courts should weigh in on public policy concerns, or should rely on the legislature to determine and only look at the law
 2. *Parens Patriae* = court's responsibility to look after the best interest of a minor where the court is acting as a parent / guardian [Baby M, pg. 19]
 - (1) Highest priority of a court in equity – all other considerations are secondary, including contractual rights and responsibilities and legal theories
 - (a) Child's best interests determine custody of child in custody disputes [Baby M]
 - (b) However, *parens patriae* does NOT determine the legal parentage of the child, only the custody once parentage is established. [Johnson v Calvert, p. 48]
 3. Public Policy expressed as “a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interest of the public weal” [Shaheen v Knight, pg 9]
 - (1) Although guarantee of cure is not against public policy (because no unanimity of opinion), assigning damages for birth of a healthy child is against public policy [Shaheen v Knight]
 4. “There are some things that money can't buy” – e.g., minimum wage, discriminatory payment, child labor, unsafe or unhealthy labor. All examples are statutorily created.
- B. Statutory & constitutional provisions also apply as limits on freedom of contract. One cannot contract for an illegal or unconstitutional promise or performance. [Baby M, contract violates adoption statutes as well as public policy like *parens patriae* and keeping children with both parents, pg 32]
- (1) Statutory and Constitutional provisions are expressions of public policy
 - (2) *Restatement Second §178: When a term is unenforceable on grounds of public policy*
 - (a) *A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.*
 - (b) *In weighing the interest in enforcement of a term, account is taken of:*
 - (i) *The parties' justified expectations*
 - (ii) *Any forfeiture that would result if enforcement were denied*
 - (iii) *Any special public interest in the enforcement of the particular term*
 - (c) *In weighing a public policy against enforcement of a term, account is taken of:*
 - (i) *The strength of that policy as manifested by legislation or judicial decisions*
 - (ii) *The likelihood that refusal to enforce the term will further that policy*
 - (iii) *The seriousness of any misconduct involved and the extent to which it was deliberate*
 - (iv) *The directness of the connection between the misconduct and the term.*
 - (3) *Restatement Second §179: Bases of Public Policies Against Enforcement*

(a) A public policy against enforcement of promise or other terms may be derived by the court from (a) legislation relevant to such a policy, or; (b) the need to protect some aspect of the public welfare, as is the case for the judicial policies against, for instance, (i) restraint of trade, (ii) impairment of family relations, (iii) interference with other protected interests.

C. Freedom of contract a basic assumption:

1. Based on idea of individual liberty – that we are all capable of acting in our own best self interest, and that the state rarely should intrude into our private matters to dictate what our best interest is
 - (1) Courts often reluctant to rule based on public policy, where no violation of statute, because legislature has not codified the public policy and court will uphold basic right/freedom of contract
2. Where a party is legally incapable (insane, minor), less deference to the assumption of freedom of contract because less sure that the party is capable of looking out for their own best interests [PRESUMABLY... NOT IN BOOK] – Hence *parens patriae*
3. Status-based distinctions based on:
 - (1) concern over the disparity of bargaining power & information
 - (2) concern with people’s ability to act in their own best interests
 - (3) transaction costs and unforeseen externalities
 - (4) market alienability (some things that can’t be bought or contracted)
 - (5) Protect the vulnerable

D. Default rules and Freedom of Contract

1. Parties may contract around default rules, and the contract itself usually contains default rules for breach and obligations [*Shaheen v Knight*, Dr. free to contract around default rule that there is no warranty of cure]

E. Public policy limitations on individual rights to protect liberties (paternalistic gov.)

Thru pg. 57

3. Damages for Breach of Contract

- A. In order to be an actionable breach of contract there must be 1) an enforceable contract and 2) there must be damages from the breach of that contract
- B. Damages only one remedy for breach of contract (also, e.g., specific performance & injunctions)
- C. Remedies are the answer to the two questions of “why have a rule?” and “what happens if I break the rule?”
- D. 3 Damage interests
 1. **Expectation** – FULFILL THE CONTRACT
 - (1) Put promisee back in the position they would be in if there was no breach
 - (2) Default damages rule
 - (3) Most generous relief, but weakest claim
 - (a) Allows parties to obtain the benefit of the bargain that would be denied if the contract was simply voided (e.g., lost profits)
 - (b) Only claim allowing specific performance

- (c) When there is a **losing contract** (e.g., you lose money by performing the contractual obligations) you are usually limited to the expectation amount (See #4, page 70)
- (4) If damages under expectation interest are uncertain or impossible to calculate, cannot award expectation damages and must utilize Reliance interest or restitution if the reliance interest is insufficient (pg 99, n 22)
- (5) Damages = Loss in Value + Other loss – Cost avoided – Loss Avoided**
- (6) Damages = Costs incurred + expected profit** (alt. formula – same result as above)
- 2. **Reliance** – Back to before there was a contract (reward costs incurred by honest party)
 - (1) “He changed his position because of the other’s promise, and was damaged by it”
 - (2) Reliance puts promisee back in the position before the contract was made and breached
 - (3) Usually more generous than Restitution (covers additional costs that were accrued because of the party’s reliance)
- 3. **Restitution** – back to before there was a contract (take away benefit from breaching party)
 - (1) “I have something I should not have, and it is unjust for me to have it” = unjust enrichment by the promisor = Restitution
 - (2) Restitution also its only cause of action, a separate doctrine of Restitution that can justify a claim of action in the absence of a contract (e.g., I found a \$20 bill that someone lost)
 - (3) Strongest claim for relief – based on notions of justice and equity
- E. Contract damages do not include pain and suffering – they cannot be construed as “other costs” (Hawkins v McGee, “Hairy Hand”)
 - 1. Dr. breached warranty of cure contract with patient to cure his hand, court awards damages as the difference between the hand in its current post-op state and the hand that was promised: “the measure of recovery is based upon what the defendant should have given the plaintiff” – EXPECTATION interest
 - 2. McGee v US Fidelity very similar to Hawkins, where court finds doctor entered into special contract to cure (around default rule that there is no warranty of cure), which makes the doctor liable for the breach of that contract
- F. Three damage interests overlap, and in some cases they will yield the same result
- G. **Mixed Contracts:** Where there is a mixed contract for services and goods, the matter of the dispute (whether more a dispute over goods or over services) decides the matter of whether the common law or UCC applies: because in Hooker & Sons v Roberts Cabinet Co, the dispute is more over services, that case decided on common law basis
 - 1. Court awards damages of lost (Expected) profits and administrative costs (staff could have been doing something else), but denies recovery for storage costs (space would have been empty otherwise, thus considered **costs avoided**)
- H. **Cover:** For buyer to buy goods from another to substitute for a seller’s breach (UCC §2-713, pg 85) – **RELIANCE**
 - 1. Damages awarded are the difference between the contract price (what they would have paid) and market price (price of fulfilling the contract after the breach) together with any consequential damages, less expenses saved
 - 2. Buyer does not have to cover in order to have remedy for seller’s breach

I. Damages for seller's non-delivery (UCC §2-713, pg 85)

1. Same damage award as UCC §2-713: difference b/w the market price at the time the buyer learns of the breach and the contract price plus consequential damages, minus expenses saved
2. Tongish v Thomas, Court awards damages under §2-713 for seller's breach of sale of sunflower seeds, despite Coop's (intervener) guaranteed resale contract for contract price plus handling fee
 - (1) Court ignores this resale contract because:
 - (a) Makes the case more applicable to future cases
 - (b) Much simpler to decide the case
 - (c) Protects freedom of contract ("whatever else someone decides to do is not relevant to damages under this contract")
 - (d) Objective approach to damages, rather than subjective (value on open-market vs. the value to the individual (Coop))
 - (i) Consider hypothetical where the value to the individual is greater than the market value because of sentimental values

3 Limitations on Damages

3. **Foreseeability of harm** (could promisor know the harm when he breached?)
 - (1) Foreseeability determined at the time of breach; damages limited to foreseeable damages unless there was a specific, explicitly communicated agreement to special circumstances that would inform the promisor of these damages (Hadley v. Baxendale, pg 86, no notice of consequences of breach and therefore defendant not liable to pay for special circumstances of mill being shut down)
 - (a) "A promisor is liable only for damages that are foreseeable at the time the contract is enacted" Hadley Rule
 - (2) Use, rental or sale of self-contained equipment (equipment with a use value in and of itself) is foreseeable (Martinez v So. Pacific Trans., pg 97; even though plaintiff did not inform shipping company of intent to use equipment, use or sale of that equipment was foreseeable and thus company liable for failure to deliver on time – not special damages)
 - (a) However, only compensation for time period when equipment unavailable due to delay (not for time when damaged, because plaintiff had already settled damages claim); remedy for damaged equipment includes damages for loss of use during the period that the machinery is unusable.
 - (b) Damages for delay typically the diminution in value of the goods between time of dispatch and time of actual delivery, but not applied where another rule better compute actual damages, such as lost rental value
 - (i) Loss of value typically used for delay in delivery of food or perishable goods, or non-rentable goods (pg. 101)
 - (c) Plaintiff need not show that their use is the most likely use, just that their use was foreseeable at time of contract
 - (3) Special Damages
 - (a) Two tests for determining special damages: (Martinez, pg 100)
 - (i) Restrictive test: notice was given of special circumstances and defendant impliedly or expressly assented to bearing the risk

- (ii) Common test: notice was given of special circumstances, e.g., UCC §2-715, comment 2
- (b) Special damages not recoverable without prior notice; Notice creates foreseeability – by explicitly communicating extent of damages at time of contract formation, those damages are foreseeable
- (c) In Martinez, special damages include lost profits, cost of idle labor hired to operate the machinery, or royalties plaintiff was paying for the land on which he planned to use the machine. Plaintiff cannot recover for these costs of the mining operation in which the machine was to be involved, but plaintiff can recover for the lost use of the machine
- (4) Rationale
 - (a) Efficient market (without notice, costs rise in order to cover increased / unknown risks – with notice, parties can contract to cover risk)
 - (b) Party most informed of special needs / potential consequences should have the burden to communicate those damages
 - (c) Protect defendants from unforeseeable large losses to plaintiff
- (5) *Restatement §351: Unforeseeability and Related Limitations on damages*
 - (a) *Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of breach when the contract was made*
 - (b) *Loss may be foreseeable as a probable result of a breach because it follows from the breach*
 - (i) *In the ordinary course of events, or*
 - (ii) *As a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.*
 - (c) *A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.*
- 4. **Certainty of harm** (would promisee surely have reaped these profits?)
 - (1) In order to award expectation damages (lost profits), those damages must be certain at the time of contract formation
 - (a) Chicago Coliseum Club v. Dempsey, pg 105, where at time of contract formation unclear what the profits would be from holding a title fight, dependent upon too many variables (e.g., weather) – liquidated damage clause in the contract appropriate to fix this problem (*see xxx below*)
 - (i) Court also refuses to award damages for attorney’s fees because no such provision in the contract
 - (ii) Court refuses to award damages for any costs incurred prior to contract formation, since these expenses cannot be made in reliance on the contract
 - (iii) Court does award damages for expenses after contract formed and before breach (only for labor devoted to the contract which could have been devoted to other tasks (Avoidability))
 - (b) Winston Cigarette (pg 115), lost profits are too uncertain when they are “subject to too many contingencies and are too dependant upon the fluctuation

of markets and the chances of business to constitute a safe criterion for an estimate of damages”

- (c) Anglia TV v Reed, English court allows damages against American defendant for expenses incurred prior to contract formation (that these damages were foreseeable and proper under expectation interest):
 - (i) OPPOSITE result in US Courts, where reliance interest categorically starts with contract formation (no reliance before there is a contract)
- (d) *Restatement §346: Availability of Damages*
 - (i) *The injured party has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged*
 - (ii) *If the breach caused no loss or if the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss will be awarded as nominal damages*
- (e) *Restatement §349: Damages based on Reliance Interest*
 - (i) *As an alternative to the measure of damages stated in §347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed*
- (f) *Restatement §352: Uncertainty as a limitation on damages*
 - (i) *Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty*
- (g) Mistletoe Express v. Locke (pg 120)
 - (i) Plaintiff incurred costs in reliance of contract; defendant breaches contract; jury awards damages in amount of Reliance interest, even though reliance greater than Expectation interest (losing contract);
 1. Restatement allows an injured party to ignore the element of profit and recover as damages his expenditures in reliance;
 2. Party in breach has the burden of proof to show losses avoided (expectation interest), except where profits are too uncertain
 3. Reliance interest = losses incurred (loan – amount recovered from the sale of property purchased with the loan), plus other costs incurred (dirt work and materials).
 4. No interest on loan as expectation or reliance interest – would be double recovery

5. Avoidability of harm (could promisee mitigate/avoid the harm?)

- (1) General rule that injured party (plaintiff) cannot hold a defendant liable for damages which need not have been incurred; plaintiff must, so far as he can without loss to himself, mitigate the damages caused by the Defendant’s wrongful act
 - (a) Rockingham County v Luten Bridge Co.
 - (i) Defendant breaches contract with plaintiff bridge co, which continues work on building the bridge after plaintiff notified of the breach

1. RULE: No additional damages after plaintiff is notified of defendant's breach of contract

- a. Remedy is to sue for breach of contract at time of breach, including expected profit (expectation interest)
- b. *Rationale: Plaintiff cannot punish a defendant for breach; provides mechanism for efficient breaches and gives people a right to breach and not worse off than if they had completed the contract*

(ii) Damages = Expectation (labor and materials expended in building the bridge up until the time of breach, plus profit that was expected)

(b) Shirley MacLaine Parker v. 20th Century Fox Film Corp:

- (i) Defendant notifies plaintiff (actress) of breach of employment contract to produce a film; offers plaintiff an opportunity to star in another film instead, as mitigation; plaintiff declines to take other film and sues for breach of contract:

1. RULE: Recovery by wrongful discharged employee is the amount of salary thru the contract term, less the amount which the employer affirmatively proves the employee has earned during the period after the breach or with reasonable effort would have earned from other employment

- a. Other employment must be reasonably similar to employment contract that was breached; if different or inferior to employment in contract, plaintiff need not accept and no mitigation
- b. Reasonableness = effort of finding a job that was not different or inferior
- c. Rather than permitting the employee to remain idle during the balance of the contract period, he must make reasonable effort to find other employment that is in the same field and of the same quality.

- 2. Because 2nd movie has inferior contract terms, different location, and substance of movie very different (from feminist hero to western housewife), court holds that 2nd job offer is inferior and not mitigation

(2) *Restatement §350: Avoidability as a Limitation on Damages: (1) except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation. (2) the injured party is not precluded from recovery by the rule stated in subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.*

(a) Neri v. Retail Marine Corp.

- (i) Plaintiff breaches contract to purchase motor boat from defendant after providing \$4250 deposit; Plaintiff sues for return of deposit; defendant sells boat as mitigation; defendant claims damages should include loss of profit (expectation interest) on sale of boat to Plaintiff, even though loss mitigated by sale to 3rd party;

- 1. **RULE: LOST VOLUME DOCTRINE:** (i.e., not a one time sale, like individual selling their own car) [pg 144-145] Where buyer breaches contract, seller has right to expected profit on sale plus incidental damages if that seller has virtually unlimited volume

2. **Default rule for Buyer's breach:** Seller may recover the difference between the resale price and the contract price plus incidental damages, less expenses saved in consequence of the breach [UCC §2-708] [pg 144]; however, if the measure does not make the seller whole after the breach, the lost volume doctrine applies
 - a. **Incidental Damages** include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in transportation, in care and custody of goods after the breach, in connection with return or resale, or otherwise resulting from the breach (**UCC §2-710 pg 145**)
 - (ii) Since UCC applies, and dealer had nearly unlimited volume, court awards damages of lost profit plus incidental damages (storage cost) minus costs avoided; court ends up giving plaintiff a small portion of their deposit back (minus the costs above)
 - (b) **UCC Liquidated Damages Rule:** Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated inconvenience or nonfeasibility of obtaining a reasonable remedy. A term fixing unreasonably large liquidated damages is void as a penalty. [Liquidated damages clause = damage amount specified and agreed to by both parties in the contract] [**pg. 145-146**]

4. Contracting Around Default Rules

Express Limitations on Consequential Damages

1. RULE: Party may contract around default rules of foreseeable damages to limit their liability for breach of contract (to provide exclusive remedy)

- (1) UCC allows such express limitations; such contractual remedies are optional unless the remedy is expressly agreed to be exclusive, in which case it is the exclusive remedy; where circumstances cause an exclusive or limited remedy to fail its essential purposes, remedy may be had as provided for in the UCC
- (a) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitations on commercial, economic losses are ok, but limitations of consequential damages for personal injuries are prima facie unconscionable. [UCC §2-719, pg 147]

Liquidated Damage Clauses

2. Kemble v Farren (old English case): Plaintiff (theatre) sues actor (defendant) for breach of 4-year exclusive contract; contract contains stipulated damages clause calculated as (duration x rate of pay = 4 yrs x \$250=\$1000). Defendant breaches after 1 year, plaintiff sues for full \$1000 stipulated damages clause;

(1) RULE: Courts will not enforce a liquidated damages clause that is a penalty

- (a) Penalty: that a very large sum should be due in consequence of a very small sum or breach
- (i) Common Law: Difficult to prove that a liquidated damages clause is not a penalty;
- (b) Dicta: courts will enforce stipulated/liquidated damages clauses only where the profits or expectation interest is uncertain
- (2) Damages held as a penalty / unreasonable, in light of the actual damages that the court could determine, and court awards damages of \$750 (duration left on contract x rate of pay)

3. Wassenaar v. Towne Hotel:

- (1) π has 3 yr contract with Hotel (Δ) with stipulated damages clause, that in event of wrongful discharge / breach π is owed salary for unexpired term of contract; Δ breaches contract with 21 months to go; Δ claims π did not mitigate damages

- (a) Δ has burden of proof to prove liquidated damages provision of contract is unenforceable as against public policy (as penalty)

(i) *Rationale: (1) freedom of contract; (2) put burden on party that breaches a contract, since the purpose of the clause is to not have to prove the damages*

- (b) RULE: where stipulated damages clause is valid and enforceable provision for liquidated damages, the doctrine of mitigation of damages is not applicable to determine the damages awarded to the injured (non-breaching) party**

- (c) RULE: to determine whether stipulated damages clause is valid is to test whether the clause is reasonable under the totality of the circumstances;**

- (i) 3 factors of reasonableness
1. Subjective intent of the parties (DISREGARDED now)

2. Uncertainty proportional to reasonableness (the greater the difficulty in ascertaining damages, the more likely the stipulated damages appear reasonable)
 3. Is the stipulated damages clause a reasonable forecast of compensatory damages?
 4. Relative bargaining power of the parties to the contract (added by Wassenaar)
- (ii) Prospective Retrospective Approach: (ii) [Uncertainty] and (iii) [forecast] determined both at time of contract (prospective) and at time of breach (retrospective);
1. if damages in contract are grossly disproportionate to actual harm, courts usually conclude that parties' expectations unreasonable
 2. Compare harm anticipated with actual harm at time
 - a. of breach; or
 - b. of trial
 3. Modern trend is the emphasis on what actually happened
- (2) Court holds that stipulated damages clause negates π 's duty to mitigate, that damages are uncertain (incidental / consequential damages: loss of prestige, lower salary at new job, bad references from old job, difficulty in finding job), that therefore Δ has not proven that damages are unreasonable (has not met burden of proof) and court upholds stipulated damages clause
- (a) RULE: Consequential damages usually unforeseeable, but parties can establish consequential damage measure by contract (liquidated damages clause can include consequential damages)
 - (b) RULE: Unequal bargaining power a fourth policy consideration for the reasonableness test

Restatement §356: Liquidated Damages & Penalties: (1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

Efficient & Inefficient Breaches

4. Lake River Corp. v Carborundum Co

- (1) Penalty clauses discourage efficient as well as inefficient breaches
 - (a) Efficient breach = breach where both parties equally or better off by virtue of the breach
- (2) Compensatory damages should be sufficient to deter inefficient breaches
- (3) Therefore penalties only serve the purpose of discouraging efficient breaches
 - (a) Although this overlooks that the parties have negotiated and agreed on this penalty, which may be essential to inducing some contracts
- (4) The distinction between penalties & stipulated damages is narrow; refusing to enforce penalties is paternalistic, but protects parties who are not fully competent
- (5) Court therefore upholds stipulated damages clause provided that it is a reasonable estimate of uncertain damages

5. Other Remedies & Causes of Action

A. Specific Performance & Injunctions (Equitable remedies)

1. Equitable v Legal relief:
 - (1) Money damages are the default damages for breach of contract; equitable relief is “extraordinary relief”; injunctions provide the additional deterrent of contempt of court (although a penalty, not unenforceable because it is no longer a private dispute)
 - (2) Courts are reluctant to grant specific performance and other injunctions because they (1) require supervision over compliance with the order, and for historic reasons of (2) granting damages as default and (3) separation of courts of law & equity
 - (3) Courts grant equitable relief ONLY where legal relief is inadequate**
2. Types of equitable relief
 - (1) Coercive relief (injunctions): enjoin someone to do something or not to do something
 - (2) Declaratory relief: obtain declaration of a party’s rights under a contract, test the validity of a contract
 - (3) Restitutional relief: restore to the plaintiff something that belonged to him. RESTITUTION cause of action arises here.

Contracts for Land

3. **RULE: Because real property (land) treated as unique, courts typically grant specific performance (equitable relief) as remedy for breach of contract for land. Money damages considered inadequate, and law presumes specific performance as default remedy for breach of contract for sale of land. Courts will grant money damages only where specific performance is inadequate remedy (equity).**

4. Loveless v Diehl: (Arkansas 1963)

- (1) Plaintiff seeks specific performance remedy to enforce option contract to buy property that π has been renting; π agrees to buy and resell to 3rd party in separate contract for \$1k profit; Δ breaches contract and refuses to sell land;
 - (a) Court ignores π ’s future contract; not relevant; only issue is the contract between the parties;
 - (b) Court rules that specific performance is the default remedy for breach of contract to sell land (real property); although court has some discretion to award alternate remedy, only if the default remedy is inadequate (equity)
 - (i) No valid reason for denial of specific performance; court reasons that to allow seller to breach and award damages less than the value of the improvements to the property would result in unjust enrichment
 1. Note that this was a losing contract; π had spent more in improvements to the property (\$5k) than he would gain by selling prop. for \$1k profit
 - (c) Court justifies awarding specific performance to encourage parties to enter into contracts for sale of land; by enforcing contract, provides certainty to the notion of the transferability of land;

Contracts for goods

5. **RULE: Default remedy is damages; no presumption of uniqueness justifying equitable relief;**
6. **RULE: If**

7. Cumbest v Harris: (Mississippi 1978) [Page 189]
 - (1) Contract for sale of stereo equipment with option to repurchase; π attempts to repurchase stereo that he sold to Δ ; Δ breaches option contract to repurchase; π claims stereo is unique and seeks equitable remedy (specific performance)
 - (2) Stereo is largely irreplaceable (π hand built some parts, others no longer can be replaced, some have 2 year waiting period for reorder) and has sentimental value b/c π built stereo over 15 years with great labor
 - (3) **RULE: Default remedy for breach of contract for sale of goods is money damages. Three exceptions to the general rule.**
 - (a) **Exception: Where there is no adequate remedy at law;**
 - (b) **Exception: Where the specific articles of property are of peculiar, sentimental or unique value ('heirloom' or 'one of a kind');**
 - (c) **Exception: Where due to scarcity the chattel is not readily obtainable.**
 - (4) Because the stereo has sentimental value, is unique, and not readily obtainable, court rules specific performance of option contract to repurchase is appropriate remedy in such a case.
8. Scholl v Harzell (Pennsylvania 1981) [Page 192]
 - (1) Contract for sale of spare parts to 1962 Corvette; π pays \$100 deposit; Δ breaches contract and returns deposit; π sues for replevin or for damages
 - (a) Replevin = where π has exclusive and immediate right to possession of goods that are in the possession of another; No replevin in an unexecuted contract; deposit does not give π automatic right to property; only where person has your property (this is a breach of contract case)
 - (b) Specific performance not appropriate in this case (which is what replevin attempts to accomplish) because the goods not sufficiently unique or irreplaceable, even though a "collector's item"
 - (2) **RULE: UCC more generous than common law in granting specific performance of sale of goods; UCC §2-716 allows for specific performance when goods unique or in other proper circumstances; inability to cover is evidence of proper circumstances for awarding specific performance**
 - (3) **RULE: Collector's item is not necessarily 'unique'**
9. Sedmak v Charlie's Chevrolet, INC. (Missouri, 1981) [Page 194]
 - (1) Contract for sale of a limited edition corvette (1 of 6,000 made); Δ breaches oral contract to sell after market value increases beyond sale price; π sues for specific performance of contract at contract price
 - (a) Court holds that π cannot cover except with great expense, trouble, and delay because very few if any similar cars;
 - (b) UCC §2-716 allows for awarding specific performance in other proper circumstances, which expresses drafter's intent to liberalize rules to include not just unique goods but also good where it was difficult to replace (cover) without considerable expense, trouble or law
 - (c) **RULE: Where cover of goods in breach of contract is difficult, if not impossible, without considerable expense, delay, and inconvenience, damages are inadequate remedy and courts shall award specific performance of contract.**
 - (d) **RULE: 'unique' = very difficult to cover**

10. UCC §2-716 Buyer's Right to Specific Performance or Replevin [Page 197]

- (1) *Specific performance may be ordered where the goods are unique or in other proper circumstances*
- (2) *The judgment (decree) for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.*
- (3) *The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicated that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.*

Contracts for personal services

11. Courts generally disfavor awarding specific performance for employment contracts (personal services): RATIONALE

- (1) *PRO: employment contracts are usually very unique;*
- (2) *PRO Usually difficult to ascertain breaches of contract*
- (3) *CON: Can't force performance of personal services of the same quality under compulsion as freely;*
- (4) *CON: requires court monitoring of the order*
- (5) *CON: Can become like slavery*
- (6) *CON: discourages entering into contracts because a breach can mean going to jail*

12. RULE: Courts will not grant specific performance of an employment contract; however, they will grant injunctive relief in certain instances

13. Lumley v Wagner (England 1852) [page 203]

- (1) Δ enters into contract for exclusive performance at π 's theatre; Δ breaches exclusivity clause by agreeing to perform at another theatre; π sues for injunctive relief to bar Δ from performing at another theatre in violation of exclusivity clause
- (2) Court awards the injunction to prevent violation of the negative stipulation ("you may not perform at another theatre"); court holds that an injunction not the same as specific performance
- (3) **RULE: Specific performance is not the same as an injunction; that an injunction not to breach an exclusivity employment clause does not compel specific performance of the contracted employment**
 - (a) **In general, Modern courts are more likely to order an injunction without an express negative stipulation in the contract;**
 - (b) **California courts will not enforce post-employment non-competition clauses, finding that they are against public policy (non-competition is a type of negative covenant)**
 - (i) **Difference is whether the negative covenant is during or after employment under the contract**

14. Ford v Jermon (Pennsylvania 1865) [page 207]

- (1) Δ breaches exclusive employment clause in contract; π sues for specific performance and for injunction to enforce negative covenant (exclusive employment clause); Court dismisses

- (2) MINORITY RULE: Negative injunctions are not granted for employment contracts, as they have the same effect as specific performance;
 - (a) that for the negative injunction to be successful, it must bar any type of employment, and this is tantamount to slavery;
 - (i) Arguably there is equitable differences between employment by a competitor (issue of unjust enrichment) and employment in another field
 - (b) Injunctive relief requires court monitoring similar to granting specific performance
15. Dallas Cowboys Football Club v Harris: (Texas 1961) [Page 219]
- (1) Δ has written contract to exclusively play for LA Rams for 1 year with option for Club to renew for another year; Club tries to pick up option, Δ refuses to play for π and goes back to school for one year; Δ 's contract with Rams assignable, and Rams sell his contract to π ; Δ at same time signs contract to play for a team in rival league; π sue for injunction to restrain Δ from playing in the AFL (Rival league)
 - (a) Contract is exclusive
 - (b) Contract includes stipulated damages clause to allow for use of injunction to prevent π from playing for another team, because damages too uncertain;
 - (c) Contract includes stipulation that π has special, exceptional, and unique skills
 - (d) Contract states that retirement from league tolls the contract terms; year off from football does not eliminate option for π
 - (2) **RULE: Injunctive relief will be granted to restrain violation by an employee of negative covenants in a personal service contract if the employee is a person of exceptional and unique knowledge, skill and ability in performing the service called for in the contract.**
 - (a) **Unique = the same service could not easily be obtained from others; Unique does not mean one of a kind, or only. Definition very similar to UCC §2-716**
 - (b) Issue of whether a persons skills are unique and warranting injunctive relief is a factual determination
 - (3) **RULE: Enforcing negative covenant in personal services contract is not against public policy for being too harsh and unreasonable as to be unenforceable in equity.**
16. **OVERVIEW: Modern Courts will not order specific performance in contracts for personal services, but they will grant an injunction to enforce a negative covenant (e.g., non-competition or exclusive employment), and may grant an injunction even in the absence of an express negative covenant, if the employer can demonstrate that the employee's services are sufficiently unique (difficult to replace)**

Restitution

- 17. **Summary: Restitution does not rely on a promise; although it can be damages for the result of a breach of contract, Restitution is an equitable remedy that essentially reclaims a benefit that has been conferred on a recipient under circumstances where it would be unjust to allow the recipient to keep the benefit without payment. Restitution can be the result of an implied promise by law**

(Quasi Contract), or in the absence of a promise or contract (e.g., where someone accidentally deposits money in your bank account instead of their own). Damages focus on the unjust enrichment of the party. 3 types of restitution.

18. Restitution for Breach of Contract:

(1) Bush v Canfield: (Connecticut 1818) [page 236]

- (a) Contract for delivery of goods, at specific price, for delivery on date certain; π pays \$5k deposit in advance of receipt; market price drops below the contract price (losing contract); Δ breaches contract and fails to deliver; π sues for restitution of deposit, even though Δ would have made \$3k profit if he had not breached contract
- (b) Damages under expectancy interest would be (Loss in value (\$11k) plus other loss (\$0) minus cost avoided (\$9k) minus loss avoided (0)) = \$2,000, allowing the Δ to keep the \$3k profit he would have made;
- (c) Court rules that because the seller breached, they should not profit from their breach; awards \$5k in damages (Return the deposit to the π)
- (d) RULE: Party in breach should not benefit by their breach; expectation damages are not the only measure of breach of contract damages**
- (e) Dissent would have allowed for the full \$5k damage if the π had rescinded the contract (terminated the contract); Majority rejects the distinction between open and rescinded contracts**
 - (i) If market price < contract price, and there was no deposit and no reliance damages, then no damages for seller's breach (π not harmed, Δ not unjustly enriched)**
 - (ii) If market price > contract price, then expectancy damages to π (lost profit) for seller's breach**
 - (iii) If market price < contract price, no deposit, but Δ breaches to sell goods for above the contract price to another party, no damages; no unjust enrichment of Δ by π (and π could cover for less than contract price)**

(2) Restatement §371: Measure of Restitution Interest: [page 242]

If a sum of money is awarded to protect a party's restitution interest, it may be as justice requires be measured by either:

- (a) The reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position;**
or
- (b) The extent to which the other party's property has been increased in value or his other interests advanced.**

19. Restitution to the Party in Breach:

(1) Britton v Turner (NH 1834) [Page 243] **MAJORITY VIEW**

- (a) Δ and π make contract for π to work for 1 year for specified wages; π breaches after 9 months (3/4), no evidence that Δ harmed by breach. Jury awards prorated amount of wages;
- (b) RULE: Because defendant received value by the π 's labor, the π is entitled to "quantum meruit" – as much as has been earned**
 - (i) Rationale: If no restitution for party in breach, we provide incentive for employers to drive away labor after partial contract completion**

(ii) *Rationale: should not make someone who has partially performed worse off than someone who does not perform at all*

(c) **RULE: Where a party contracts to perform to build something, and the work is done with some variations from the mode proscribed by the contract, if the other party has the benefit of the labor and materials he should be bound to pay so much as they are reasonably worth; in such a case the buyer can choose whether or not to accept the thing, but if he does accept the thing he must pay the reasonable value of it; if he does not elect to take it... (?)**

(i) **Because the Δ cannot reject the labor at the time of the breach or end of the contract (he accepts it day by day), he is liable for pro-rated damages; not like a contract for building a house**

(d) Court suggests that parties can expressly contract for no payment unless total performance (as liquidated damages), but a court very well might find this a penalty clause that is unenforceable as against public policy

(e) **RULE: Restitution does not allow recovery of lost profits; Restitution cannot confer a greater award than the contract terms (contract sets a ceiling on damages)**

20. **RESTATEMENT §373: Restitution When Other Party Is in Breach [page 242]**

(1) *Subject to the rule stated in subsection (2), on a breach by nonperformance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of partial performance or reliance*

(2) *The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.*

21. **RESTATEMENT §374: Restitution in Favor of Party in Breach [pg 251]**

(1) *Subject to the rule stated in Subsection (2), if a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach.*

(2) *To the extent that, under the manifested assent of the parties, a party's performance is to be retained in the case of breach, that party is not entitled to restitution if the value of the performance as liquidated damages is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.*

22. Restitution & Quasi Contract:

(1) Cotnam v Wisdom: (Arkansas 1907)

(a) Two doctors (π) sue the estate of the deceased for services rendered while the deceased was unconscious and was dying; because deceased was unconscious, no meeting of the minds was possible (no assent to the offer of assistance)

(b) Δ (Estate) argues that because no assent, no contract, therefore no breach

(c) Court finds that there was an **implied contract by law (Quasi Contract)**;

(i) old, well-recognized law allows for such mythical creations of the law, where liabilities are created without a contract / without assent.

- (ii) Contract liabilities typically predicated on a promise in a contract, not a duty (like torts)
- (d) RULE: Where a person is unable to form assent to a contract (because he is unconscious due to emergency, insane, or a minor) a quasi contract may be formed**
 - (i) *Rationale: Encourage people to help those who cannot contract for services by promising payment by law for those services*
 - (ii) *Rationale (2): The law presumes that people in these conditions would contract for these services if they could, since it is in their best interest*
- (e) Damages for quasi contract difficult to measure, esp. here because the services did not save the person. Π lost opportunities to help others (lost profit – expectation interest) and also made expenditures in service to Δ (reliance); case in Restitution because difficult to measure benefits of the quasi contract.
 - (i) If Δ had been saved, subjective value of the benefits would be enormous (the value of Δ 's life); alternatively, since he was not saved, the benefit was negligible. Thus market value a better measure, particularly since there was no contract; court rejects damages based on benefit
- (f) RULE: Damages for quasi contract / implied contract by law are the market value of (Reasonable compensation for) the services performed, irrespective of the Δ 's ability to pay or the subjective value to the Δ of the benefits conferred under the quasi contract.**
- (2) Martin v Little, Brown & Co. (Pennsylvania, 1981) [Page 255]
 - (a) Π informs publisher (Δ) of a third party's copyright infringement; volunteers this information to the Δ ; Δ acts on the information that π supplied, but does not pay π (offers him a small award); π sues:
 - (i) For breach of express contract (court finds no contract formed by the letters exchanged)
 - (ii) For breach of contract implied in fact (court finds no evidence that common practice implies a contract in this case)
 - (iii) For breach of contract implied by law (court finds no duty on Δ here; π volunteered the information)
 - (b) Contract Implied by Fact = actual contract where the parties agree on obligations, but instead of explicit promises, is implied by acts, circumstances, or common practice. Existence of such a contract is inferred from action. Contract Implied by Fact is same as an express contract and the same rules apply. Default remedy for breach = damages.**
 - (i) E.g., implied promise to pay for valuable services: where one performs for another, with the other's knowledge, a useful service of a character that is usually charged for, and the latter expresses no dissent or avails himself of the service; the person benefited must do something from which his promise to pay may be inferred [e.g., ordering food in a restaurant, no explicit contract but industry practice to pay for meal]**
 - (c) RULE: Volunteers are not entitled to restitution, under contracts implied by fact.**

- (i) Rationale: Rule protects volunteers, and those who use volunteers, by eliminating uncertainty as to whether they will require payment*
- (ii) Rationale: Rule protects contracts because if volunteered services required a remedy, no need to form a contract*
- (iii) Rationale: very difficult to assess value of volunteer services.*

Reaching an Agreement [pg 275]

6. Objective Theory of Assent

Traditionally, courts looked for a meeting of the minds (subjective). No longer. Courts apply an objective measure of mutual assent and look at manifestations of the party's intent to see whether a reasonable person would have believed there was a contract formed / assented to.

RULE: Mutual assent is measured objectively, not subjectively (however, it contains a subjective element: whether the promisee subjectively believed a contract was formed is evidence of whether an objective, reasonable person would believe so).

1. Embry v Hargadine, McKittrick Dry Goods Co. [page 276]
 - (1) Employment contract expires; π claims that Δ assented to his offer of a new 1-year contract, and subsequently breached it by firing him; Δ claims he never assented to contract, and therefore no breach.
 - (2) **RULE: Courts must use an objective test to measure assent, measured as whether a reasonable person would have believed that there was assent to the offer based on the external manifestations of the Δ .**
 - (3) **RULE: In order for a contract to be formed, 1) the promisee must subjectively believe that there was a promise (Assent), and that 2) such belief was reasonable (objective).**
 - (a) *Subjective intent (inner thoughts) relevant to whether a contract was formed as evidence of objective manifestations, but inner thoughts do not bind parties to a contract; only an objective measure of mutual assent.*
 - (b) *Subjective intent is relevant because if the promisee did not believe there was a contract, he should not have formed an expectation or relied on it;*
 - (c) *Courts likely to charge a reasonable person with the exact knowledge of the promisee; this allows the promisee to testify in support of why his belief was reasonable.*
2. Lucy v Zehmer [Page 282]
 - (1) π seeks specific performance of a contract to purchase land from Δ ; contract made in bar, over several hours; Δ claims no intention to assent to π 's offer to buy, but instead just a practical joke and he was drunk. π argues he believed there was a contract formed. Δ would not accept π 's \$5 deposit.
 - (2) Court finds evidence that promisee (π) subjectively believed there was a contract formed by looking at his behavior afterwards. If π subjectively believed there was not a contract formed, there would be no contract. Court finds such belief was reasonable, and therefore a contract was formed.
 - (3) When parties reduced the agreement to writing, a contract was clearly formed because there was objective evidence of such a contract. Conduct of the Δ after this point mostly irrelevant because a contract was already formed.
 - (4) Court finds Δ was objectively capable of forming assent; not too drunk. (this also measured objectively)
 - (5) Most likely there cannot be a contract formed where both parties subjectively believe that there was no contract.
 - (6) **RULE: outward manifestations (objective) of intent are binding on a party, regardless of his inner thoughts (subjective intent)**

- (7) **RULE:** The mental assent of the parties is not required to form a contract. If the words or acts of one of the parties reasonably lead the other party to believe a contract is formed, his inner thoughts are immaterial.
3. **RESTATEMENT §19: Conduct as Manifestation of Assent: [page 290]**
- (1) *The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.*
 - (2) *The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.*
 - (3) *The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.*

What is an Offer

[pg 291]

Traditionally, contracts formed by offer and acceptance. Law based on this model. Modern system is usually an offer, a counter offer, draft a written contract, and both parties assent to contract. **Contract is formed at time of acceptance.**

1. Preliminary Negotiations

1. Nebraska Seed Co. v Harsh [pg 291]
 - (1) Δ sends letter to π identifying price and approximate quantity of goods for sale. π alleges that this was a written offer, that they assented to, and Δ breached contract for sale.
 - (a) Court holds this is only a solicitation. It is an invitation to the other person to make an offer to the proposer; such an invitation cannot become a contract merely by the assent of the party the invitation is sent to. The party that sends out the solicitation must assent to the offer received in response to the solicitation.
 - (2) **RULE: Mere statement of the price at which property is held cannot be understood as an offer to sell. A solicitation for offers is not an offer.**
 - (3) **RULE: A solicitation is distinguished from a contract by the open terms (here, including: 1) no definite quantity; 2) no time or method of delivery; 3) no specific language such as “offer” or “promise”; 4) and most likely sent to a large number of recipients)**
2. **RESTATEMENT §24: Offer Defined [pg 302]**
 - (1) *An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. **[OBJECTIVE/Subjective TEST]***
3. **Restatement §22: Mode of Assent: Offer & Acceptance:**
 - (1) *The manifestation of Mutual Assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.*
 - (2) *A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.*
4. **Restatement §26: Preliminary Negotiations:**
 - (1) *A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.*
5. **Restatement §33: Certainty**
 - (1) *Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.*
 - (2) *The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.*
 - (3) *The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.*
6. COMMON Law ESSENTIAL ELEMENTS OF A CONTRACT:

- (1) Parties; Price; Subject Matter; Time of Performance
- 7. Restatement §33 (Certainty) has replaced Common Law in most jurisdictions. UCC similar to the Restatement approach under §33. Restatement has 3 essential criteria:
 - (1) terms of previous inquiries (if any) (§26)
 - (2) the number of people to whom it is addressed, and (§29)
 - (3) the completeness of the offer or solicitation. (§33)
- 8. **Restatement §34 [pg 409] & Restatement §204 [pg 410]**
- 9. **UCC §2-204: Formation in General [page 303]**
 - (1) *A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a contract.*
 - (2) *An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.*
 - (3) *Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.*
- 10. **UCC §2-206 Offer and Acceptance in Formation of a Contract [pg 303]**
 - (1) *Unless otherwise unambiguously indicated by the language or circumstances*
 - (a) *An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;*
 - (b) *An order or other offer to buy goods for prompt or current shipping shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.*
 - (2) *Where the beginning of a requested performance is a reasonable mode of acceptance an Offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.*
- 11. DEFAULT TERMS – UCC §2-305, 2-308, 2-309, 2-310 (pg 304-305)**
- 12. **Leonard v Pepsico: [pg 294]**
 - (1) π sees advertisement on television; seeks to purchase item seen on TV ad but not available in catalog; sues for specific performance of offer to sell Harrier jet for 7 million Pepsi points.
 - (a) An advertisement is not an offer (because directed at large group of people, court infers that advertiser could not provide for everyone to accept and therefore does not intend to make an offer)
 - (i) **RULE: An advertisement is not an offer, except where it is clear, definite, and leaves no open terms; e.g., ad that states, “first come, first served, 3 coats for \$1 each, on Saturday at 9 AM” is a contract.**
 - 1. **Words of limitation (such as “first come first served) are required to form an offer where the advertisement is sent to many people.**
 - 2. **The fact that a proposal is very detailed suggests that it is an offer, while omission of many terms suggests that it is not.**
 - (b) Court finds Pepsi ad not sufficiently definite because it explicitly reserves details of the offer to a separate writing (the catalog); sending in the Pepsi

points was an offer and Pepsi processing the order form and payment would have constituted acceptance (solicitation -> offer -> acceptance)

- (c) Court finds that a reasonable person would not have believed that the ad was an offer; because a reasonable person would see that the ad was done in jest, the reasonable person would not believe this was an offer. Subjective intent of the parties irrelevant. If the objective, reasonable person would believe that the advertisement was made in jest, it is not an offer.

2. Written Memorial Contemplated:

Empro Manufacturing v Ball-Co Manufacturing: [pg 306]

1. Issue: does written, signed letter of intent constitute a contract?
 - (1) LOI could have no legal effect
 - (2) LOI could be a binding contract
 - (3) LOI could be “something else”; less than a contract but more than nothing, an agreement to negotiate in good faith – Court Rejects this approach
2. LOI includes express provision that the agreement is “subject to” the execution of a contract,
 - (1) However, court rules that “subject to” term is not magic words that automatically mean it is not a contract, rather that it is evidence – not dispositive.
3. Also finds that Δ 's letter signing the LOI added new terms that were not in the LOI
4. Thus, there is objective evidence that there was not intent to create an offer and acceptance (expressed, objective intent to continue negotiating) and the LOI not definitive enough because of the open terms; therefore, under objective test, no contract was formed

Restatement §27: Existence of Contract where written memorial is contemplated:

5. *Manifestations of intent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations*

Note that under the UCC, because it supplies default terms, may be more likely to find a contract than Common law courts

3. Revoking an Offer

Dickenson v Dodds: [pg 314]

1. Δ offers to sell land to π ; π discovers that Δ has offered to sell land to another person and had in fact sold the property prior to π transmitting his acceptance;
2. **RULE: An offer is revocable provided that the revocation is communicated (express or constructive) to the offeree prior to transmittal of acceptance**
3. **RULE: Offeror need not expressly revoke an offer if the offeree discovers that the other's conduct effects constructive notice**
4. Although offer to π included a provision holding the offer open until a certain date, because there was no consideration it is an unenforceable provision (“naked promise”): in order to form an option contract, there must be consideration given for the option
 - (1) Option contracts are not revocable

4. Restatement Provisions on Offer & Revocation: [pg 319-320]

Option Contract= promise that limits promisor's power to revoke an offer;

Offer = manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that their assent is invited and will conclude the contract

Offeree's power of acceptance may be terminated by:

- 1. Rejection or counter-offer by the offeree**
- 2. Lapse of time**
- 3. Revocation by the Offeror**
- 4. Death or incapacity of the Offeror or offeree**
- 5. Non-occurrence of any condition of acceptance under the terms of the offer**

Revocation by communication:

- 6. Offeree's power of acceptance is terminated when the offeree receives from the Offeror a manifestation of an intention not to enter into the proposed contract:**

- (1) Constructive Notice: Definite action inconsistent with an intention to enter into the proposed contract terminates the offer (revocation) if the offeree acquires reliable information to that effect**

RULE: UCC §2-205 [FIRM OFFER] provides that a written offer to sell between two merchants (not one time sellers, only those who sell goods regularly) that is held open until a certain date cannot be revoked until the time stated or for a reasonable time if no time is stated, never to exceed 3 months (even if no consideration is given for the offer). [pg 321]

Review:

Revocation: Offers are revocable until acceptance, except for options contracts, where a consideration is given in exchange for exclusive offer; UCC allows Firm Offers between merchants to be revoked only after 3 months, without any consideration for the firm offer

What is Acceptance?

:

1. Ardente v Horan: [pg 322]
 - A. π sends letter to Δ to buy real property, but letter includes conditions on acceptance (“concerned that the following items remain with the real estate”);
 - B. Not entirely clear whether π would accept offer without the condition; such ambiguity resolved as a conditional offer (counter-offer), and thus no contract formed.
 - C. Also not entirely clear that Δ ’s made an offer because they sent the purchase and sale agreement unsigned, leaving themselves the last act of signing to form the written contract; π also stated that they had to investigate title before accepting
2. **Mirror Image Rule: [pg 321]**
 - A. **An acceptance cannot add additional terms to the offer, otherwise it is only a counter-offer; Acceptance must be identical to the offer**
 - B. **Where the language of an acceptance provides additional conditions, it will only constitute a conditional acceptance unless there is unambiguous and clear manifestation of acceptance of the additional offer**
 - C. **If offeree rejects an offer, the offer dies**
 - D. *Restatement §61: An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.*
 1. *An acceptance must be unequivocal. Adding a modification to the offer does not negate the acceptance unless, if fairly interpreted, the offeree’s assent depends on the offeror’s further acquiescence in the matter [objective]*
3. **Mailbox Rule: [pg 325]**
 - A. **Acceptance becomes effective at the point the acceptance leaves the offeree’s hands; when the offeree drops his acceptance in the mailbox, it takes effect and the Offeror cannot revoke the offer; the offeree cannot revoke his acceptance, however, once the offer is “in the mail”; if the acceptance becomes lost in the mail, it is still effective**
 - B. **Default rule: Offeror can insulate himself by expressly contracting that only delivery constitutes acceptance**
 - C. **Mailbox rule does not apply to revocations**
4. **Acceptance by Performance (Unilateral Contracts)**
 - A. Carlill v Carbolic Smoke Ball Co. [pg 329]
 1. Δ makes 3 arguments why he is not liable for breach of contract after π followed directions in an advertisement to buy and use smoke ball to ward off infection, but still became sick and seeks warranty provided in the ad:
 - (1) Not an offer, but only an advertisement:
 - (a) Because the offer is very detailed (includes all necessary terms) and very few people could accept the offer (because the product so effective, according to Δ), it is like a posted reward, and thus it is an offer
 - (2) Not an offer because it is an exaggerated, silly claim;
 - (a) Because Δ included notice of deposit in a bank to pay for anyone who claims warranty, objective proof that the statement was intended to be an offer
 - (3) No notice of acceptance of offer:
 - (a) π communicated explicit notice of acceptance after performance, and before revocation by Δ ; Offeror has freedom of contract to require notice or to not

require notice in writing prior to performance; terms of the offer implied no notice was required before performance (like reward offer for a lost dog – you don't have to tell them you're looking for the dog in order to get the reward)

2. RULE: If Offeror seeks performance as acceptance, once the other party has completed performance, the contract is formed

3. Bilateral & Unilateral Contracts:

(1) Bilateral K = Offeror seeks a promise as acceptance

(2) Unilateral K = Offeror seeks a performance as acceptance

B. Restatement §54: Acceptance by Performance: [pg 342]

1. *Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.*

2. *If an offeree who accepts by rendering a performance has reason to know that the Offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the Offeror is discharged unless:*

(1) The offeree exercises reasonable diligence to notify the Offeror of acceptance;

or

(2) The offeror learns of the performance within a reasonable time; or

(3) The offer indicates the notification of acceptance is not required

C. White v Corlies & Tiff: [pg 344]

1. π alleges Δ breached contract after negotiations over construction contract; π , upon receipt of letter he alleges was an offer, begins to perform contract by buying supplies; then receives notice of revocation the next day; π claims acceptance by performance formed a contract

(1) Mailbox rule does not apply to revocations-only to acceptance

2. π never gave notice (express or constructive) of assent by either performance or promise; therefore no objective evidence of acceptance before the revocation, therefore no breach of contract b/c contract was never formed

3. Strong evidence that Δ sought a promise, not a performance, for acceptance; this compels notice of acceptance to the π

5. Restatement §30 & 32: Acceptance: (Offeror is Master of the Offer) [pg 348]

A. § 30: Form of Acceptance [Offeror may specify means of acceptance]

1. *An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.*

2. *Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.*

B. §32: Invitation of Promise or Performance: [Default = accept by reasonable means]

1. *In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.*

6. Petterson v Pattberg [pg 348]

- A. Δ offers π a unilateral contract to reduce mortgage by paying it off now (invites a performance); Δ then sells the mortgage before the π performs, and π sues for breach of contract
1. If π learned that Δ sold mortgage before he attempts to perform, that would constitute constructive notice of revocation and the revocation would be effective (Dickenson v Dodds)
- B. **SPLIT: When is contract formed by Performance?**
1. **Under Common Law, in a unilateral contract, the contract is formed when the performance is complete**
 - (1) Sometimes courts attempt to avoid this harsh result by finding a promise by the offeree at the beginning of the performance that forms the contract then
 2. **Restatement states that an option contract is formed when the offeree begins to perform, and therefore the Offeror cannot revoke it (Restatement §62)**
- C. However, for a revocation to be effective, it must be communicated prior to acceptance

7. **Acceptance by Silence**A. Hobbs v Massasoit Whip Company: [pg 353]

1. No explicit offer and acceptance, but prior history of transactions using similar methods; π ships skins to Δ , as they have done in the past, and when Δ does not return the skins promptly they claim a contract formed by silence (nonperformance)
 - (1) Court finds standing offer by Δ to buy goods; not a legal offer, and thus performance by π did not automatically create a contract, but instead creates legal duty to return the goods within a reasonable time otherwise acceptance by silence/nonperformance
 - (2) Reverse Unilateral Contract: Offer is a performance (shipping skins) and acceptance is a promise (to pay)
2. Prior transactional history of acceptance by silence justifies Δ in providing goods and expecting payment or return; Δ entitled to expect assent by silence because of past dealings

B. *Restatement §69: Acceptance by Silence: [pg 354]*

1. *Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:*
 - (1) *Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation*
 - (2) *Where the Offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer;*
 - (3) *Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the Offeror if he does not intend to accept;*
2. *An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the Offeror it is an acceptance only if ratified by him.*

8. **E-Commerce & Mutual Assent**

- A. Caspi v Microsoft Networks: [pg 355]
 - 1. π sues Microsoft for rolling over members into more expensive plans; dispute centers on forum selection clause in membership agreement;
 - 2. Because π agreed to contract and clause prior to becoming a member (by clicking acceptance on terms of membership agreement – “click-wrap contract”), π bound by forum selection clause
 - 3. Forum Selection clause limits where a party can sue or be sued
- B. Ticketmaster v Tickets.com [pg 357]
 - 1. π sues Tickets.com (Δ) for breach of contract after copying information on π 's webpage onto their own page;
 - 2. Court finds no assent to contract because the terms and conditions of use of the webpage (offer) are located at the bottom of the webpage and the customer need not view the terms and conditions to use the webpage: No notice of terms and no required explicit assent (by click wrap), therefore no contract and no breach
- C. Sprecht v. Netscape Communications: [pg 359]
 - 1. Contract includes a mandatory arbitration clause included at the bottom of the page (have to scroll down; do not have to explicitly assent by clicking on the agreement); because no notice of the contract/offer, Δ therefore cannot assent and there is no contract;
- D. RULE: An offeree is bound by the terms of the offer if he unequivocally assents to it, regardless of whether he has read the terms of the contract**
 - 1. RULE: An offeree is not bound by the terms of the offer if he has no notice of the offer and his assent is not explicitly requested – he cannot know that he is being offered something

Discerning the Agreement

Interpretation of Terms

1. Interpreting Ambiguous Terms

- A. Raffles v Wichelhaus: OLD ENGLISH CASE [pg 378]
1. Contract for purchase of cotton, where parties disagree on meaning of contract term “to arrive ex Peerless”;
 2. Because no meeting of the minds on the meaning of the term, no contract was formed and therefore no breach
- B. Oswald v Allen [pg 389]
1. π and Δ agree to contract for sale of “swiss coin collection” – Δ and π have different interpretations of the terms (of what coins are part of that collection); parties never realized there were multiple interpretations of the term – that the term was ambiguous
 2. Because there is no objective meaning of the term, and neither party knew the meaning that the other party attached to the term, there was no contract formed
 3. **RULE: where an ambiguous term is understood differently by the parties, and neither should have known the other’s meaning, there is no contract**

Restatement §201: Whose Meaning Prevails: [pg 391]

1. ***Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning;***
if both parties subjectively agree on the meaning, the subjective meaning is binding, even if different from the objective interpretation]
2. ***Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made:***
 - (1) ***That party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party;***
If parties disagree on the meaning of the term, but one party knew what the other meant by the term at the time of contract formation, the meaning of the other party prevails
 - (2) ***That party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party***
If both parties disagree, but one party should have known the meaning of the other party, the other party’s meaning prevails
If there is an objective meaning of a term, and the parties disagree on the term’s meaning, typically both parties have reason to know the meaning and that objective meaning prevails – Not necessarily true?
3. ***Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent***
Where both parties disagree and did not know the other’s meaning, there is no contract formed
Where both parties disagree and have constructive notice of the other’s meaning, there is no contract

Restatement §202: Rules in Aid of Interpretation [pg 391]**Hierarchy of Evidence for meaning of a term under the UCC §1-205 and UCC §2-208 [pg 392]**

1. *Express terms of the contract*
2. *Implied terms (or context) of the contract*
3. *Negotiations*
4. *Course of performance (how they behave under this contract)*
5. *Course of Dealing (evidence from prior contracts)*
6. *Usage of Trade (objective meaning of term)*

2. Interpreting Vague TermsFrugalment Importing v BNS Int'l Sales Corp. [Pg 397]

1. Issue: what is the meaning of the term “chicken” in the contract: is it the narrow definition that π asserts (only young, expensive chickens) or the broad meaning that Δ (Seller) asserts?
2. Court rules that π has not met their burden of showing that the word is used in the narrow sense that π asserts
 - (1) π had subjective meaning of the term narrowly
 - (2) Δ had subjective meaning of the term broadly
 - (3) Objective meaning of term broad (Usage of Trade); also, broad meaning of the term implied in contract by reference to USDA regulations that depend on objective meaning of term.
 - (4) Therefore, b/c obj. meaning, π had reason to know that Δ is using the broad term (π should have known: UCC §2-201(2))
 - (5) Therefore, no breach of contract for shipping chickens that conform to broad term
3. Δ 's subjective meaning would not be binding except that it coincides with the objective meaning of the term

Filling Gaps in the Terms

1. Agreements to Agree

A. Sun Printing v Remington Paper [pg 404]

1. Contract for Δ to supply paper to π 's newspaper company; price set for 3 months of 15 month contract, then contract requires parties to agree on price and duration at that price, never to exceed a price ceiling based on an external standard
2. 2 terms of the contract open: price & quantity
3. π and Δ cannot agree on price; π (buyer) sues for breach of contract
4. **UCC §2-204 [pg 303]: if intention to form a contract, and there is a reasonably certain basis to grant a remedy, then an enforceable contract has been formed**
 - (1) because there are multiple possible remedies, majority holds contract is not reasonably certain and therefore not enforceable
5. UCC §2-305(1)(b): Open Price Term [pg 304]: price = reasonable price at time of delivery, if the price is left to be agreed and they fail to agree
 - (1) Court holds that because not certain how long price should last (Even ceiling price), only an agreement to agree and not an enforceable contract;
6. If court doesn't know what the price is, court can't award expectation damages because cannot measure difference between the contract and market price (cover)

7. When intent is unclear, courts should not substitute intent; don't revise under guise of interpreting; Certainty of Contract more important to court than justice in this particular case

B. Restatement §204 Supplying an Omitted Essential Term [pg 410]

1. *When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.*
2. *Different from UCC*

C. Restatement §34: Certainty & Choice of Terms; Effect of Performance or Reliance [pg 409]

2. Illusory Promises

- A. Illusory Promise = where there is no mutuality of obligation (where only one party has an obligation); both parties must have an obligation for there to be a contract under the doctrine of consideration (next semester)

1. Traditionally courts would not enforce this type of contract:
2. Under Modern law the courts generally will enforce requirements contracts by finding an obligation (act in good faith)

B. NY Central Iron Works v US Radiator Co [pg 411]

1. Contract for Seller (Δ) to supply as much goods as π requires; π requires more than has ordered in the past (course of dealing/past practice), and Δ breaches K;
 - (1) Requirements Contract: One party establishes quantity based on good faith need
 - (2) Obligation of good faith and fair dealing sets limit on the quantity; cannot speculate except where the other party knew at time of K formation that the party was a speculator and speculation was in the contemplation of the parties
2. Court holds K is enforceable b/c obligation on both parties
 - (1) Δ bound to sell all radiators that π needs
 - (2) π bound to purchase only the radiators it needs in good faith [exclusive deal]

C. Eastern Airlines v Gulf Oil Corp. [pg 413]

1. K for Δ to supply jet fuel to meet π 's needs; requirements K; π sets quantity term;
2. Because sale of goods, UCC applies - §2-306 limits quantity to good faith need, except where unreasonably disproportionate to estimate or normal/prior requirements
 - (1) Unreasonably disproportionate = Ceiling or maximum (usually not minimum)
 - (2) Good faith = floor or minimum (although where buyer is π , good faith can be a maximum on what he can demand under Requirement K)
 - (3) Damages for breach of Requirements K can be difficult to assess (b/c quantity not fixed);
 - (a) if seller breaches, buyer can cover
 - (b) If buyer breaches, may be problems of certainty
 - (c) Here, indefiniteness is not a problem because objective evidence of the quantity required to operate π 's business (seller breached)

D. Wood v Lucy, Lady Duff Gordon: [pg 416]

1. Court finds that exclusive arrangement for dealings imposes duty on Δ / implied promise to act in good faith and make reasonable efforts to promote π 's interests, and thus is an enforceable K;
2. Evidence of Δ 's intention / burden

- (1) Δ gains economic value under the K only if he acts in good faith;
 - (2) Δ promises to account for expenditures, secure copyrights and send monthly reports
 - (3) Δ has established business organization for advancing the K
- E. UCC §2-306: Output, Requirements & Exclusive Dealings: [pg 423]**
- 1. *A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.*
 - 2. *A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.*

Form Contracts & Contracts of Adhesion

- 1. Characteristics of Form K
 - A. Form contracts constitute the majority of K; usually not negotiated; most terms set by one party, with price and delivery the only terms set by the other party;
 - B. Typically parties have unequal bargaining power (large Corp. & single individual)
 - C. Form K are generally enforceable:
 - 1. Essential for businesses to operate; cuts costs of negotiation, which can save \$ for consumers;
 - 2. Judicial Efficiency because fewer disputes over the same issues
 - 3. Competition as limiting unreasonable terms – other companies can offer diff. Terms
 - 4. Maintain internal consistency of multiple salespeople in a single office
- 2. Contract of Adhesion: Generally, no specific Definition
 - A. Terms one sided in favor of drafter
 - B. Drafter has a monopoly / no alternate source for K
 - C. Unequal bargaining power
 - D. Not negotiated (form K)
 - E. Not a discretionary K but is for a necessary good
- 3. Carnival Cruise Lines v Shute: [pg 424]
 - A. π sues in Tort for injury suffered while on a cruise, sues in Washington state where tix bought and π lives; however, back of tix included DEFENSIVE forum selection clause, limiting lawsuits against Δ only to FL;
 - B. Court holds forum selection clause is prima facie enforceable unless unreasonable
 - 1. Heavy burden to prove it is not reasonable
 - C. 3 Justifications for allowing the forum selection clause
 - 1. Benefit consumers b/c lowers costs for Company for litigation
 - 2. No fraud or malicious intent – does not impede constitutional or statutory protections
 - 3. Adequate notice of provision
 - D. RULE: Defensive forum selection clause is enforceable against consumers
- 4. Monsanto: [Handout]

- A. Company sues farmer for breach of K and patent violation; sale contract includes forum selection clause; π (corp) sues individual per the forum selection clause, even though does not conform to Personal Jurisdiction Requirement (Civ Pro)
- B. Court holds OFFENSIVE forum selection clause is enforceable against a business person

**Which Terms Were Agreed To? (Where terms of offer and acceptance differ):
The Battle of the Forms**

1. Under Common Law:
 - A. Last Shot Rule:
 1. Where a purported acceptance differs from the offer, it is not a Mirror Image and therefore is a counter offer;
 - (1) If other party accepts by performance, the K offered by the last party to send the form prevails and party that performed is bound by the other's K terms
 - (2) If no performance, then no K formed (no acceptance)
2. Under UCC: (UCC §2-207)
 - A. Eliminates the Last Shot Rule and Reverses the Mirror Image Rule
 1. If response to offer proposes different terms, it is still an acceptance unless expressly made conditional on assent to additional terms
 - (1) Is this a definite expression of Assent? If yes, then K formed
 - (2) If there is a K, it is on the offeror's terms;
 2. New terms are construed as proposals for addition to the K (offeree accepts the offer, forms K, and proposes modification of K with new terms): not binding
 - (1) Between merchants, those new terms become binding elements of the K (assent by silence) unless:
 - (a) Offer expressly limits acceptance to the original offer;
 - (b) New terms materially alter the offer
 - (c) The Offeror has already objected to the terms or objects to the terms within a reasonable time period after notice is given
 - (2) Merchants = those in the business of buying and selling, those who are repeat sellers and are knowledgeable
 - (a) Merchants treated diff. B/c assumes they read their K and are knowledgeable about K law and business; therefore, if merchant does not object he is presumed to agree to the new term unless it is a material alteration
 3. Additional Terms treated differently from new terms; ONLY FOCUS ON NEW TERMS under UCC §2-207
 - B. Step-Saver Data Systems v Wyse Technology: [pg 439]
 1. Offeree proposes additional term (no warranties) to K; court finds K was formed by phone conversations, and/or by performance by Δ shipping hardware;
 2. Δ argues it gave only conditional acceptance and limited acceptance only if π accepted the terms of the box-top license. Court rejects arg.;
 - (1) Box-top terms not part of K under UCC §2-207 because:
 - (a) π objected to terms
 - (b) Disclaimer of warranty a material alteration
 - C. ProCD v Zeidenberg: [pg 451]
 1. **RULE: UCC §2-207 applies even when there is only one form;**
 - D. **UCC §2-207 Additional Terms in Acceptance or Confirmation**: [pg 449]
 1. ***A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.***

2. *The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the K unless:*
 - (1) *The offer expressly limits acceptance to the terms of the offer;*
 - (2) *They materially alter it; or*
 - (3) *Notification of objection to them has already been given or is given within a reasonable time after notice of them is received*
3. *Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this act.*