# The Meaning of the Agreement

## Principles of Interpretation

**Three Basic Theories:**

- **Subjective**
  1. Meeting of the minds
     - **a.** What the parties thinking at the moment of contract formation
     - **b.** About protecting autonomy
- **Objective**
  1. What a reasonable person would conclude based on words & conduct of parties
  2. Sophisticated attorneys & business supports, judges favor
  3. Problem: Neither party may have considered what a reasonable person would think
- **Modified Objective** (Modern Approach/Restatement)
  1. Corbin
  2. Three step approach § 201:
     (1) If parties attach same meaning to term it has that meaning
     (2) If A is the innocent party, use A's interpretation when:
        - **i.** If A didn't know B thought different, but B knew what A thought
        - **ii.** If A had no reason to know B thought different, but B did have reason to know what A thought

     **(3)** Neither party is bound by the meaning attached to the other, even though the result may be a failure of mutual assent

***Joyner v. Adams*** **(**1987)

Facts: P originally contracted with Brown Investment to develop an office park. Brown had financial difficulties, lease amended to substitute Adams. Contract included a term that said if D failed to develop the entire parcel by the end of Sept. than rent would escalate under the price index formula. Parties disagree as to what "development" means.

D claims "developed" means to get the lots ready for construction (water, sewage, etc)

P claims "development" means constructing buildings on all the lots

Holding: Court reversed and remanded to determine the parties intent. Court needs to determine what either party knew about the other's meaning. Court rejects interpreting the ambiguity against the draftsman under § 206 because it isn't clear if one of the parties solely drafted the agreement & it wasn't an adhesion contract. The parties negotiated at arm's length.

***Frigaliment Importing v. B.N.S***

Facts: P contracted with D for the sale & delivery of chicken at a set price. D corp (german) understood chicken to mean "adult chicken", P understood "chicken" to mean "baby chicken". P sued the D after the second shipment D sent was mostly fowel (adult chicken) and consequentially was worth significantly less.

Holding/Reasoning: Court held that it must look outside of the contract to understand the plain meaning of "chicken". When 1 party isn't a member of the trade, the opposing party must show that the newcomer knew about the trade usage. P didn't meet the burden of showing that there was a narrower definition of chicken to mean "baby chicken".

In communications between the parties P used the English word "chicken" instead of the German which segregates between baby and adult chicken.

There was no evidence that D was familiar with trade usage of "chicken" meaning "baby chicken", 1 witness said that when he wants a baby chicken he says "baby chicken".

Course of Performance: After P received 1st shipment it wanted the 2nd shipment.

**Rules in aid of interpreting extrinsic evidence for use in interpretation**

Modern Contextual Approach: § 202(1) rejects ambiguity as a prerequisite for extrinsic evidence.
Words and conduct are interpreted in light of all the circumstances, however it is limited by the parol evidence rule.
§ 202(3): Unless a different intention was manifested. Words are given the generally prevailing meaning.

Latent Ambiguity: Not apparent from words alone, some courts allow extrinsic evidence to uncover.
Allows extrinsic evidence only if courts find it could be used to support a reasonable alternative interpretation.
All approaches allow use of extrinsic evidence to interpret Contract with patent ambiguity.

***C & J Fertilizer v. Allied Mutual***

Facts: D insured P in case of burglary, the insurance agreement contained a provision that barred recovery if there was no damage to the exterior. P was burglarized and there was no damage to the exterior, only to the interior doors. P sued when D refused to pay based on a term that required damage to the exterior doors.

Holding/Reasoning: Under the doctrine of reasonable expectations the term will not be enforced, and therefore the D must pay. Even the agent thought P was covered initially. The visible mark clause wasn't dickered for.

**Doctrine of Reasonable Expectations** (adopted by more than half of the states) § 211(3):

1) Must be an Adhesion Contract
2) Must be non-dickered terms

Examples of Reasonable Expectation include Implied Warranty, and Unconscionable Under the Circumstances.

Customers are not bound by unknown terms which are beyond the range of reasonable expectations.

Defeats Reasonable Expectations if:

- Eliminates the dominant purpose of the transaction
- Bizarre or oppressive
- Eviscerates non-standard terms explicitly agreed to

Adhesion Contract: "Take it or leave it" agreement, drafted by 1 party and signed by another party with unequal bargaining power. Boilerplate language or standard form. One party may frequently performs these contracts and another party who does not.

*Seven Characteristics of Adhesion K*

1. Printed form w/ many terms + meant to be a K
2. Drafted by only one party
3. Transaction is routine for drafter
4. Implicit or explicit that only those terms allowed
5. Document signed by "innocent" party post-dickering
6. Innocent party enters into few of these type transactions (compared to drafter)
7. Innocent party's obligation is pay $

## Parol Evidence Rule

- Exclusionary rule which prevents evidence that supplements or contradicts prior to or contemporaneous with the written agreement

- If the writing is not intended to be final agreement, parol evidence rule does not apply

§ 209(1): An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement. If integrated, than evidence of prior or contemporaneous communications introduced to add or contradict a written agreement is barred.

§ 209(2) Must determine integration before determining interpretation or applying the parol evidence rule

*Complete v. Partially Integrated Agreements*
§ 210(2): **Partial**: Everything that isn't completely integrated

- § 215: Cant contradict written terms
- § 216(1): May supplement with additional/consistent terms

§210(1): **Complete**: adopted by parties as a complete & exclusive statement of the terms of the agreement
§ 216(1): Cant supplement or contradict the agreement if it is considered completely integrated.

Determining Integration:

A. **Strict Classical Approach:** Figure out if the agreement is integrated or not by reading it; Williston's "four corner approach"
- Merger clauses commonly used to indicate complete integration

B. **Liberal Modern Approach:** Writing cant prove its own completeness § 210 Comment B

Should consider all facts and circumstances surrounding execution of contract, as well as writing. A merger clause may not necessarily control.

**Exceptions to the Parol Evidence Rule**

- Interpret or explain the meaning of the agreement § 214(c), UCC 2-202 comment 2
- Oral or written agreements after writing
- § 217 show the agreement wouldn't take effect without a fulfilled condition
- § 214(d) Invalid for fraud, duress, undue influence, incapacity, etc.
    - Some courts limit fraud exception to "fraud in the execution"
    - Most courts will extend to "fraud in inducement"
        - Some limit exception for fraud in inducement if alleged misrepresentation contradicts a term in writing (Sherrod)
- Equitable Remedy (however, most cases reject use of promissory estoppel to avoid the rule)
- Reformation of the contract

***Thompson v. Libby*** (Four Corners Approach)

Facts: P agreed to sell D logs. Agreement was memorialized by a written contract which didn't provide for a quality warranty. P sued D. P argued that parties reached an oral agreement prior to the written agreement concerning the log quality.

Holding/Reasoning: The court held that the D couldn't admit oral evidence that P had provided an oral warranty because of the parol evidence rule. The contract on its face is a complete expression of the agreement, thus parol evidence is not admissible to change/contradict the terms of a valid, written contract. Agreement does not appear to be incomplete or informal on its face.

***State Farm Mutual Insurance*** (Modern Approach)

Facts: 3 way car accident occurred & P was represented by D's attorney & personally retained his own attorney. 2 drivers settled with P for $2.5 million in excess of D policy limit. P sued D claiming bad faith for failing to settle suit within policy limits. D claimed that P had relinquished bad faith claim when he signed a release agreement in exchange for $15k. "In full satisfaction of all contractual claims, causes of action he has or may have against State Farm & all subsequent matters."

P argues that the release only covered contract claims, not tort claims.

Holding/Reasoning: Court held that release agreement was ambiguous. Additionally, the text of the release agreement could reasonably be interpreted as the plaintiff asserts. The defendant should have used more specific or at least broader language to cover "bad faith claims" since they may be interpreted as a Tort & not a contractual claim. Adopted the Corbin/Liberal Modern Approach.

Parol Evidence Support for Taylor's Claim;

- State Farm apparently didn't insist that release contain broad language → suggests knew Taylor wouldn't sign if it did
- State Farm knew large size of bad faith claim, Taylor would seek something more than $15,000 to release claim
- Parties used limiting language in release, confining it to "contractual" and "subsequent" matters

AZ adopts Corbin view:

a. **(1) Examine all evidence to determine integration and intent of parties**
b. **(2) Use parol evidence rule to exclude evidence that would vary or contradict the meaning of the written words**
c. Judge may stop listening if proffered interpretation highly improbable

***Sherrod Inc*** (Limitation on exception to Parol Evidence)

**Facts:** P sub-contractor, was hired to do earth-moving work for a larger job building housing units. P contends that it made its initial bid of $97,500 based off of reliance on that there was 25k cubic yards. Bid was accepted & P began working off agreement "$97.5k for "lump sum" of dirt". P later realized the job encompassed more dirt than it had contemplated however D threatened to withhold payment if the P did not sign a written agreement. The agreement contained a merger clause that P signed. P sued to recover quantum merit claiming fraud, & breach of covenant of good faith.

**Holding/Reasoning:** Fraud Exception to Parol Evidence Rule only applies when the alleged fraud doesn't relate directly to the subject matter of the contract.

- The oral testimony is inadmissible because the reliance on the previous fraudulent statement is contrasted directly with the terms of the contract which contained a merger clause which barred verbal agreement before or after the contract.
- A written contract may only be altered by a subsequent contract in writing or an executed oral agreement.

Dissent: Ruling rewards fraudulent parties who are in a superior bargaining position, and it creates injustice. (Corbin View)

**Less Strict Parol Evidence Rule of *Taylor* §214(d) would have allowed the evidence in**

***Nanakuli Paving & Rock v. Shell Oil***

Facts: D & P had two long-term supply contracts for asphalt materials. P asphalt paver sued claiming D had breached the 1969 contract by raising the asphalt price from $44-$76, claiming price protection was incorporated through trade usage & reinforced by how the D actually performed.

Issue: What does "Shell's posted price at the time of delivery" mean?

Holding/Reasoning: Usage of Trade requires that the evidence be sufficiently widespread, definite & well settled. Express terms did not conflict with the parol evidence the P sought. P's parol evidence supported it's interpretation of the price.

Parol Evidence for *Nanakuli*:

Course of Performance: D had price protected P two times prior to this incident.

Trade Usage: All asphalt material suppliers in Hawaii followed price protection

**Express Terms** (Best)

**Course of Performance:** § 1-303(a) Action of the parties in carrying out the contract at issue.

**Course of Dealing:** § 1-303(b) Sequence of conduct btwn the parties prior to signing the agreement

**Trade Usage (**worst): § 1-303(c) any practice or method of dealing having regularity of observance in a place, vocation, or trade as to justify expectation of observance

*§ 1-303(f): subject to 2-209 a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

§ 2-202: Final Written Expression: Parol or Extrinsic Evidence

## Supplementing the Agreement: Implied Terms

Implied Term: Something that ends up in the contract but wasn't expressly stated. (Implied by Law)

Tailored Default Rule: Inferable term from the intent of the two parties.

Default Implied Rule: Courts/legislature decide that the majority of contracting parties would have agreed. Exp: implied warranties

- Parties save $ through legislature mandated terms & it saves time

UCC wants Contract to be fulfilled, so courts have power to imply terms

- No Price Term? Court's usually impose market value
- No quantity? Unlikely to imply

***Wood v. Lucy***

Facts: D is well-renowned designer who leased exclusive right to name for half of P's profits. Agreement for 1 year, but P sued alleging that D broke the agreement by placing endorsement on other fabrics.

D argues there is no contract b/c no consideration. P didn't have a performance minimum.

Holding: P made an implied promise, finding that if P didn't make any effort in selling the fabric than there would have been no agreement in the first place. Promise to pay ½ of profits was an implied promise to bring profits into existence. P had an implied obligation to use reasonable efforts, b/c the court believes it reflects the intention of the parties.

***Leibel v. Raynor***

Facts: Oral exclusive dealer-distributor agreement for sale of garage doors. D agreed to sell P garage doors at discounted price, P agreed to sell D's doors exclusively. After 2 years D canceled the agreement w/o notice, leaving P with inventory he couldn't sell. P sued arguing he had right to rxable notice.

Holding: This is an agreement governed by the U.C.C b/c it's for the sale of goods. D violated the doctrine of good faith, reasonable notification of an agreements cancellation is the minimum. Written notice given to P was unreasonable as a matter of law. What constitutes reasonable is a question of fact for the jury.

- Reasonable: acceptable commercial conduct based on the nature, purpose & circumstances

§ 2-309: **Notice of Termination**

(2) If indefinite in duration, valid for a reasonable amount of time.

(3) Termination, except on the happening of an agreed upon event, requires reasonable notification be received by the party.

Comment 8: interprets (3) in light of good faith, need "reasonable time to seek a substitute arrangement",

- Parties can agree to terminate w/o advance notice as long as it would not be unconscionable to dispense w/ notifications

## Implied Obligations of Good Faith

§ 1-304 Obligation of Good Faith: Every contract or duty within the UCC imposes an obligation of good faith in its performance & enforcement.

§ 1-201(b)(20): "Good Faith" means honesty in fact & the observance of reasonable commercial standards of fair dealing.

§205: every Contract imposes upon each party duty of good faith and fair dealing

Good Faith: Honest belief, absence of malice and fraud or seek unconscionable advantage

| **Form of Bad Faith Conduct** | **Meaning of Good Faith Conduct** |
|---|---|
| 1 Seller concealing a defect | Fully disclosing material facts |
| 2 Builder willfully failing to perform in full (substantial performance) | Substantial performance w/o knowingly deviating from specs |
| 3 Openly abusing bargaining power to coerce increase in K price | Refraining from abuse of bargaining power |
| 4 Hire broker; deliberately prevent consummation of deal | Acting cooperatively |
| 5 Conscious lack of diligence in mitigating damages | Acting diligently |
| 6 Arbitrarily/capriciously exercise power to terminate K | Acting w/ some reason |
| 7 Adopt overreaching interpretation of K language | Interpret K language fairly |
| 8 Harass for repeated assurance of performance | Accept adequate assurances |

### *Seidenberg v. Summit Bank*

Facts: Ps sold business to D in exchange for shares of the company and placement in charge of daily operations. D told Ps unless terminated, they could expect work until retirement (min. 5 years). D fired Ps after 2 years. P's sued b/c D acted in bad faith, never wanted close working relationship, or to assist Ps in growing the business.

Holding: Party exercising discretion breaches duty of good faith & fair dealing if it exercises it unreasonably, arbitrarily, or capriciously with the objective of preventing the other party from receiving its reasonably expected fruits of the contract. Bad Faith determined from D state of mind & context. Can find a breach of Good Faith even when an express term wasn't violated.

Here, D just wanted P's corp. and were willing to make employment agreement to get it. D failed to allow close working relationship, delayed direct mail campaign, failed to provide information concerning employee benefits.

Parol Evidence normally doesn't impact good faith claim b/c it's an implied term.

**Covenant of Good Faith cannot override an express term.

Implied Covenant of Good Faith is applied in 3 ways, which are unaffected by Parol Evidence Rule

1) Permits inclusion of terms & conditions which haven't been expressly set forth in the written contract
2) Utilized to allow redress for the bad faith performance of an agreement even when the D hasn't breached express terms
3) Permits inquiry into a party's exercise of discretion expressly granted by a contract's terms

**R 228: satisfaction of a reasonable person in the obligor's position**

**I.** Subjective standard more likely to be applied for personal services

***Morin Building***

Facts: D hired P to build exterior aluminum walls for a new building. Agreement contained Satisfaction clause: "if dispute over quality or fitness of materials or workmanship, decision as to acceptability rests strictly w/ owner". P performed work, but aesthetically imperfect from certain angle, it was rejected. P sued.

Holding: The contract states that satisfaction based on aesthetics, however P probably didn't intend to subject it's work to "aesthetic whim"

It is a general purpose contract, incorporated from another form contract, unlikely that P intended to bind itself to an unattainable standard. Circumstances suggest that the parties did not intend to subject P's rights to aesthetic whim, therefore D's rejection was unreasonable and the work must be paid. GM's objective was to build auto plant, not build piece of art. Morin would've demanded premium if would have been subjected to a subjective standard.

**Court generally applies objective reasonable person std. when Contract involves commercial quality, operative fitness, or mechanical utility

***Warner Bros***

Facts: P and D entered into agreement where P would receive $250k for 3 years for non-exclusive "1st look deal" at movies that P made & 2nd was that P would receive $750k "pay or play" directing deal. D never developed any of Ps projects or hired P to direct. P sued on bad faith.

Holding: Court held that if D acted in bad faith in rejecting P than such conduct is not beyond the reach of the law. Aesthetics have more subjective discretion, but this discretion is not unlimited if in bad faith. The dissatisfaction must be genuine. P contracted for the opportunity to make movies with the D, & if they rejected her movies out of bad faith she could claim damages.

## Warranties

**Express Warranties** §2-313

1(a): Affirmation of a fact or promise made by the seller to the buyer which relates to the goods & becomes part of the basis of the bargain
1(b): Any description of the goods which is made a part of the basis of the bargain.
1(c): Any sample or model which is made part of the basis of the bargain
2: Don't necessarily need formal words such as "warranty"/"guarantee"

- Must be more than "mere puffery", statement purported to be seller's opinion or commendation of the goods.

Caveat emptor: Old doctrine "let the buyer beware", height of formulism. Has been replaced for the most part by imposing obligations on the seller.

Courts are divided on the element of reliance, some require reliance & some don't, some take it as a rebuttable presumption

**Implied warranty of merchantability** §2-314

- Applies only to merchants (for the particular good), but not necessarily a commercial sale
- Would the goods pass w/o objection in the trade?
- Must be fit for ordinary purpose which the goods are used
- Other warranties may arise from course of dealing or usage of trade

**Implied warranty of fitness for a particular purpose** §2-315

- No merchant requirement
- Buyer must communicate that he's relying on the sellers representation
- Goods are not fit for the buyer's intended purpose
- Buyer must have relied on seller's skill/judgement

***Bayliner Marine v. Crow***

Facts: P purchased a new sports boat from D after reviewing the info manual which said the boat could go up to 30 mph with a certain weight and a certain size propeller. P added 2000 pounds worth of weight & after repairs the boat could only go 17 mph. P sued claiming breach of express warranty & breach of implied warranty of merchantability & fitness.

Holding:

Express Warranty: Court holds that D only made an express warranty for the specific weight & propellers found in the manual. The info manual referred to different sized propellers & lighter weight. Statements that are merely the seller's opinion do not create a warranty. D's statement on the brochure was merely a commendation & not subject to a warranty.

Merchantability: The boat meets the requirement for merchantability. It's a boat, stays afloat and moves, so it's suitable for fishing. P's specific intended usage is irrelevant.

Particular Purpose: P didn't communicate with D of his intentions nor communicate that he was relying on the seller's representation.

**2-316**: Exclusion or Modification of Warranties

**a.** Merchantability: **must mention merchantability and in case of writing must be conspicuous**

b. Particular purpose: **can be less specific, but must be in conspicuous writing**
   - Example: "no warranties extend beyond description on face"

Other ways to disclaim: **UCC 2-316(3)**

**c. Can exclude w/ "as is" language**
   i. Has to be conspicuous

d. Can exclude or modify w/ course of dealing or performance and trade usage

**Workmanlike Construction**

1) The house was constructed to be occupied by the buyer as a home
2) House was purchased from a builder-vendor, who constructed it for sale
3) When sold, the house wasn't reasonably fit for its intended purpose or hadn't been constructed in a good & workmanlike manner
4) At the time of purchase, the buyer was unaware of the defect & had no reasonable means of discovering it
5) By reasons of the defective condition the buyer suffered damages

*Jurisdictions are split on the ? of whether subsequent home-owners can claim

*Clear majority recognizes an implied warranty of quality in the sale of new homes, but not all.

***Speight v. Walters Development***

Facts: D custom built home, sold to a party, who sold it to another party, who sold it to P. P noticed water damage & mold which was found to be a result of a defectively constructed roof & rain gutters. P sued for breach of implied warranty of workmanlike construction.

Holding: Court held that home ownership is likely to change multiple times nowadays, subsequent owners are in no better position to discover the issue as the original owner. Therefore the court extends the implied warranty to subsequent home owners. Safety net for builders is the statute of limitations period.

# AVOIDING ENFORCEMENT

## Minority

Traditionally Contract voidable by minor, but power to affirm upon reaching majority; **§14**

- Very restrictive: Recovery based on restitution & not available unless minor misrepresented age or willfully destroyed the property, only liable for rxable value of "necessaries"
- Necesaries are usually limited to items one needs to live
- Justified on ground didn't have judgment to protect themselves in market place

Today less justified b/c teenagers are more sophisticated and more involved in consumer marketplace

- The more minor understood and exploited party, less sympathetic ct.
- Some Js: minor who misrepresents age can still disaffirm, but may be liable for tort for fraud

***Dodson v. Shrader***

Facts: P purchased a new truck for $5000 prior to reaching 18, D didn't ask age & P didn't misrepresent his age. P's truck developed engine problems and eventually blew up. P requested full refund, truck worth $500 now, D refused, & P sued.

Holding:

Benefit Rule: Here you might look at what it would cost for the Minor to lease a similar truck for the same period of time.

Use Rule: Truck has depreciated $4500, so seller would have to give back $500 for return of truck.

Court adopts the modified use rule. Contract with a minor where there has been no undue influence, contract is fair & reasonable, minor has paid toward purchase price & taken & used property. Minor must provide rxable compensation for use, depreciation, & willful or negligent damage.

Two Jurisdictional Rules:

**Benefit rule**

- Focused on value minor got from Contract
- Lease payments for similar vehicle

**Use rule**

- Focus on depreciation
- What can potentially be returned?

## Mental Incapacity

Cognitive Test §15(1)(a): Whether the party whose contract it seeks to avoid unable to understand in a rxable manner the nature & consequences of the transaction.

Volitional Test §15(1)(b): Whether the transaction in its result is one which a reasonably competent person might have made. Whether the party was unable to act in a reasonable manner in relation to the transaction & the other party has reason to know of his condition.

**Need medical evidence to show mental incapacitation

***Sparrow v. Demonico***

Facts: P sued D sister for partial ownership of family home. Parties reached a settlement agreement, however D contends that D suffered a mental breakdown & thus lacked capacity to sue. Day of settlement, D likely couldn't drive, slurred words, cried, and was generally out of control.

Court found the controlling consideration is whether the transaction in its result was one which a competent person would make. Mental defect doesn't have to be permanent, only at the time of the transaction. D has no medical evidence, no evidence that the agreement was unreasonable & therefore court sides with P.

## Duress & Undue Influence

Legally unenforceable because of the process by which the Contract was made, not looking at the substance of the contract.

## Duress

Any wrongful threat by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will & judgement, if the threat was intended or reasonably have been expected to operate as an inducement.

§175 When Duress Makes A Contract Voidable
(1) Wrongful/improper threat
(2) that leaves the party with no reasonable alternative (No alternative sources of goods, services, or funds.)
(3) Improper threat actually induced the victim to agree to the contract (subjective standard; is this particular victim induced?)
§176 When a threat is improper

(Pure Process) Threat involves a crime or tort, criminal prosecution is threatened, lawsuit is threatened in bad faith, threat is a breach of duty of good faith.

(Substantive) Resulting exchange is not on fair terms &

The threatened act would harm the recipient & wldnt significantly benefit the party making the threat.

Threat effectiveness is significantly increased b/c of prior unfair dealing or other illegitimate use of power.

***Totem Marine v. Ayeska Pipeline*** (duress/economic duress)

Facts: P entered a contract with D to transport pipeline materials to Alaska. D said it was 2000 tons, it was really 7000, and improperly piled. D terminated the contract & gave no reason. P submitted invoices for $200-$300k, D said they weren't sure when they would pay it. P signed agreement releasing D from claim by P for $95k b/c P needed cash immediately to avoid bankruptcy. P sued, seeking to rescind the settlement on the basis of economic duress.

Holding: Court held that a threat to breach a contract/withhold payment of an admitted debt constitutes duress.

(1) Ayeska admitted to owing Totem $, but told Totem that it would be up to 8 months until it paid unless it accepted only $97.5k. This amounts to an improper threat b/c it threatened to withhold an admitted debt.
(2) Totem had no rxable alternative, it was either take the $97.5k or risk bankruptcy.
(3) D's threat induced P's agreement b/c Alyeska was the one who terminated K and jerked Totem around by withholding payment.

## Undue Influence §177

Persuasion which tends to be coercive in nature, Overpersuasion which overcomes the will w/o convincing the judgement

- Misrepresentation of law/fact is not essential
- Existence of dominant/servient party is crucial
    - Could be lesser weakness such as elderly, sick or other form of lessened capacity
    - May consist of total weakness of mind
    - Could be excessive strength on one side or undue weakness on the other
    - Often a confidential relationship

Overpersuasion typically has a few hallmarks

1) Discussion of the transaction at an unusual or inappropriate time
2) Consummation of the transaction in an unusual place
3) Insistent demand that the business be finished now
4) Extreme emphasis on consequences of delay
5) Use of multiple persuaders by the dominant side against a single servient party
6) Absence of 3rd party advisors to the servient party
7) Statements that there is no time to consult advisors/attorneys

***Odorizzi v. Bloomfield School***

Facts: P employed as teacher by D school. Arrested for homosexual activity. Resigned the next day, sued based on that the resignation was due to undue influence. D came to his apartment the day when he was released from jail, told him if he resigned immediately the incident wouldn't be publicized & he was threatened with suspension.. P claims the resignation is voidable based on duress, fraud & undue influence.

Holding: Succeeds on Undue Influence claim. Disparity btwn parties, P was exhausted & emotionally wrecked at the time. It was at an usual time, P hadn't slept for 40 hours. Unusual place, P's apartment. D told P he needed to resign immediately. Emphasized that if he didn't his arrest would be made public. Principal & superintendent v. P. No attorneys. Told him there was no time to speak with an attorney.

Duress Claim: No duress, b/c the threat to fire P was not improper. It was the duty of the school to fire teachers who are arrested.

Fraud Claim: No fraud, b/c P didn't show that D told P any false statements

## Misrepresentation

### Fraudulent Inducement §167

1) D made false representations as a statement of existing & material fact.
2) D knew the representations to be false or was reckless
3) D made the representations intentionally for the purpose of inducing another party to act upon them
4) Other party rxably relied & acted upon the representations
5) Other party sustained damages by relying upon this representation

§164 When a Misrepresentation Makes a Contract Voidable

- If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable.

Fraudulent; §162(1): Misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent & the maker:

(a) knows or believes the representation is not in accord w/ facts or

(b) Doesn't have confidence for the basis of the assertion
(c) Knows he doesn't have basis for assertion

Material §162(2): likely to induce reasonable person to assent or maker knows it will likely induce the recipient to assent
**A non-fraudulent misrepresentation will not make a contract voidable unless it is material

§169 Reliance on an Assertion of Opinion is Not Justified Unless

- Relationship of trust and confidence such that reasonable to rely on opinion
- Reasonably believes person has special skill, judgment, or objectivity with respect to the subject matter; or
- Particularly susceptible to misrepresentation of type involved

***Syester v. Banta*** (fraudulent inducement)

Facts: D sold $33k worth of dancing techniques to an elderly widow. Included in all of the courses were lifetime memberships. D promised that P would be a professional dancer, gave her gold stars far sooner than normal, sold her a course that the dance instructor didn't know how to teach. D advised P to get rid of her attorney, had her sign a release of all claims for $4k, and D never paid the $4k. P sued claim misrepresentation.

Holding: D argued that the release was a complete defense. Court held that Ps claims were valid, that D had misrepresented themselves, and that the punitive damage award was valid here b/c of the gross misrepresentation.

Court finds there is evidence of both Fraudulent & Material Misrepresentation:

Misrepresentation:

a. Fraudulent: told her she could be professional dance and knew it wasn't true; **R 162(1)(a)**
    i. Made it w/ intention of inducing her to sign release
b. Material:
    **i.** Knew telling her she could still be a professional dancer and hinting at romantic relationship would likely induce her to sign release; **R 162(2)**
    ii. Not reasonable though? She knows already sued them once!

Court also finds that it was rxble for P to rely on D's assertions §169 b/c 1) teacher-student relationship 2) D was professional dancer 3) lonely widow.

***Jennings*** (fraudulent inducement)

Facts: In 1998 D purchased a new home and in 02 D contacted the builder about water leaks. Between 02 & 04 the builder repaired water leaks. In 03 D hired a painter to cover the water spots on the ceiling and a contractor caulked the windows to prevent further water leakage. The D was told that it was a "band-aid" repair.

D listed the home for sale in 05, D completed & signed sellers disclosure dated 02/28/05, but answered "No" when asked whether there was any water leakage or damages in the house. D acknowledged there had been a leak but it was repaired. After inspecting the home several times, P purchased the home. A few weeks after P purchased home, there were heavy storms that caused extensive water intrusion into the home. P sued D for Fraudulent Inducement, Fraud by Silence, Negligent Misrepresentation, Breach of Contract.

Holding/Reasoning: Valid claim for fraudulent inducement. The paragraph was an integration clause protecting sellers from a buyer's allegations that a seller made representations not in writing, but it does not prevent a buyer from relying on a seller's written representation. There was enough evidence here to overturn summary judgement for D on all the issues.

Fraudulent Inducement issue: 1) D lied about the repair which would be a material issue in purchasing the home 2) D knew he was lying b/c he had hired the repairman himself 3) D knew he would have to sell at a reduced

price and risk losing the sale if he disclosed the problems 4) P should be able to believe seller's representations of the property 5) P bought the house, and suffered thousands of dollars' worth of damage.

**Fraud by Silence** §161

1) D had knowledge of material facts that the P didn't have & cldnt have discovered by rxable diligence
2) D had obligation to communicate the material facts to P.
3) D intentionally failed to communicate the material facts to P
4) P justifiably relied on D to communicate material facts to P
5) P sustained damages as a results of D's failure to communicate

***Park 100 v. Kartes* (fraud in the inducement)**

Facts: D's were part owners in a business in 84. P & D made an agreement for D to lease a facility from P. P provided a lease agreement to D's attorney which didn't contain a "personal guarantee" clause. On the day before D was supposed to move, P went to D's office & found the D. P told D he had lease papers & they had to sign them before they relocated, in reality it was really a personal guarantee of lease.

Years later P sent D an estoppel certificate to pay for the business's lease agreement. D refused, P sued. D raised defense of actual fraud.

Holding/Reasoning: Generally parties are obligated to know the terms of the agreement they sign, however when misrepresentation is involved to induce a party's signature, one cant be binded.

## Unconscionability

**Procedural and substantive elements**

Minority, mental capacity, duress, undue influence, and misrepresentation are only procedural

Procedural: absence of meaningful choice

Substantive: Contract terms unrxably favor one side.

- Prevailing view is that you need both procedural & substantive, but not necessarily to the same degree

**Does it shock the conscience?**

Everyone must react the same, must think it is a "grossly unfair bargain"

Must be unconscionable at time K entered into

§208 Unconscionable Contract or Term: If a contract or term is unconscionable a court may…

- Matter of law for judge to decide
- May refuse to enforce whole K
- May enforce w/o unconscionable term
- May limit application to avoid unconscionable result

§2-302 – Unconscionable Contract or Clause

- Matter of law for judge to decide
- Opportunity to present evidence regarding commercial setting, purpose, and effect to determine unconscionability
- Same enforcement options as R 208
- Some courts find unconscionability a defensive concept

***Williams v. Walker-Thomas Furniture*** (Unconscionability)

Facts: From 57-62 each D in these cases purchased household items from P. D's signed agreements which stated that the items were leased for a stipulated monthly rent, but cross collateral provision ("add-on clause") in contract keeps a balance due on every item purchased until the balance on all items is liquidated, if D defaulted than P could repossess. D purchased items overtime, defaulted, and P sought to repossess the items.

Holding/Reasoning: Court adopted the unconscionability doctrine and held that the agreement may be unconscionable. In determining reasonableness, primary concern must be terms of the contract considered within the circumstances at the time.

Procedural: Procedurally unconscionable here b/c absence of meaningful choice for the P. Gross inequality of bargaining power, important terms are hidden or minimized.

Substantive: Contract terms unreasonably favorable to other party. Terms make it extremely difficult for P to pay off property.

***Higgins*** (unconscionability)

Facts: P's are siblings, executed an agreement for arbitration in 05 with D's t.v station. D t.v show wanted to produce show about Ps, their parents death, & refinish their house. P signed a release/agreement which included an arbitration clause under "Miscellaneous". No signature was required, its typed in smaller font, & no discussion took place between Ps and Ds concerning the clause. Family Ps were staying with kicked Ps out of the house soon after. Ps sued the tv show, and want the arbitration clause declared voidable.

Holding/Reasoning: There is a strong public policy in favor of arbitration but this does not extend to unconscionability. Court finds that the agreement was an adhesion contract.

Prevailing view is that substantive & procedural unconscionability **must both be present**, but not necessarily in the same degree. There is no rule barring a Ps unconscionability claim if the P read the clause at issue.

Procedural Unconscionability *What actually happened

Entire agreement drafted by stronger party. Clause appears near end of lengthy, single-spaced document, not titled, in "miscellaneous" section. Had to initial multiple clauses in Contract, but not the arbitration clause. Ds knew the Ps were young, unsophisticated, & had recently lost their parents.

Substantive Unconscionability *Generally described as unfairly one-sided

One sided: Says, "I agree," not the parties agree. Only requires orphans to submit their claims to arbitration; TV co. free to sue in court. Orphans can't appeal arbitrator's decision, while TV co. can appeal if lose in court.

***Quicken Loans*** (Fraud & unconscionability**)**

Facts: P purchased property in 88, selected D to work with consolidating her debts and lower her monthly payment. D had property appraised by an affiliate for way over the property's value & negligently approved it. P initially got cold feet & didn't return the D's phone calls, so the D persisted & left multiple voicemails, finally P agreed.

P argues D promised to refinance in several months once P's credit score raised. D sent 81 page closing document agreement right before closing, notary signed with P & didn't know anything about the agreement. D later refused to refinance, and eventually foreclosed on P after she was placed in the hospital. P sued!

Holding/Reasoning:

Fraud Claims: D didn't disclose the balloon payment as required by law (fraud by silence?). Promise to refinance was fraudulent as well.

The loan discount point misrepresentation was inadequate for fraud b/c the P showed no proof that it relied on the D's representation of the Loan Discount Points.

Unconscionable Claims:

Procedural: P was not a sophisticated borrower, earned $14.36 an hour. D was sophisticated, loan agreements are it's bread and butter. Long adhesion contract, no opportunity to ask questions when given agreement.

Substantive: Total cost of loan was exorbitant, costing the P an additional $349k as compared to her prior debts. She will lose her home when she cant afford the balloon payment.

# Justification for Non-Performance

## Mistake

### §151 Mistake Defined

A mistake is a belief that is not in accord with the facts.

### §152 Mistake by Both Parties

1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchanges of performance, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under §154.

### §154 When a Party Bears the Risk of a Mistake

A party bears the risk of a mistake when

a) The risk is allocated to him by agreement of the parties, or
b) He's aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
c) The risk is allocated to him by the court on the ground that its reasonable in the circumstances to do so.

***Lenawee County Board v. Messerly*** **(**Mutual Mistake**)**

Facts: D purchased a triplex in 71. D sold to Barnes in 73, Barnes defaulted & sold to Messerly's. Messerly sold property to Pickles. Agreement included a Land Contract Clause: "Purchaser has examined this property & agrees to accept same in its present condition. There are no other or additional written/oral understandings". County condemned the property after noticing raw sewage on the ground (bad septic tank). D sued Pickles when he didn't pay for the property, Pickles counter-claimed seeking recession.

Holding/Reasoning: Mutual Mistake requires an erroneous belief that related to an existing fact at the time the contract was executed. The expectation that the property could be used as an income generating property is not a mutual mistake! At the time the contract was made the property could be used as an income generating property. **Predictions & Expectations are not facts, therefore not a mistake

The relevant mutual mistake is that both parties believed that there was a compliant septic tank. The mistake relates to an assumption that the parties relied on in believing that the property was habitable. The mistake of both parties had a material effect however based on §154 the parties assigned the risk of loss to the Pickles & therefore it was rxable under the circumstances for the Pickles to bear the cost.

### §153 When Mistake of One Party Makes a Contract Voidable

1) Mistake at time Contract was made by one party
2) Relates to basic assumption
3) Material effect on agreed exchange
4) Doesn't bear the risk of the mistake under §154 &
   - Enforcement of the contract would be unconscionable or
   - The other party had reason to know of the mistake or his fault caused the mistake

***DePrince v. Starboard Cruise*** (Unilateral Mistake)

Facts: P went on a cruise where D operated an onboard jewelry store. P inquired for a 15 carat diamond, manager sent inquiry to corporate who sent inquiry to supplier (Sophia). Sophia responded that the diamonds

would be $235k, P spoke with gemologist afterwards & determined that D was making mistake & the diamond was really worth $2 million.

P and manager made sales agreement, P paid for it. D later learned the price quote was "per carat". D attempted to rescind, P sued for breach of contract & D raised unilateral mistake defense.

Holding/Reasoning: D is not entitled to summary judgement on the question of unilateral mistake. Several different tests, 4 prong test (most difficult), 3 prong test (most similar to §153, 154) & 2 prong test (most lenient). Court applies the 4 prong test.

4 Prong Test:

1) Mistake was induced by the party seeking to benefit from the mistake
2) No negligence or want of due care on the part of the party seeking a return to the status quo
3) Denial of release from the agreement would be inequitable
4) Position of the opposing party has not so changed that granting relief would be unjust.

Summary Judgement was improper b/c it was a factual question whether the mistake was induced by the P, and whether the D was negligent in making its mistake. D may have been negligent in accidently selling such an expensive diamond for so cheap.

## Changed Circumstances

Usually thought as involving changes in circumstances that occur between the making of the contract & time set for performance.

### §261 Impracticability

1) An event made the performance impracticable
2) The nonoccurrence of the event was a basic assumption on which the contract was made
3) The impracticability resulted w/o the fault of the party seeking excuse
4) Party hasn't agreed to perform despite impracticability that would otherwise justify his nonperformance (parties can contract around impracticability)

**Impossibility is a higher standard than impracticability

***Waddy*** (impracticability)

W.V S.C (2004)

Facts: P entered contract with D to purchase 30 acres, contract contained clause that D accepted the cost of removing hinderances to the land. P was to pay $750 per acre & P made a down payment. The property had two encumbrances on the title which P's attorney represented the D in remedying. Based on D's representations, attorney believed it would be easy to remedy & didn't immediately try to obtain the 2 releases. P made an additional down payment for an additional 18 acres. Attorney was unable to complete the releases by the closing, and D decided he didn't want to sell. P sued, D raised defense of impracticability.

Holding: Party arguing impracticability must show more than a mere increase in difficulty/cost to be excused from performance. Party must have made reasonable efforts to overcome the obstacles to performance.

The D had 2.5 months to obtain the releases which would have only taken one month. D also contracted to accept the cost of removing hinderances to the land & therefore the fact that the D delayed in seeking the release can not be used as an excuse for nonperformance.

### §265 Frustration

*1)* Principal purpose of contract
*2)* Substantially frustrated by the occurrence of an event

*3)* Non-occurrence of which was a basic assumption of the contract
- Unless: Parties contract around it, the party claiming frustration's is at fault, or circumstances say otherwise

***Mel Frank Tool*** (Frustration)

S.C of Iowa (1998)

Facts: D leased a storage facility from P to be used as a chemical distribution warehouse. Lease required that the D comply with all city ordinances. D told P that it would be using the property for chemical storage however it did not mention that some of the chemicals were "hazardous". During the lease, the city changed the fire code to prohibit the storage of hazardous materials.

D told P it would have to relocate to avoid civil/criminal proceedings & b/c it could no longer use the premises w/o cost prohibitive alterations. P sued for breach, D raised Frustration Defense.

Holding: Frustration: Was the nonoccurrence of the circumstance a basic assumption on which the contract was made? No, D didn't assert that ALL of its inventory consisted of hazardous materials or even a majority of it. The purpose of the lease was to store chemicals, not just hazardous chemicals.

D never asserted the nature of its inventory or the lost profits due to the ordinance, therefore the Court cant determine that D's purpose was frustrated.

## Modification

Qs to ask:
a. Was there separate consideration for the modification?
b. Did the parties agree to the modification under legitimate circumstances?

*Preexisting duty rule*; §73
c. Performance of legal duty neither doubtful nor subject to honest dispute can't be used as new consideration
d. Slightly different performance if it reflects more than pretense of bargain is consideration

Modification binding if: §89
e. Equitable b/c of unFOS circumstances
    i. May apply even if impracticability defense wouldn't work
f. Provided by statute
g. Justice requires due to material change of position in reliance on promise
    i. Promise means accepting reformation

UCC 2-209(1) dismisses pre-existing duty rule – need no new consideration
h. Modification must abide by Statute of Frauds 2-201
i. Attempt at modification may amount to waiver of limitation on modifications
j. Can retract waiver w/ reasonable notification that strict performance required
    i. Unless unjust in view of material change of position
k. Good faith bar to "extortion" of a modification "without legitimate commercial reason"

***Alaska Packers v. Domenico*** (restatement pre-existing duty rule)

1902 C.O.A

Facts: Ps entered contract agreeing to travel to Alaska & work for the fishing season. Ps agreed to $60 + 2 cents for each red salmon caught. After arriving in Alaska, Ps demanded $100 instead or they would return to Cali. Superintendent of D told Ps he was w/o authority to raise wage, but raised the wage anyway to $100. D refused

to pay $100 when the Ps returned. P sued claiming breach, D argued the 2nd agreement was without Consideration.

Holding: 2nd agreement is w/o consideration, Court adopts pre-existing duty rule. It's unfair for a party to threaten breach to have the contract modified in his favor, when nothing has occurred requiring a modification.

Season is extremely short, area is remote, D had lots of $ invested in the operation & Ps w/o any valid excuse refused to continue their services for which they were under contract to perform.

***Kelsey Hayes v. Galtaco Redlaw*** (UCC modification – fails for duress)

U.S District Court 1990

Facts: P makes brakes assemblies for auto manufacturers. D supplied castings to P. Parties signed a 3 year contract in 87, D would be sole provider of castings & D would sell at fixed prices. In 05/89 D decided to shut down casting production due to financial problems. D offered to sell for several more months for a 30% price increase. P agreed, since it couldn't get alternative castings for 18-24 weeks & it's 2 major clients production would be shut down.

06/89 D required an additional 30% price increase to continue supply, P was once more forced to agree. P paid for 198 shipments out of 282, P sued arguing that it shouldn't have to pay for the additional 84 b/c the subsequent agreements were made in duress.

Holding: Economic Duress may exist in absence of an illegal threat, however the duress must be wrongful. D threatened to breach the contract if P didn't agree to significant rate hikes. P contacted 6 other manufacturers of the casts, but none were able to provide them soon enough. Therefore faced with a potential shutdown of P's factory & it's clients factories, P had no alternative to agreeing to D's modifications. P also vigorously objected to the D's breach of the 87 agreement.

**Think of modification** as a Contract w/in a Contract or a collateral Contract

## Consequences of Non-Performance

### Express Conditions

Often, an agreement will expressly state that the performance isn't due unless & until some specified event has taken place. If it does, than the performance is conditional.

**Express conditions**: written in the K
The event is a condition precedent to the obligation of the party or parties performing their K duties

- Usually only conditions the duty of one party to protect that party from having to perform when it would be less advantageous
- **Condition may be in neither party's control, one, or both**
- Nonoccurrence of condition may be excused for variety of reasons

Term can be interpreted as both promise and an express condition
Language that creates an express condition:

- If; unless and until
- Failure of condition will cause agreement to be "of no further force or effect"
- "Neither party shall have any rights against nor obligation to the other"

§226 **Constructive conditions**: created by the courts

**a.** Implementing what they believe is the underlying intentions of the parties

Obligor = one whose performance is at issue (performance conditioned); obligee = one to whom the performance flows to
§229 **Excuse of a Condition to Avoid Forfeiture**

- If the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence unless it's occurrence was a material part of the bargain.

***enXco v. Northern States***

C.O.A 2014

Facts: Parties entered agreement 10/08 for two contracts. 1st contract, P agreed to develop a project site & obtain permits. D would purchase P's real estate & assets for $15 million. 2nd agreement, D agreed to pay P $350 million for engineering, infrastructure & testing. Parties weren't obligated under the second agreement until/if the 1st agreement was met. 1st agreement contained conditions that both parties had to satisfy by a certain date, included a termination clause. D terminated agreement when P failed to meet deadline to obtain a certificate. P sued arguing it's actions were valid b/c of temporary impracticability.

Holding: Court rejects P's temporary impracticability argument. P argues that it was impracticable b/c of a snowstorm, hearing location error & state law notice requirements. P waited 2 years and P had various options it could have used to meet the date. Parties anticipated delays & contracted a lengthy period for the P to meet the conditions.

Court rejects P's disproportionate forfeiture argument, P didn't lose anything, only the value of its assets, and both parties were sophisticated. Still owns the land.

***J.N.A Realty v. Cross Bay*** (Disproportionate Forfeitures)

N.Y COA 1977

Facts: P leased a premises for 10 years in 64 to tenant, who built a restaurant there. Lease had an option to renew provided that the tenant notify the landlord 6 months prior to the lease expiration. Tenant sold restaurant & lease to D in 68, & the tenant obtained an option to renew for 24 years as a condition of the sale. P sent a letter 2 weeks before the 6 month option to renew expired, but didn't mention the impending deadline. P informed D he would need to evict at the end of the term. P sued to evict D, D raises defense of disproportionate forfeiture.

Holding: Court grants the eviction, but also grants money damages to the tenant based on disproportionate forfeiture.

D's disproportionate forfeiture case: D has made considerable improvement, $40k at the time of purchase & $15k during the tenancy, entitled to relieve if there is no prejudice to the P. Tenant shouldn't be denied equitable relief from the consequences of his own neglect.

**Court adopted different test than §229, didn't require that the condition not be a "material part of the bargain".

## Material Breaches

When does one party's failure to perform justify the other party in refusing performance?

**Total Breach/Material Breach**: Sufficiently serious to justify discharging the non-breaching party from his obligations to perform. Injured party is entitled to collect not only actual damages but also future damages that will reasonably flow from the breach.

**Partial Breach**: Does not discharge the non-breaching party's duty to perform. Right to damages only for the actual harm that resulted to date, not for future harm.

***Jacob & Youngs v. Kent***

(1921) N.Y C.O.A

Facts: P built home for D for $77k. Agreement stipulated that all of the Plumbing was to be manufactured by "Reading". D moved in & found that some of the plumbing was made by another manufacturer. P replaced some of the piping, however D refused to pay for the additional work, so P sued.

Holding: Although the P did breach the Contract, the P substantially performed the Contract. Purpose of the agreement was for P to construct a livable house for D. The incorrect piping was a mistake which both parties failed to notice. Although they were produced by different manufacturers, they were of the same quality, appearance & market value. **The failure to install correct piping was unimportant to the agreement!

Measuring damages by cost of replacement would be unfairly oppressive, damages should be assessed by the difference in value btwn house built with "Reading" & house as-is (no difference). *Diminution in Value instead of Cost of Replacement test when breach was unintentional and mistake made in good faith.

§237 **Effect on Other Party's Duties of Failure to Render Performance**

Non-breaching party may suspend performance until breach is cured when it's material (we don't distinguish btwn material & total in this class)

*Comment d*: If there has been substantial performance non-breaching party may not suspend performance (*Jacob & Youngs*)

§241 **Determining Whether A Breach is Material**

- extent to which the injured party will be deprived of the benefit which he rxably expected
- extent to which injured party can be adequately compensated in damages
- extent to which party failing to perform will suffer a forfeiture
- likelihood that party failing to perform will cure the failure (considering circumstances)
- extent to which the party failing to perform comported with standards of good faith & fair dealing

**UCC 2-508**: "qualified" perfect tender rule

i. (1) If a seller delivers an "imperfect" good before deadline, seller can send you a "perfect" good as long as w/in K time
    1. **Imperfect means not what you bargained for**
ii. (2) If seller sent a good that they know is nonconforming, but thought the buyer would accept it, seller has a reasonable amount of time to make tender conform
iii. Can bargain for a higher standard
    1. Language of K must be clear and seller must be on notice of language

***Sackett v. Spindler***

Cali C.O.A 1967

Facts: D owned shares of a corporation. Entered agreement with P for P to purchase 6316 shares for $85k. P was to pay for the shares in three installments, paid the first on time, 2nd payment was late & short. P paid the balance later, but the check bounced, in response the D reclaimed the stock. A month later P notified D that he was ready to pay for the stock, P gave an advance of $3944 but once again failed to meet the deadline. D terminated the agreement, P sued arguing that D was not entitled to terminate the agreement.

Holding: Ps failure to pay the agreed upon amount and meet the deadlines represents a total (material) breach & therefore the D was allowed to terminate his performance.

Whether a breach is total or partial depends on the materiality of the breach. P was grossly negligent or willful in his failure to pay, it was uncertain whether P would ever actually pay. §241 factors support that the breach was material.

## Anticipatory Repudiation

### §250 When a Statement or an Act is a Repudiation

repudiation is a: (a) statement or (b) act by obligor indicating intent to not perform

- Must be a definite and unequivocal manifestation of repudiation
- Looking for total breach, not partial

**§253 Effect of Repudiation as a Breach & on other Party's Duties**

(1) If an obligor repudiates a duty before he has committed breach by non-performance, his repudiation alone is a total breach
(2) repudiation discharges the other party's duty to render performance

**§256 Nullification of Repudiation**

(1) Effect of a repudiation is nullified by a retraction of the statement if notification of the retraction comes to the attention of the injured party before he
    - materially changes his position in reliance on the repudiation or
    - indicates to the other party that he considers the repudiation final

***Truman v. Shupf***

Appellate Court Ill. (1995)

Facts: Parties entered land contract, D agreed to sell P land for $160k. Sale was contingent upon buyer obtaining zoning for an asphalt plant. P informed D that there was public opposition to the zoning, P withdrew zoning request b/c chances were slim of successful zoning.

P offered $142k since zoning was unsuccessful, D refused, P responded that it still wanted the property. D refused, arguing that P voided the contract. P sued.

Holding: P never repudiated the agreement. Repudiation requires a clearly implied threat of nonperformance. The language of the letter concerning the failure of the zoning request was not a clear repudiation.

Even if the P did repudiate, the P may timely retract the repudiation if the D has not changed his position in reliance or expressed intent that it was a repudiation. D did not treat the contract as rescinded, D didn't enter into another agreement, nor considered the matter with another party. Therefore D hasn't changed his position.

**§251 When a Failure to Give Assurance May be Treated as a Repudiation**

(1) Obligee may demand adequate assurance of due performance when rxable grounds arise that the Obligor will commit a total breach by non-performance, may suspend performance until assurance is received.
(2) If obligor fails to provide adequate assurance within a rxable time the oblige may treat that as a repudiation.

**§2-609 Adequate Assurances of Performance**

(1) When rxable grounds for insecurity arise concerning performance, the other party may in writing demand adequate assurance, & may suspend performance until he receives assurance
(2) Btwn merchants rxableness of grounds for insecurity & adequacy of assurance is determined based on commercial standards
(3) Acceptance of improper delivery or payment doesn't bar the aggrieved party's right to demand adequate assurance
(4) After receival, failure to provide assurance within 30 days at the latest is a repudiation

- Unreliable rumors or insignificant risks don't constitute reasonable grounds for insecurity.
- Demand for adequate assurance must be based on circumstances that arise after the contract was formed, not on a situation known at the time the Contract was formed.
- Example: Buyer who falls behind in "his account" with seller, buyer discovers seller is making defective deliveries of parts for other buyers with similar needs

***Hornell Brewing v. Spry***

S.C of N.Y County (1997)

Facts: D & P made exclusive distribution agreement. D would exclusively distribute P's products in Canada. P sold product to D on 10 day credit, but D's unpaid invoices continually grew. Grew to over $100k & D's sales were far below projections. D repeatedly reneged on promises to pay.

P demanded adequate assurances that it would be paid at that point for the unpaid invoices. D held phone conversation with P & 3rd party financier for D. P & D's 3rd party financier discussed payment of unpaid invoices & P was paid the full amount. P allowed the distributorship to continue with a maximum outstanding balance of $300k.

Afterwards P learned from a credible source that D was running a sham operation & D ordered $400k worth of product. P requested a line of credit & a personal guarantee before shipping that much product. D never agreed to termination of the distributorship agreement, therefore P sued.

Holding: Once a seller has reasonable grounds for insecurity it must request assurances from the buyer. Seller may determine what constitutes "adequate assurances". P had rxable grounds for insecurity. D had no financing in place, had failed to pay on time, and had failed to sell product.

D initially satisfied the requested assurances by paying the unpaid balance off, and holding a telephone conversation between P and D's financier. However, D gave rise to additional insecurity when D made an order of $400k & P discovered that D's operation was a sham.

D's failure to respond to the request for assurances constituted a repudiation & entitled P to suspend the agreement.

## Expectation Damages

**§344 Purpose of Remedies**

(a) "Expectation Interest": Breach of Contract – Injured party should be placed in as good a position as he would have been in had the contract been performed
(b) "reliance interest": Promissory Estoppel – Injured party should be placed in as good a position as he would have been had the contract not been made
(c) "restitution interest": Unjust Enrichment – Turns the lens, wrongful party should restore any benefit that he has received & not given return performance for.

**§347: Measure of Damages in General**

Subject to the limitations states in §§350-53, the injured party has a right to damages based on his expectation interest as measured by

a) Loss in the value to him of the other party's performance caused by its failure or deficiency, plus
b) Any other loss, including incidental or consequential, caused by its failure or deficiency, less
c) Any cost or other loss that he has avoided by not having to perform

**§2-715: Buyer's Incidental & Consequential Damages**

(1) Incidental Damages: Reasonable Expenses to avoid or minimize loss:
    - inspection, receipt, transportation, & care & custody of good rightfully rejected, commercially reasonable charges, expenses related to cover & any other reasonable expense incident to the delay or other breach
(2) Consequential Damages: Only recover if seller had reason to know and buyer could not reasonably prevent the loss through cover.

Damages Calculation

- Remedy shouldn't put the non-breaching party in a better position than if the contract had been performed.

- Biggest $ is usually the contract price.
- General Rule: No attorney fees in contract cases

Contracts Mixed with Torts

- §355: Punitive Damages -No punitive damages for Contracts unless the breach is also a tort
- §353: Loss due to Emotional Disturbance – Assume this doesn't happen except in rare cases.

Specific Performance

- Most of the time you need an injunction, land is the best candidate for specific performance, although these are uncommon
- No specific performance for services, but rarely; negative enforcement

***Crabby's v. Hamilton***

Missouri C.O.A (2008)

Facts: P seller accepted offer to buy from D for $290k. Agreement condition upon D's ability to get a loan for the purchase. D received info concerning tax liens on the property & the closing date was extended so P could resolve the liens. D sent letter to P that he wasn't buying the property due to tax liens & minor fixture issues. D purchased another restaurant instead. P didn't sell for 10 months afterwards to a 3rd party for $235k. P sued for breach of contract.

Holding: P argued that the difference in sales prices was the proper damage calculation.

D argues that the $235k sale is not an accurate reflection of "fair market value" b/c it was a distress sale & nearly a year after the original agreement.

Court holds that the sale 11.5 months after the breach was a reasonable time period to provide substantial evidence of fair market value. Fact that the seller wanted to "sell the property badly" does not support a determination that P was compelled to.

Proper Remedy:

Difference in value between $235k & $290k = $55k

+ Incidental Damages: $45k for property tax, utilities, mortgage interest.

= Total $100k

***Handicapped Children's v. Lukaszewski***

S.C Wisc (1983)

Facts: P hired D as a therapist for $10,760 a year. D attempted to resign however P demanded that D return since she was under an employment contract. D eventually didn't return to work & submitted a resignation letter. P had to hire a replacement for $1026.64 more yearly than D. P sued for breach of contract.

Holding: Undisputed that D breached the contract but the question is whether or not the breach was justified. D failed to meet her burden that breach was for health reasons. Issue is damages.

Damages Calculation should center on what the non-breaching party bargained for, NOT the objective value of the services P received. P bargained for the services of a therapist with D's education & experience at the salary agreed upon, it didn't expect a more experienced therapist who had to be paid more $.

***Any additional value received from the replacement's greater experience was imposed & thus can't be characterized as a benefit. The injured party must take all reasonable steps to mitigate damages & must attempt to obtain equivalent services at the lowest possible replacement cost, here, P did!

**Damages would have been reduced if there had been a lesser qualified teacher available.

**§348(2) Alternative to Loss in Value of Performance**

If the loss in value to the injured party isn't proved with sufficient certainty, damages may be measured by either:

a) Diminution in market value or
b) Reasonable cost of completing performance or remedying the defect if the cost isn't clearly disproportionate to the probable loss in value to P.

***American Standard v. Schectman***

N.Y Supreme Court (1981)

Facts: P and D agreed that P would convey buildings/equipment left on a property to D, in exchange D paid $275k, promised to remove equipment, demolish structures & grade the property. P sued when D failed to grade the property.

Holding: D argued that P suffered no loss b/c the value in the property was unaffected by the difference in the grading. P sold the property for $3000 less than fair market value. Cost of completion of the grading was estimated at $110k by P's experts.

**The typical measure of damages for construction is the reasonable cost of replacement or completion. Sometimes when the cost of completing performance is disproportionate to the resultant benefit to the property, the Court will adopt a diminution in value test. However, for the court to apply this test the D must have shown good faith substantial performance.

Here, D intentionally failed to grade the property and the fact that the grading did not have a significant effect on the value of the property does not excuse his failure to perform.

**Differences between *American Standard* & *Jacobs & Young***

1) Grading in *American Standard* wasn't incidental to the agreement as the manufacture of the piping was in *Jacobs & Young*
2) Work didn't have to be undone in *American Standard* whereas in *Jacobs & Young* the walls & plumbing would have to be torn out
3) Defendant in *American Standard* intentionally neglected to grade the property whereas in *Jacobs & Young* the failure to comply was unintentional

**Restrictions on the Recovery of Expectation Damages: FOS, Certainty, Caus.**

***Hadley v. Baxendale*** (early FOS case/consequential damages)

Court of Exchequer (1854)

Facts: P's mill production was stopped when the crankshaft broke. D carrier corp. told P that if the part were dropped off before 12 it would be transported to the repair shop by the next day. Delivery took several days longer due to D's neglect. P sued for loss of income during the period it was out of commission.

Holding: P is entitled to damages arising fairly & reasonably from D's breach, or what may be reasonably supposed to have been within the contemplation of both parties at the time the agreement was made.

Recover damages reasonably supposed to have been in contemplation of **both** parties at the time the contract was made

**a.** Must be **FOS**
**b.** Special circumstances must be communicated

Here, P was only aware that the shaft was for a mill & P owned it, wasn't aware that the crankshaft was the only one & the mill would be shut down until it was repaired.

**Loss of Expected Gain is Recoverable if:**

1) Loss is within contemplation of the parties at the time the contract was made
2) Loss flows directly or proximately from the breach
3) Loss is capable of reasonably accurate measurement or estimate

**§351 UNFOS & Related Limitations on Damages**

(1) Party in breach must have reason to foresee as probable result of breach when contract was made
(2) Loss may be foreseeable if
  (a) follows from the breach in the ordinary course of events
  (b) as a result of special circumstances, the breaching party had reason to know
(3) Court may limit foreseeable loss by excluding loss of profits, allowing only reliance recovery, otherwise if "justice so requires in order to avoid disproportionate compensation"

- Unconventional and uncommon for courts to use
- Usually where there is extreme disproportion b/w price charged and liability sought

*Comment A*: No tacit agreement required to be liable for loss, but communication of the special circumstance must be done before they enter into the contract.

**§352 Uncertainty as a Limitation on Damages**

Damages aren't recoverable for loss beyond an amount that the evidence establishes with rxable certainty.

***Florafax***

(S.C Oklah. 1997)

Facts: P entered agreement with Belarose whereby P would accept in-bound calls, initial term was for 1 year with month to month automatic renewal. Soon after, P entered agreement with D where D would accept P's calls. Agreement was for 3 years, price/fee renegotiation clause at 2 years. Agreement also contained a consequential damages clause where the D agreed to pay.

P was D's largest customer, D was aware that P was a middleman & that P was expanding. D's performance was inadequate, inadequate callers for the biggest floral week of the year. Led to Bellarose (P's biggest client) to terminate agreement with P. P terminated it's agreement with D & was forced to set up its own calling center. P sued D for breach of contract.

Holding: Court finds that D breached the contract, issue here is whether the D can be held liable for consequential damages related to the Bellarose termination.

D was aware of the Bellarose agreement, therefore it was within D's contemplation. 60 day limit from Bellarose agreement doesn't apply b/c D had no right to terminate that agreement & application to damages for P would unfairly allow D to benefit from a cancellation right it never had. Agreement btwn D & P was for a minimum of 2 years.

For damages to be recoverable they must be the natural & proximate consequences of the breach & not speculative. Here, Bellarose President testified that he considered the relationship with P to be long-term & the biggest issue was D's performance.

Incidental Damages: Florafex had to set up calling center for $800k

Consequential Damages: Bellarose Contract value

**Mitigation of Damages**

**§350 Mitigating Damages**

(1): Damages aren't recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.

(2): Injured party isn't precluded from recovery to the extent that he's made rxable but unsuccessful efforts to avoid loss.

*Comment b*: Once a party has reason to know that the other party will not perform, he's expected to halt performance to avid further damages. Also expected to take affirmative steps to mitigate the losses.

***Rockingham County***

U.S C.O.A 1929

Facts: P entered contract with D to build a bridge, authorized by a vote of the county commission. D repudiated the agreement, P continued work anyways hoping D would change its mind. P sued seeking to recover damages from D's breach of contract.

Holding: After D repudiated, it was P's duty to stop construction. P may not pile up the damages. Proper remedy is the amount sufficient to compensate P for labor & materials expended in part performance prior to the repudiation + profit that would have been realized had the work been carried out (expectation damages).

*Non-Breaching party has an affirmative duty to mitigate the damages

*Once P has made prima facie case that he made the effort to mitigate losses, the burden shifts to breaching party to show there were substantially similar alternatives.

## Rights & Duties of Third Parties

Assign Rights & delegate Duties

§302 distinguishes btwn intended and incidental beneficiaries - Only intended beneficiaries may recover

Intended Beneficiary 3 Part Test

1) Promised performance will be of a pecuniary benefit to a 3rd party
2) Contract expressed to give promisor reason to know such benefit is contemplated
3) By the promisee as a motivating cause

***Vogan v. Hayes Appraisal Associates***

S.C of Iowa (1999)

Facts: D contracted with bank who was mortgaging P's home. The agreement was for D to perform initial appraisal of construction & perform periodic appraisals on progress. D monitored progress of Contractor's work on P's house in order for the Bank to make correct payments to the Contractor. Bank estimated there was $2k left of initial mortgage amount, but Contractor estimated it would cost another $70k. P's took 2nd mortgage out for $40k. D certified job as 60% complete, 8 days later at 90% complete. At that point the bank released the rest of the funds. Contractor defaulted, another contractor estimated it would take an additional $60k to complete.

P sued D for negligence in certification of completion.

Holding: P sued D on the basis that P was a third party intended beneficiary of the D & the bank's contract. Court finds that the P was an intended beneficiary because the promised performance of D's appraisal would be of benefit to P, and the language in the Contract gave D reason to know that the benefit to P was contemplated by the bank. Inspection Reports by D also contained P's name as the home owners.

**§311 Variation of a Duty to a Beneficiary**

(2) In absence of term; promisor and promisee retain power to discharge or modify duty by subsequent agreement
(3) Power terminates when, before notification, beneficiary:
1. Changes position in justifiable reliance on promise
2. Brings suit on it
3. Manifests assent to it at request of promisor or promisee

***Chen v. Chen***

Penn. S.C (2006)

Facts: Couple divorced, father agreed to pay $25 weekly for child support & agreed to pay more with better job. D paid mom $25 weekly until P's 18th birthday, father never paid more after getting better jobs.

P sued asserting she is a 3rd party intended beneficiary of her parents settlement agreement & is entitled to damages due to D's breach.

Holding: Court holds that the P is not an intended beneficiary of the settlement agreement, she has no right to sue. Public Policy favors a denial of a child seeking the specific dollars one parent owes the other parent, absent special circumstances. P is only an incidental beneficiary.

Parties never intended that the P would have a direct right of action to sue for money. Intention was for the mother to have discretion over the general benefit of the daughter.

Assignment: Act or manifestation by the owner of a right indicating his intent to transfer that right to another person.

- Assignor must make clear his intent to relinquish his right to the assignee & must not retain any control over the right assigned or power of revocation.

**§317 Assignment of Right**

(1) An assignment of right is a manifestation of the assignor's intention to transfer, assignor's right to performance by obligor is extinguished & assignee acquires the right.
(2) A contractual right can be assigned unless:
- Substitution of a right of the assignee for right of assignor would materially change the duty of the obligor
- Assignment is precluded by contract

***Herzog v. Irace***

Maine S.C (1991)

Facts: Jones injured in accident & retained D to represent him in his personal injury suit. Later required surgery on his shoulder, Jones signed agreement to pay for the surgery directly though his settlement. P notified D, & continued to treat Jones for a year. Jones received settlement, told D not to pay P. Jones later sent check to P, but it bounced. P sued D for breach.

Holding: Letter gives no indication that Jones attempted to retain control over the funds. The Assignment was valid & D had ample notice. The assignment does not create an ethical conflict between the attorney & his client.

**§2-210 Delegation of Performance; Assignment of Rights**

(1) Party may perform his duty through a delegate unless otherwise agreed to or the other party has a substantial interest in having original promisor perform.

(2) All rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase the burden/risk imposed on him, or materially impair his chance of receiving return performance.
(6) Other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity & may demand assurances from the assignee.

***Sally Beauty v. Nexxus Products***

C.O.A 7th (1986)

Facts: Best (hair product distributor) reached agreement with D (hair product manufacturer) for a distributorship agreement. P (competitor) later purchased Best via stock purchase. D informed P that it would not distribute products to a direct competitor. P sued claiming breach of contract.

Holding: D argues that the distributorship agreement was for personal services, based on a relationship btwn Best & D, and therefore not assignable.

Based on §2-210(1) assignment is barred. P's position as a subsidiary of a competitor is sufficient to bar the delegation of Best's duty. Reasonable for D to believe that P's performance would be different than what D originally bargained for.

Dissent: Not in direct competition. D likely had grounds for "insecurity", therefore the remedy would have been to demand assurances of due performance!