**Overview[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=1)**]**

Attack Outline

Which law covers? UCC = sale of goods (merchants) Common Law/Restatement (non-goods (services, property))

Was contract formed? Offer/Acceptance + Consideration

o Offer = Intent to commit + definiteness + communicated + identified offeree

Bargaining Intent = offeror intended to create present contractual rights and duties (not just inviting offer)

Definiteness (reasonable certainty)

Restatement: offer expressly or impliedly covers essential terms? (quantity, time, price, parties, place)

o Acceptance = mutual assent

Different modes of acceptance

Power of acceptance terminated OR counteroffer?

o Consideration = Bargained-for exchange + detriment to promisee OR benefit to promisor

Bargained-for exchange?

If promise to forbear right (Hammer), did promisor have honest/reasonable belief of valid claim?

Mutual obligation

Agreement based on illusory promise (reserve some right, option or alternative limiting his obligation) which may lead to an unqualified right?

Agreement based on promise to perform act that promisor already obliged to do?

Enforceable despite no bargained-for exchange?

Promissory estoppel -- Foreseeable/induced reliance on the promise (ex. of man retiring with reliance on pension

Waiver of some nonmaterial condition to the bargain?

Moral obligation or pre-existing duty?

o Other types of contract (besides Express Contract)

Contract implied in fact = Mutual agreement + Intent to promise

Quasi-contract (unjust enrichment) = Benefit conferred + Oppt to decline + Appreciation by D + Acceptance and retention of such benefit (fairness)

Promissory estoppel – has to be change (detrimental reliance)

Enforceability

o Illusory promise

o Definiteness

OLD RULE: Varney – definite enough for intent, determining breach, remedy

NEW RULE: Parties, subject matter, time for performance, price

o Formation defenses

What did contract require? Look to terms. Gap-filler under UCC.

What are potential claims? Breach of contract / Promissory estoppel / Unjust enrichment

Any reason not to enforce?

o Formation Defenses

SoF = $500 threshold + written, sig exception for merchant

4 exceptions

Capacity = minor is void

Mistake = mutual, unilateral; must be material

misrep,

fraud,

duress,

unconscionability,

illegality/public policy

o Do parties have enforceable rights? = problems of third-party beneficiaries, assignees, and delegees

o Is there an absolute duty to perform? = problems of conditions, changed circumstances, discharge

What are the remedies?

o Specific Performance

o Damages: Expectation, (Consequential?), Reliance, Restitution

Theories: consent/voluntary, justice

Consideration

Contract requires:

detriment to promisee OR benefit to promisor -- usually look to detriment

Bargained-For Exchange – look for intent to induce

Consideration can consist of

return performance (unilateral contract – promise for performance)

Promise not tendered until act performed

return promise (bilateral contract – promise for promise)

Promise enforceable immediately

For every new agreement you need new consideration

Requires “mutuality of obligation” – both parties bound or neither is, Oliver Wendell Holmes, The Common Law

**A. Bargained-For Exchange[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=2)**]**

Kirksey v. Kirksey (Alabama 1845) – conditional gift!

FACTS: Dear Sister Antillico.

HOLDING: D made merely gratuitous offer. No consideration à no bargained-for exchange à no contract breach.

Reciprocal inducement -- To be consideration, promisor must induce the conduct of the promisee. Prospect of conduct of promisee must induce the making of the promise (eg promisor expects benefit)

There was no apparent intent to bargain. D didn't ask for return promise. Just said "if you come see me."

Note

Promissory Estoppel does not require consideration (so easier), would have given her some protection

Measure of damages = reliance damages

Offeror actually did get some benefit by land policy, but court wasn’t aware of it.

Hamer v. Sidway (NY 1891) -- detriment

FACTS: Nephew promises not to drink or swear until he’s 18 for $5k from uncle. Then promises not to collect (eg sue for recovery) until he’s 21.

HOLDING: Waiving of any legal right or future claim is detriment. At request of other party is consideration.

Generally just look at detriment to promisee, then benefit to promisor doesn’t matter.

If promised party benefits is too open-ended question to resolve.

Langer v. Superior Steel (Penn 1932) – benefit makes bargain

FACTS: Guy retires under contract not to work for competitors, but then former employer stops paying.

HOLDING: Giving benefit to the promisor is typically enough to amount to bargained-for exchange.

To determine if a conditional gift or a promise -- Think about what the promisor is trying to get!

If nothing à no intent to induce à conditional gift.

If benefit à intent to induce à promise/bargained-for

Pennsy Supply Co v. American Ash Recycling Co (Penn 2006) – no actual negotiation needed

FACTS: No actual negotiation, but D offered free AggRite to P as potential contract if P would dispose of it for free.

HOLDING: This was more than a conditional gift. It’s BGE.

The free AggRite induced P; the free disposal induced D.

Not a conditional gift b/c (a) D actively promotes taking AggRite by bidding process, (b) D cost-savings.

In re Green (1930) – need sufficient consideration (more than mere recitation and nominal consideration)

FACTS: P’s consideration of $1 is nominal (“peppercorn”) and the “other good and valuable consideration” was not factually present/performed by P.

HOLDING: Court doesn’t normally care about consideration adequacy, but WILL look if sufficient.

Past illicit intercourse is not consideration

Restatement §71 cmt. b. “a mere pretense of a bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal” – must be actual contract

Recitation of consideration not enough.

Nominal Consideration = promisor falsely makes gift look like promise as bargain with the promise so that promise is legally enforceable, but the transaction lacks the substance of a bargain because neither party views each promised performance as the price of the other (ex. father promises to give daughter a house in exchange for $1 → it is clear that neither party views the $1 as the actual price of the house.)

Adequacy versus Sufficiency

Sufficient = Have you met minimum to be an exchange

Adequate = then look at proportion given/gained

As long as BGE, court won’t require

Benefit to promisor AND detriment to promissee

Equivalence of values exchanged;

BUT: If values exchanged are so disproportionate, there may be evidence of something else:

Misrepresentation making the promise unenforceable

Purported consideration is not really consideration b/c it was not bargained for – rather the promise is a promise to make a gift (nominal consideration)

Mutuality of obligation --???

**B. Mixed Motives[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=3)**]**

Even if the promise reached due to mixed motives, the court won't look at the motives but just the actual outcome if there is sufficient consideration (i.e. non-peppercorn passing of value between parties)

o You won’t be relieved from a bad bargain unless the consideration is so inadequate as to be constructively fraudulent -- ??

Thomas v. Thomas (Eng 1842)

o FACTS: Rent was paid directly from P to D and was also obligated to care for the grounds.

o HOLDING: Agreement enforceable if there’s sufficient consideration, regardless of the parties’ motives.

Must be some detriment to promisee that wouldn't otherwise be there.

Don’t care about adequacy.

Browning v. Johnson (Wash 1967)

o HOLDING: In a unilateral contract, sufficient consideration to support a promise exists when, at the request of the promisor, the promisee incurs a detriment or the promisor receives a benefit.

First contract was invalid b/c: (a) Lack of mutuality – both parties need obligation, (b) contract too vague

Second contract was valid b/c: P gave up right to sue on claim for 1st K

DOESN’T MATTER THAT FIRST K INVALID, because it was valued.

Destruction of legal relation = consideration.

Apfel v. Prudential-Bache Securities (NY 1933)

o HOLDING: Disclosure of an idea by a seller may constitute consideration to support a contract even if the idea is not novel, provided the idea possesses value to the buyer.

Don’t need to show that idea is novel. Doesn’t matter if P owned idea or it was public knowledge.

ONLY need to show that exchange had real value to buyer.

UNLESS you contract explicitly for novelty.

D's continued payment and use of idea --> D got benefit à value --> consideration

**C. Illusory Promise – Discretion, Mutuality, Implied Obligations[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=4)**]**

RULE: If a party is free to perform or withdraw from the agreement at his own unrestricted pleasure, the promise is illusory, and provides no consideration

Promises today are rarely illusory b/c courts will impute duty of good faith

Ex: What is an illusory promise? A promises to wash B’s car, and B promises…

To pay A if he feels like it? Illusory

To pay A if he likes the way it looks? Likely illusory, but courts becoming more tolerant of promises like this so long as subject to duty of good faith

To pay A if she does a good job? Promise, compared to market standard

To pay A if between $10-$20? Promise, because no matter what, she will have to pay

To pay A if sun shines for 15 minutes that day? Promise, subject to condition under control of 3rd party

Types of contract

Requirements Contract: one party agrees to sell all that the other party requires (I’m giving you all you require)

Seller may sell to other buyers, but buyer may not buy from other sellers

Seller gets the benefit of all the buyer’s business

Buyer gets the benefit of a steady supply, usually at a preferred or stable price

Output Contract: (I’m giving you all of my OUTPUT YOU’RE TAKING IT ALL)

Buyer can buy from other sellers, but the seller must sell all its output to the buyer

Seller is assured that it can sell whatever it makes

Buyer is assured of some supply, usually at preferred or stable price

Discretion

Rehm-Zeiher (KY 1913)

RULE: Contract is not enforceable when the execution of it is within the sole discretion of one of the parties.

To be enforceable, contract must be binding on both parties

No mutuality of obligation here -- P could request less whiskey for any “unforeseen reason,” leaving the amount it took entirely to its unfettered discretion (free opt out)

Mutuality

McMichael v. Price (1936)

FACTS: D agreed to purchase all sand which he could sell from P. D ceased purchasing sand early.

RULE: In a requirements contract, obligations of parties to buy and sell must be mutual.

Breach if he does not make a good effort to sell sand, but in this case he was

Forfeiting to buy sand from someone else = sufficient consideration/mutuality of obligation

The freedom to go out of business is limited by the obligation to perform in good faith. So a shutdown motivated by the unprofitability of the contract may violate the duty

D Argument that P could escape liability under contract by going out of sand business– no merit.

HOLDING: Court infers mutuality and a duty of good faith to sell – Valid outputs contract.

UCC 2-306: allows good faith requirements and output contracts

Sympathetic to use of "open price" terms. Encourages "certainty with flexibility"

Good faith – DO NOT specify quantity "unreasonably disproportionate" to prior quantities

Ex: Don’t request B purchase 10k units when he normally purchases 1

If contract appears to be one-­‐sided, courts can…

Say it lacks mutuality so no agreement

Read it in a way to salvage it (that parties intended agreement to be bound)

Rectify agreement – just add an obligation (seems like court had a basis for it this way)

“You’ve been getting it, so we add a term to make more mutual”

Damages: don’t pay under K, but still pay since you received benefit (under unjust enrichment)

Implied Obligations

Wood v. Lady Lucy Duff-Gordon

RULE: There can be implied obligation of mutuality to sustain consideration, based on context

HOLDING: Implied promise to make “reasonable best efforts” to market Duff-Gordon's trademark.

UCC 2-306: agreement for exclusive selling of good imposes duty to use “best efforts” by both parties

Implication found due to: (a) P's profession as brand marketer and (b) granting of exclusive right on condition of paying half profits.

Rejection of legal formalism – Cardozo attempts to fill in gap of poorly drafted contract

Look at INTENT to be bound (D couldn’t profit w/o P’s efforts, accounting)

If obligation is imperfectly expressed (or impliedly expressed), there is a contract.

Courts will go out of their way to find implied mutuality.

Note: No recitation of contract here, but valid contract. Compare to Greene (agreement, but nominal)

No clear rule on if recitation required. Courts consider context behind case.

In Greene, socially bad exchange (agreement so to declare bankruptcy and get money back)

In Duff-Gordon, socially valuable exchange (commercial)

Omni Group v. Seattle First National Bank ()

FACTS: Agreement for sale of land for money, auto on condition that Omni gets satisfactory report of feasibility. Omni foregoes report, so auto bound to purchase. Clark sues to get out (thinking he can get better deal), claiming Omni's initial promise was illusory b/c subject completely to Omni’s control.

o HOLDING: Promise given for promise dependent on condition does not render it illusory.

Valid consideration = promisor’s duty of good faith to judge satisfaction.

Whether the promisor was actually satisfied or should reasonably have been satisfied is a question of fact, but in neither case is the promisor’s promise rendered illusory.

Mutuality of obligation looked at objectively vs. subjectively.

Objectively = reasonable person (OK here)

Ex: "If report is satisfactory, then A shall…"

Must be "practicable" to determine reasonable person would be satisfied

Subjectively = personal

Ex: “If report is satisfactory to A, then A shall…”

Not illusory because court reads as subject to good faith

Good faith obligation to produce report

Good faith obligation to be satisfied on receipt of report

Context: Court wants to encourage predictability of contracts; don't want Clark reneging on deal b/c decides he wants more.

So conditional way out is fine. Common for contract to have: (a) conditional performance or (b) reserved power of termination

But “way out” must restriction on discretion or else lacks mutuality (because unrestricted)

Ex: duty of good faith, party's dissatisfaction must be reasonable/good faith, termination announced with advanced notice

Remedy = specific performance.

Warrick Beverage Corp. v. Miller Brewing Co. (1976)

FACTS: Brewer and distributor had some type of contractual obligation to each other via buy/sale of goods (via UCC), even though they had written agreement that gave mutual reservation to terminate and stated they had no other relationship.

HOLDING: Thus, no mutuality and must abide by law requiring fair and due regard to other party before terminating.

**D. Pre-Existing Duty Rule[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=5)**]**

RULE: Promise to perform a preexisting legal duty does not constitute consideration for new contract or modify.

EXCEPTION (both UCC and Restatement): Modification w/o consideration allowed so long as the proposed modification is warranted by a legitimate commercial reason (usually a change in circumstance that substantially increases the cost of performance for one party)

UCC §2-209: Allowed if… adopted in good faith (honesty in fact and fair dealing)

Adhere to "reasonable commercial standards in fair dealing"

ONLY applies to sale of goods (wouldn’t apply to Alaska Packers’ labor contract)

Restatement §89: Allowed if… “fair and equitable in view of circumstances not anticipated”

Three Part Test:

(1) modification made before K was fully performed by either side;

(2) underlying circumstances which prompted modification were unanticipated;

(3) modification is fair and equitable

And must be voluntary

Alaska Packers' Association (1902)

FACTS: Refused to continue fishing while at sea unless raise. No replacements so captain agrees to raise without them agreeing to do more time working.

RULE: Modifying contract must bear new consideration. Can’t just promise to do exact same thing as already legally bound to do by prior promise (no new detriment to promissee)

No new consideration here (no changed circumstance).

Duress/coercion -- Even if there was consideration, the new contract was made under duress (eg ship couldn’t get cargo profit without labor). So refusal to pay later not breach of contract.

Remedy = modification not enforceable. If employer sued – not clear damages because hard to measure lost profits– expectation damages (and workers probability couldn’t pay

Angel v. Murray (1974)

FACTS: D paid an extra $10,000/yr to a trash collector under contract by the city (P) due to an unexpected increase of 400 dwelling units. Guy already contracted to clean ALL trash. *Is the modified contract supported by consideration? Yes.*

RULE: Modification of contract is valid if unexpected difficulties arise during course of performance + parties agree voluntarily (not under duress) to modify it.

Three Part Test: (1) modification made before K was fully performed by either side; (2) underlying circumstances which prompted modification were unanticipated; (3) modification is fair and equitable

Massachusetts Rule (minority): Idea that foregoing right to sue on breach of contract (for prior contract) is sufficient detriment to make new, modified contract

Policy considerations?

**E. Moral Obligations & Revived Legal Obligation[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=6)**]**

OLD RULE: Promise based on moral obligation/past consideration has NO consideration. Considered donative promise, thus unenforceable (Mills)

EXCEPTION:

If there was preexisting legal obligation before new promise, but which was barred by some other rule of law (ie SoL). The subsequent promise revives that legal obligation.

When promise made after promisor received material benefit.

MODERN RULE: Promise based on moral obligation is enforceable if tied to previous material benefit, provided the benefit gave rise to an obligation to make compensation (Webb)

Restatement 86 = “Promise made in the recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice”

So consider if unjust not to enforce promise. Was P just acting as good Samaritan w/o expectation of payment? Was value of care much less than value of payment?

o Policy implication

May ensure that people fulfill certain moral obligations. Society thinks that is important

In situations where contract not possible à incentives people to provide goods or services with some confidence that they will be compensated later (ex: docs will help unconscious people for later payment)

Court may not enforce full promise if its way more than benefit received

When to substitute moral obligation for consideration?

o Was there an opportunity to K? à If yes, enforce ex-post promise

o Was there a promise or other acknowledgment of the moral obligation? à Enforce obligation if promise

o What is the nature of the benefit conferred / source of the moral obligation?

Type of benefit normally compensated for or should be? à If yes, enforce

o Relationship btw parties?

o Did party conferring benefit expect compensation? à If yes, maybe enforce

o Will denying compensation make future provision of goods/services in similar contexts less likely? à If yes, likely enforce

Mills v. Wyman (Mass 1825)

FACTS: P cares for D’s adult son without request, but son dies. D then promises to pay for the care, but later refuses.

D’s promise is unenforceable, because he did not receive material (e.g. economic) benefit from Mill’s actions (saving his son’s life doesn’t count as a material benefit).

RULE: Promise based on moral obligation (w/o consideration) ONLY enforceable if tied to preexisting legal obligation.

If subsequent promise of moral obligation has underlying legal obligation à Can revive preexisting legal obligation even if now inoperative by law (ex: bankruptcy, SoL)

No legal consideration, just verbal promise. Need MATERIAL BENEFIT EXCHANGE.

Father never requested care + didn’t expect anything in return for later promise

Cannot promise to pay for nothing

If Father had requested à quid pro quo

If son was alive when promise was made à father had to pay – quid pro quo

No legal obligation to pay for *adult* son

If son was 16 à material benefit because son is part of you as a minor. Your health has material economic benefit. Father has obligation to provide for minor

RULE: Prior conduct cannot constitute consideration. Need MATERIAL BENEFIT EXCHANGE.

o Note:

Courts are increasingly recognizing reliance interests which would allow P to recover here

Subsequent promise = acceptance that allows for Unjust Enrichment claim

Webb v. McGowin (Alabama 1935)

o FACTS: In consideration of P having prevented him from sustaining bodily harm and in consideration of the injuries P received, D agreed to pay him $15/week for the rest of his life for his maintenance. P dies. D still has to pay to P’s estate.

o RULE: Material benefit received in the past can constitute consideration for a subsequent promise to pay in the future

First Hawaiian Bank v. Zukerkorn – revived legal obligation

o FACTS: Collection of demand notes was barred by six-year statute of limitations unless something occurred which started running it anew. D agreed to pay off prior debt (after SoL run) when getting new credit card from bank. *No decision here, left to jury.*

o RULE: New express or implied promise to pay a debt by debtor (whether previously barred by SoL or not), binds the debtor for a new SoL period.

A new promise by a debtor to pay his debt may occur by:

(a) express promise,

(b) express acknowledgement of the debt (implied promise),

(c) partial payment on debts (implied promise)

**F. Reliance[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=7)**]**

Requirement: (a) reasonable, (b) change of position ---can you get reliance from contract claim? What are damages?

You either have claim for contract OR promissory estoppel (NOT BOTH)

If there is promise of conditional gift

Can get detrimental reliance -- If you reasonably relied on statement, and b/c of that had detriment (did something or refrained)

Claim = Promissory estoppel

If there is promise of act on return promise --> potential inducement --> contract

Contract reliance

Reliance damages

Losses sustained by promisee

Claim = breach of contract

CAREFUL ON EXAM: IF YOU’RE IN K, CAN’T TAKE SECOND BITE IN PROMISSORY ESTOPPEL DON’T JUST INVOKE PROMISSORY ESTOPPEL AS ALTERNATIVE CLAIM, ONLY VALID IF TRYING TO ESTABLISH CONSIDERATION TO MAKE IT A VALID K

Doctrine: If a gratuitous promise induces material reliance by the promisee in a manner that the promisor should reasonably have expected, the promise may be legally enforceable (BUT DOES NOT CREATE A CONTRACT)

No consideration or BGE. Reliance is the substitute for consideration.

Elements: some confusion in First v. Second Restatement

|  |  |
| --- | --- |
| First Restatement -Promise by promisor -Reasonably expects to induce and does -Action by promissee -Definite and substantial character -Enforced to degree that avoids injustice -(emphasis on action, not remedy justice) | Second Restatement -Promise by promisor -Reasonably expects to induce and does -Action by promissee OR third party -(No definite and substantial character) -Enforced to degree that avoid injustice -Remedy limited as justice requires |

Enforceable if it induces a detriment to the promisee // flexible – can be stretched

Public Policy: equitable doctrine, some false negatives, usually an imperfect substitute for consideration, forward looking, etc.

Remedy = often be limited to reliance damages – some debate as compared with Restatement

2nd Restatement §90: treats as a contract and says default is expectation damages, not reliance,

“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.”

Consider context if promissory estoppel available

Promises more likely to be legally binding in a commercial than familial relationship

Charitable subscription is typically binding

When to look for promissory estoppel?

Failure of consideration

Failure of agreement

Lack of required writing

Equitable estoppel = Prohibition on person denying existence of state of facts if it intentionally leads other person to reliance on circumstance and thus incur detriment.

o 4 elements (Strong v. County of Santa Cruz, Cal. 1975)

Party to be estopped is apprised of facts

He intends that other party will act based on his conduct, or detrimented party had right to believe it was intended

Detrimented party is ignorant of true facts

Detrimented party relied upon conduct to injury

Ricketts v. Scothorn – Equitable estoppel (relied detriment = consideration, contract)

o FACTS: Grandpa gave granddaughter promissory note to pay her annually so she didn’t have to work, and she quit (relied on that promise?). Got another job later with his consent, and he never repudiated the obligation – said he would pay when he sold the farm. Grandpa died and P sued for payment.

o HOLDING: Substantial/reasonable detriment based on inducement/reliance serves as consideration for the promise (thus contract exists, so D equitably estopped from denying consideration)

Court finds consideration b/c desired reliance led to detriment despite nonbargain

Remedy = reliance damages (less than expectation damages) which did she get?

Application of equitable estoppel (though same idea as promissory estoppel, just with contract)

(a) Expectation by grandpa’s intentional promise, (b) P reasonably relied on it, (c) not look for work is substantial character (but not forever), (d) would be unjust to deny payment

Unusual use of estoppel. Court usually reluctant to estop statements of future facts/predictions/promise versus existing facts. Also usually understood as shield, not a sword

o Note: Distinguish from Hammer v. Sidway, where that was promises exchanged supported by consideration subject to a condition (don’t swear), which is allowable WITHOUT promissory estoppel

Langer v. Superior Steel Corp. (above) – Reliance as consideration for contract OR promissory estoppel

o Promise could be enforced on either consideration or promissory estoppel

o Legal detriment/forbearance constitutes consideration

Charitable Subscriptions

Charitable subscription is typically binding

Second Restatement doesn't require proof of reliance for charitable subscription to be binding

Unbargained-for reliance by charity on promised gift can be difficult to prove

Based on public interest benefit of charities

Rejected in Kadimah (outlier)

o Allegheny College v. National Chautauqua County Bank of Jamestown (NY 1927)

FACTS: D promises $5k donation for scholarship in her name after death. School never expressly accepted. D gives $1k but then reneges.

HOLDING 1: For charitable subscription, bilateral contract exists when party accepts offer.

Implied consideration: Moment college accepted $1k, they assumed the duty to do whatever acts were customary or reasonably necessary to maintain the memorial.

o P benefit from named scholarship. If it were anonymous, she could repudiate.

o BGE implied by accepting cash.

Bilateral contract created! So D reneging was breach.

o If offer withdrawn before condition met (ie no scholarship established yet) + no promise by school (verbal or implicit) --> Even if consideration, unilateral contract

o If offer withdrawn after first payment made --> School makes promise by accepting down payment --> bilateral contract!

HOLDING 2: For charitable subscription, promissory estoppel exists when reasonable steps taken to meet induced promise. (Don’t need to show actual reliance or actually taking steps).

Restatement §90.2, “A charitable subscription or a marriage settlement is binding under subsection (1) without proof that the promise induced action or forbearance”

o Basically promissory estoppel w/o inducing reliance, which is a weird exception.

DISSENT: Offer becomes a promise when the condition is satisfied; this condition was not satisfied

o Congregation Kadimah Toras-Moshe v. DeLeo (Mass 1989)

FACTS: Payment promised orally, but estate refuses to pay after his death. He did not request anything in exchange. Synagogue doesn't promise to do anything, but factors $25k into budget and plans to use it to repair shed into library.

HOLDING: Congregation had no reliance (didn't act/forebear on info) --> no promissory estoppel

Does not follow Restatement section requiring no proof

RULE: Promises that are too indefinite to give rise to contract claim CAN give rise to promissory estoppel claim (Blynn / Red Owl)

Do we need to know cases like King v. Riveland, Prinicpal-agent relationship, entertainment contract?

**Agreement[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=8)**]**

RULE: If acceptance too indefinite to form a contract, was it definite enough to form a promissory estoppel claim?

Offer

o Subjective Test: Meeting of the minds when forming a valid contract

o Objective Test: Reasonable person standard in determining if words and actions constituted valid offer

(1) Could words/actions be understood as offer by reasonable person in promissee's position?

(2) Did promisee understand it as such?

We only care about reasonable interpretation of outward statements/actions, NOT inner thoughts

Secret thoughts may only be relevant if the contracting party actually knows what the person is secretly thinking

o What is not an offer?

Something that a reasonable person would not think is serious

Mere invitations to negotiate

Acceptance

o Objective Theory of Contract: Acceptance = Something that a reasonable person would think was an acceptance

o Mailbox Rule: An offer is treated as accepted as soon as it leaves the hands of the offeree

o Master of the Offer: Offeror can specify in the offer the steps that must be taken to accept to the offer:

This can be used to limit what will count as acceptance (ex: you can only accept by signing on the line and returning by FedEx)

Can’t be used to expand the scope of what constitutes an acceptance beyond what would reasonably appear to be an acceptance (ex: “you can accept by just rolling out of bed in the morning” does not make getting out of bed an acceptance)

o Terminating Acceptance

When is it no longer possible to accept an offer?

The offer has expired b/c of a lapse of time (time that is stated in the offer, or if there hasn’t been a time stated, after a reasonable amount of time)

The offer has been revoked before it was accepted, assuming the offer was revocable

Mirror Image Rule (Common Law): If it is conditional on other terms, it is a counteroffer even if those other terms are minor

Also, unless the response makes clear that it is not conditional on the other terms, courts are likely to find that it was conditional on the other terms

Revocation UNLESS offer is irrevocable or offer has already been accepted

Revocation can be express or implied (implied = if offeror takes a definite action inconsistent w/an intention to enter into proposed K and offeree acquires reliable info to that extent)

**A. Offer[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=9)**]**

Doctrine: Expression of an offer creates a power of acceptance in the other party, which is a power to conclude a bargain

Key Principles:

MUTUAL ASSENT

OBJECTIVE THEORY OF CONTRACTS (Zehmer, Embry)

Two essential elements:

Intent to enter a bargain, and

Offer → “I will sell or buy”

Invitation to deal → “I would consider, etc.” All just negotiations and NOT formal offers (advertisements are invitations to deal and not offers in the contract law sense of the word)

Exception: ads MAY be offers if they are in definite terms and (1) show clear intent to make a bargain, (2) invites those addressed to take specific action without further communication, or (3) over-acceptance is unlikely

Definiteness of terms

Requires an expression of an offer to make clear (1) the subject matter of the proposed bargain, (2) the price, and (3) the quantity

EXAM: HAVE TO MAKE CLEAR WHAT IS BREACH

Some Principles re Offers:

Create a power of acceptance in the offeree (different from invitations to make an offer)

Terms must be sufficiently definite on material terms (reasonable for recipient to read intent)

Court must be able to understand obligations, performance, and breach to be contract

Offeror is “master of her offer”

Can set mode of acceptance, as long as something offeree isn’t expected to usually do

Rationale: Power imbalance -- offeror has demand

Can withdraw contract anytime before acceptance, IN ABSENCE of consideration/invited reliance

If no consideration for offer, offeror can withdraw anytime before acceptance

EXCEPTION: Options Contract = offer based on consideration (eg I promise not to withdraw offer for 10 days) à cannot withdraw unilaterally

Fine to pose multiple offers for same thing

Offeror avoids responsibility to multiple acceptors by withdrawing offer before acceptance (notify offeree or make them aware)

Even fine to make 2 contracts, knowing one will have certain breach

Restatement:

Restatement §24: Offer Defined: 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

Restatement §26: Preliminary Negotiations 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 dissent

Rejection (denying offer) versus revocation (withdrawing offer)

Objective Theory -- Unclear Acceptance / Joke Offer

Mutual assent required

OBJECTIVE THOERY OF CONTRACTS

o Embry v. Hargadine, McKittrick Dry Goods Co. (Missouri 1907)

FACTS: P (offeree) demands at will contract extension. D says “that’s all right, get your men out there”.

HOLDING:

RULE: Objective reasonableness found by words/acts despite being counter to the offeree's intent.

Offer doesn’t require ACTUAL meeting of minds.

Mutually beneficial exchange not necessary.

RULE: If terms are very indefinite – contract isn’t enforceable

o Except: CONTRACT RENEWALS are enforceable because assume you’re adopting earlier terms

Remedy?

Lucy v. Zehmer (VA 1954)

FACTS: D agrees to sell farm to P when drunk. Negotiated for 40 minutes, wrote and signed on napkin. D claims it was joke, but D only expressed joke to wife before signing.

HOLDING: Objectively reasonable contract.

No requirement of formality in contracts, but evidence of writing/negotiation is considered = strong presumption of agreement

If P had been aware that D thought it was a joke, then it's not valid

Extreme drunkenness not always easy to tell – factual Q // D wasn’t that drunk

Remedy = specific performance

o Public Policy of Objective Theory of Contract

Facilitate exchange -- Make it rational to invest. Rely on contract.

Reduce gaming – Easier to give more info. Don’t want people to disingenuously withhold and be sly.

Morally, let person be responsible for himself. Autonomy over presenting themselves, proving capacity, learning from mistake.

**B. Advertisements as Offer or Mere Solicitation[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=10)**]**

Doctrine

RULE: Advertisement constitutes an offer if it is clear, definite, and explicit and leaves nothing open for negotiation – acceptance will complete the contract. (Lefkowitz)

TEST: Leaves nothing open to negotiation = reasonableness (Pepsico)

Two parts of test:

Would reasonable person have understood it?

Did P understand it?

Restatement §26 Comment B: “Ads of goods by display, sign, newspaper, radio, TV, are not ordinarily understood or intended as offers to sell. The same is true of catalogues, price lists, and circulars, even though the terms of the suggested bargains may be stated in some detail – possible to make an offer to the general public but there must be some language of commitment”

Lefkowitz v. Great Minneapolis Surplus Store (1957) – ad is not formal offer, unless clear, definite, explicit + leave nothing open to negotiation

FACTS: Ad mentions specific item (fur coat of $160) for set price ($1) on first come, first serve basis. P wants to buy, even though he knows there’s “house rule” of only selling to women.

HOLDING: Ads are usually not formal offers, merely invitation to offer.

RULE: If public ad is clear, definite, explicit + leaves nothing open for negotiation à constitutes an offer, acceptance of which will complete the contract.

Once you put in the specific language, the seller won’t be stuck with multiple contracts, and will sell to just one person, the first person that shows up

Bilateral promise (promise to sell if you come to buy) à contract made upon acceptance.

Specificity is important for damages

If you can specify specific object lost, then you can calculate damages

Specific language = seller tied to one contract (first person to show up). No problem of seller stuck with commitment to multiple buyers.

Bait and switch = Using intentionally vague ad to get people into store

States will prohibit bait-and-switch ads by law

Ex: "While supplies last" is acceptable

Damages = difference btw normal price and advertised price.

Note: If advertiser does NOT want to be on the hook for an offer, then they should leave out specifics of the deal and make the advertisement as ambiguous as possible

John Leonard v. Pepsico – JOKE AD, NO LANGUAGE OF COMMITMENT TO OFFER.

FACTS: P thought he could get a Harrier Jet from catalog due to a Pepsi commercial/promotion. Rejected.

Holding: The commercial was just an ad, not an offer. Unreasonable to believe he could get a jet. Plus, Pepsi specified mode of acceptance with very specific procedure that did not work for jet.

Ad wasn't specific, just said “refer to catalog for terms of offer.” --> Commercial didn't give terms, so no complete offer (promise)

“Terms and conditions MAY apply” è catalog didn't make promise for jet à no contract upon acceptance (because not bilateral contract)

RULE: No objective person could reasonably have concluded that the ad offered a jet.

Clearly a joke: funny, injects drama, improbably plot, exaggerated fantasy of traveling in jet, jet is a military plane, $700,000 is nowhere near jet’s value – commercial was joke

Policy

Importance of Objective Standard

Objective reasonableness standard at heart of contracts

Enhances economic certainty

Not perfect for individuals -- can bind them without expectation of being bound

"Meeting of minds" is fiction -- just need appearance, not actual

Fact-Finding

Judges are recently most common fact-finder

Many issues have transformed from matter of fact to matter of law

Allows judges to do fact-finding, b/c they cover matter of law

Judges ruling for who they think should win, not actually who should

**C. Acceptance[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=11)**]**

Doctrine:

Major questions: (1) what kind of acceptance is required (promise [bilateral] or act [unilateral]), (2) when can silence operate as acceptance

Acceptance for offer of bilateral contract

RULE: Generally can ONLY be accepted by a promise

Ex: If you offer to pay painter $500 if they *promise* to paint garage and they start painting à you can revoke because they never accepted by promise

Compare: If you offer payment if they paint garage (NOT promise) and they paint à you cannot revoke because they accepted by performance

RULE: Acceptance not effective until offeror receives NOTICE

Express acceptance is always good.

Non-standard forms of acceptance = silence, continuing act, etc.

Promise implied from conduct

Acceptance of benefit may result in K where it leads an offeror to reasonably conclude that her offer has been accepted

Ex: If painter nods head yes in response to request for promise to paint garage, this will count

Promise implied by silence

Limited circumstances – only applies when prior course of dealings makes it so that offeror has reasonable grounds for construing silence as acceptance and does so.

Performance to signify a promise

Possible to do something to signify promise.

Ex. “if you want to accept my offer to buy your car, let me know by leaving your car in my driveway on Thursday

Acceptance for offer of unilateral contract

RULE: Becomes binding on COMPLETION of performance

D can withdraw offer anytime completion, must pay restitution.

RULE: Need not notify offeror, unless offeree has reason to believe that offeror won’t know of performance

Restatement 45:

If performance can be completed instantly à offer can be withdrawn only before performance

If performance cannot be done in an instant à offer can be withdrawn up to significant time after performance has begun

But offeree reliance interest protected. Option contract created when offeree tenders or begins to tender performance (Options Contract! So offeree owed re

Whats difference btw tender and beginning to tender?

Offer construed as open for a reasonable time.

Notice is not normally necessary before a contract is created

Acceptance for offer requesting promise OR performance

RULE: If acceptance allowed by performance or promise, accepted at beginning of performance (Evertite)

Contrast: If acceptance invited ONLY through performance, partial performance will create an option contract

Restatement 45/87/62/97

Acceptance by Promise

La Salle National Bank v. Mel Vega (Ill. 1988)

Facts: La Salle is buyer of real estate from Vega. Contract says it's not formed until signed by buyer’s trustee. La Salle’s agent (not trustee) signs and returns to Vega. Vega signs, but then reneges.

HOLDING: Contract not formed. Acceptance was conditioned on specific terms (trustee signing), not met.

RULE: Offeror is master – can specify terms of offer including MODE of acceptance

Offer = act by one person giving other person legal power to create contract (obligation)

If doesn’t confer power of acceptance, then mere solicitation

Hendricks v. Behee (Missouri 1990)

Facts: D made offer to P to buy real estate. He sent offer to P's agent, they accepted. But D notifies P of withdrawal before D notified of P’s acceptance. P contends that the contract ripened when they accepted (b/c there's $5k deposit on the line).

HOLDING: To accept bilateral offer, acceptance MUST be communicated to offeror.

Unless offeror specifies that no notice required

Notifying offeree agent is insufficient à must notify OFFEROR (or their agent)

Mere signature insufficient (mutual assent – other party needs reasonable belief of acceptance)

2nd Restatement: Unless case where silent acceptance or offer specifies otherwise, acceptance must be made with (a) reasonable diligence to notify or (b) seasonable time

Law of Agency = If agent acting under scope of authority, their act binds the principal

Even if principal not aware of agent’s action (but principal then has action against agent)

Note: Mailbox rule – if they specify the date, you need to have it postmarked by that date (not actually to them)

Acceptance Implied by Silence

GENERAL RULE: Silence =/= acceptance

2nd Restatement on acceptance by silence

Trade Usage = norms of trade generally

Course of Performance = way you interact in formation of that contract can explain what contract means

Course of Dealing = What norms established by interaction btw these parties over multiple past contracts

o RL Ammons v. Wilson & Co (Mississippi 1936)

FACTS: D tells P its willing to receive order up to certain price/amount, subject to acceptance by D. P makes huge order and doesn’t hear back from D. P relies on silence as acceptance to ship b/c D had been silent for 7 days and shipped in the past. But D doesn’t ship and refuses b/c product price goes up.

RULE: K exists when party can and does reasonably rely on silence for acceptance of performance

Course of Dealing (prior history) meant P reasonably relief on silence; D needed to reject in 7 days

o Beneficial National Bank USA v. Payton (Mississippi 2001) = contracted to allow acceptance by silence

Facts: D’s CC contract says bank can modify terms. D gets 30 days to reject (terminates K) or auto enforced. P added arbitration clause and D didn’t respond within 30 days.

HOLDING: Offeror can contracting around general rule of no acceptance by silence (UCC 3-205)

Restatement #69 -- Course of Performance (wrote it into contract at formation)

Objective showing that silence demonstrates subjective intent

Policy

Beneficial -- Bad balance of bargaining power -- Does consumer have alternate options? (ie banks that don't require arbitration)

Unconscionable? Voluntary? Are CC necessary part of everyday life? Prof. thinks no.

Consumer advocates feel arbitration is bad -- more favored by corps

Reasonable to expect people to read through contract?

Efficiency argument: Allowing silence/arbitration is efficient

Counter: Requiring written consent is clearer, though

Acceptance by Performance OR Promise

UCC §2-206(a): “Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a contract shall be construed as inviting acceptance in ANY manner reasonable under the circumstances” (in other words, acceptance by promise or performance both OK unless expressly indicated otherwise).

Ever-Tite Roofing Corp. v. GT Green (Louisiana 1955)

Facts: D offers to hire P for roofing job. Contract required party/agent signature OR commencing performance. P’s agent signs but wasn’t authorized to do so. (but wasn't authorized to accept contracts for P). D hires someone else while P waits for credit approval. P shows up to work and D denies contract. D says written proposal/offer never accepted in manner stipulated.

HOLDINGS:

RULE: When offer doesn’t specify acceptance, it can be by performance OR promise.

Beginning performance immediately creates K because signals intent, just like promise.

If no time specified, must leave open for reasonable time. (Restatement)

D knew there would be a reasonable delay due to compliance standards

If offeror wants to withdraw, must provide timely notice of intent.

D must at least attempt to notify P before he showed up -- had P's name/address

Remedy = P receives damages for cost of loading trucks and expected profit with interest

Could be covered by Reliance/PEstoppel (if K starts at first performance) or Restitution/Unjust Enrichment (if K starts at end of performance)

o Second Restatement 45: For offers seeking only performance for acceptance -- performance begins only at actual performance invited by offeror

Actual performance binds offeror, but preparation to perform binds offeree to completion

Acceptance by performance

o K starts at COMPLETION of performance.

Sec 62 = if offer indifferent as to promise or performance -- tendering of performance (if one shot) or tendering of beginning of performance (if longer) forms contract, not option contract

Dealing with mode of acceptance (contract formation)

Sec 45 = beginning performance creates option contract.

Dealing with reliance interest (not contract formation)

Sec 90 = real promise

If a donative promise induces reliance by the promisee in a manner that the promisor should reasonably have expected, the promise will be legally enforceable (Kirksey)

**D. Irrevocable Offer / Option Contract[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=12)**]**

Doctrine:

Option Contract = Offer that has consideration (Eg: I promise not to withdraw offer for 10 days)

Offer is an actual contract in this case!

Cannot be revoked anytime.

Offer must be held open for (a) time stated or (b) reasonable time if no time stated

Res. 45 (common law) creates Option Contract that parties did not expressly create to protect offeree reliance

Timing Issues

“Mailbox Rule”: Acceptance effective when letter is posted/mailed -- DEFAULT

Only applies when person follows how they were supposed to accept the offer

Does not apply to option contracts when there is a date of receipt (Otherwise option would be lengthened for free) – Adams?

Offers, counter-offers, and revocation are effective on receipt

Humble Oil & Refining Co v. Westside Investment Corp (Texas 1968) = Request to change terms doesn’t terminate power of acceptance of an option contract. Performance of condition is all needed.

o Facts: P pays $50 for right to keep offers from D open for 10 days, thereby making option contract (consideration). D makes offer, P writes back to amend terms, D doesn’t respond so P accepts original offer. D objects, saying that P’s amend equaled rejection and counteroffer.

o HOLDING: In options contract, P not foreclosed from negotiating contract of sale as distinguished from the option. Counteroffer on land sale does not destroy option contract (so initial offer still on the table).

GENERAL RULE: conditional acceptance is a rejection of the offer + counterproposal for a new contract.

EXCEPTION: Can contract around default rule. In binding option, offeree not foreclosed from negotiating new terms! Binding option still open to ultimate acceptance.

Remedy = specific performance of initial offer.

Consideration valid here due to payment… Majority view: If no consideration paid, no contract. Minority view: Even if consideration ($50) isn't paid, there is implied promise to pay so contract not void.

Restatement 37: Termination of Power of Acceptance Under Option Contract: The power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of contractual duty

Marchiondo v. Scheck (NM 1967) = Option contract seeking performance; part performance

o Facts: Scheck (D) offered to sell real estate to buyer and pay percentage to broker (P). Offer had 6-day time limit, but no payment. On 6th day, D notified revocation of offer, and then P secured buyer.

o HOLDING: D’s offer to pay commission upon sale was offer for unilateral contract (act to perform was sale)

Completed performance (making sale) à creates unilateral contract

Remedy = commission

Part performance creates consideration for 6-day offer à creates option K, which is irrevocable.

D can revoke only until offeree acts enough sufficient to be part performance

Restatement 45: option contract created when offeree begins or tenders part of performance

Remedy = offeree must have oppt to complete within stated time (or reasonable time if none stated)

Offeror bound to keep offer open; offeree not bound to complete

Protects reliance interest of offeree

Difference btw commencement of performance and partial performance. PP = there is enough to show substantial reliance or to show that completion was probable

Drennan v. Star Paving Co (California 1958)

FACTS: D submitted bid for school job and bid was lowest. P used D's bid to compute own bid. D made mistake in math and refused to carry out the job at the original price. D wasn’t certain P would use D's bid. *Did plaintiff’s reasonable, justifiable, and foreseeable reliance make D’s offer irrevocable?*

HOLDING: D’s offer to bid must be enforced to avoid injustice. Or

D could reasonably expect that P would reasonably rely on its bid à D’s bid/offer is irrevocable

D only bids w/ expectation to win with low price, so it knows P will rely on it.

If P should know that bid is too low, then no reasonable reliance.

But P had no reason to know D had made a mistake in submitting the bid. D's bid was within large variance of normal bids in this market.

Offers aren’t always revocable, but option contract created by reliance

D could have contracted to say that offer always revocable, but didn’t

Remedy = Difference between D’s bid and cost of O’s replacement of D

Restatement 90: “A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the party of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of that promise”

Adams v. Lindsell (Eng 1818) -- timing issue

FACTS: Lindsell offers sale to Adams, asks for acceptance in due course (14 days). Offer letter gets misdirected and arrives delayed, due to Lindsell’s negligence. When Adams finally gets it, he immediate mails acceptance but arrives too later.

HOLDING: Adam’s acceptance is fine. Even though L negligent, A is good via Mailbox Rule.

Dismissed the precedential rule (acceptance only upon offeror’s receipt), b/c of limits of post office.

Restatement 32 = invitation of promise or performance In cases of doubt, offer invites acceptance by promise or performanceRestatement 45 = option contrct created by party If acceptance by performance only, partial performance creates option contract (binds offeror to keep offer open)Restatement 62 = invitation If either promise or performance gives acceptance, partial performance serves as acceptance so BOTH parties bound .Restatement 25 = definition of option contract (consideration)Restatement 87 = offer itself can be option contract if consideration for offer(2) (promissory estoppel based on offer, not promise)Restatement 90 = protection of reliance interest (promissory estoppel based on promise)

**E. Termination of Offer[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=13)**]**

Counteroffers / Supplemental Terms

o Restatement

When offer doesn't specify acceptance, it can be by performance or promise

When offeror gives choice of acceptance: performance OR promise

Tender the beginning of performance = acceptance + promise to complete = CONTRACT

Offeree bound to complete

Rationale: Because could have accepted by promise (thus immediately bound), so immediately bound my performance too -- like Evertite

Where offer seeks only performance (not promise)

Beginning of performance (tendering) = option contract

Offeror bound to hold contract open, but offeree not bound to complete

Performance is just protection of reliance

Where offer can be expected to induce action/forbearance and does so --> offer irrevocable and option contract available to extent necessary for justice

o Minneapolis & St Louis RR v. Columbus (1886) -- Restatement

Facts: RR (D) made an offer at a certain price for range. P answered D’s offer with a qualified acceptance (not an independent proposal) for price outside of range à rejection + counteroffer

If the offer had not been accepted or rejected, negotiation is open and no obligation is imposed on either parts

Wasn’t an option contract b/c no consideration for D to hold open offer. If change of position of P, maybe would have been option K.

Restatement 39:

*Counteroffer has to be about same matters.*

*Offerees power of acceptance is terminated by making counteroffer,*

*Unless counteroffer manifests contrary intent of first offeror*

Ex: "I'm still considering your offer, but would you consider doing this?"

Counteroffer can be couched within the original offer --> Lets offeree retain right to accept!

But, offeror still has some control

If no consideration, offeror can always revoke offer

If option contract, then negotiations in between don't impact original offer anyway

o UCC'*2-207'*

(1) Acceptance even if mismatched terms, as long as "definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time"… UNLESS acceptance expressly made conditional on assent to additional terms (then counteroffer)

(2) Additional terms are just considered proposals…

For merchants, become part of contract unless:

o Offer expressly limits acceptance to terms of offer

o New terms materially alter contract

o Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Look to prior conduct or new objection

For merchant: Confirmation letter with new terms – 10 days to reject or no.

(3) Conduct -- If writings don't agree, look to conduct of parties to see if they recognize K

Contract = extent of terms agreed on by writing (matching terms) + fill gaps where they don't agree with the UCC

Only original terms agreed upon are honored

Disputed terms drop out

Any missing terms are supplied by the UCC.

No generic, “gap-filling” arbitration term provided in the UCC

o Mirror Image Rule = Common law

Can accept only the offer that was made

Changing material terms and/or insisting on new terms in your acceptance may amount to a counteroffer

Terminates your right of acceptance with respect to the last offer

Even immaterial changes can be fatal

o Requests or suggestions in response w/ acceptance

Difference between conditional acceptance and acceptance accompanied by inquiries

Conditional acceptance = not valid acceptance (eg I will accept if you do X)

Acceptance accompanied by inquiries = valid (eg I accept, but can we see if you can also do X?)

o Acceptance made independent of assent to new terms

If acceptance is conditional upon request/suggestion, but that request is already contained w/in original agreement --> valid acceptance, no counteroffer made (US v. National Optical 7th Cir 1969)

o DTE v. Briggs Electric (Mich 2007) – UCC 2-207(1)

Facts: D sends P a purchase order, and P responds w/ email of intent to accept. P sends order acknowledgement 2 months later containing new forum selection clause. D refuses.

HOLDING: (1) D's purchase order was an offer. Not indefinite – mentioned quantity, price, delivery terms. (2) P's acknowledgement order was acceptance.

RULE: Written confirmation with new term is only rejection/counteroffer if “expressly made conditional on assent” to new terms, clearly shows unwilling to proceed.

P's confirmation w/ forum clause wasn't expressly conditional on D's assent à new terms are mere proposals

RULE: Additional terms btw merchants become part of contract automatically.

EXCEPTION: If they materially alter original contract, then they require assent.

Forum selection clause is material alteration à proposal à Not binding on D.

Note: Not a material alteration if their prior experience suggests it would be there, so no surprise or hardship to include term. (Deer Stags)

RULE: If a party performs, then the contract consists of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of the UCC

o Textile Unlimited v. ABMH (9th Cir 2001) – UCC 2-207(3)

Facts: K for yarn sale, but ABMH adds arbitration clause in back of acknowledgement order. Says D must object w/in 24 hours, and D doesn't.

HOLDING: Arbitration provision is unenforceable. No gap-filling arbitration term in UCC.

UCC 2-2207(1) – offeror must give "specific and unequivocal" assent to new terms. Lack of response w/in 24 hours is not "specific and unequivocal" = no contract under 2207(1)

UCC 2-2207(3) -- Both parties claim they had contract. Conduct = contract under 2207(3)

No arbitration in original K + no gap-filling arbitration term in UCC

Indefinite and Incomplete Terms

o UCC / C/L – RULE: Indefiniteness can invalidate contract.

o Doctrine

UCC § 2-204 (3) Formation in General: 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.

Material terms are not agreed upon at all, but there is an agreement

Terms that are agreed on are vague

Parties agree on certain terms but they leave other terms for future agreement

o Varney v. Ditmars (NY 1916)

Facts: D promised P a “fair share” of his profits if P would continue to work for him through end of year and new projects. D doesn’t pay and D wins.

HOLDING: “Fair share” is too vague, indefinite, and uncertain. The amount could not be computed.

Objective theory of K – court shouldn’t try to determine ambiguous terms.

Price is essential figure. Parties needed to specify price OR method of calculating price.

"Fair share" does not implicitly mean market value. Fair and reasonable might be synonymous with FMV, but not “fair share of profits”

DISSENT (Cardozo): Agreement was for D to pay and P to accept a fair price --> enforceable! P just needs to give evidence of that (but failed to do so). At the least, P should get payment till end of year.

Both parties clearly intended agreement, but dispute of what they intended. For D to calculate price (maj) or for D to pay and P to accept fair price (Cardozo)

o UCC Article 2-204

UCC provisions will act as default to fill gap left in contract by parties.

2-204(3): Code intended to fill gaps rather than strike down indefinite contracts

o Some incomplete terms are fine. Contract doesn't fail if:

(1) Reasonably certain basis for determining remedy

(2) Parties intended to make contract

All of these gap fillers can be contracted around

o EXCEPTION: Cannot waive "good faith" requirement, even by express agreement.

But parties can determine standards for measuring good faith.

Ambiguous terms ----- Gap-filler

Open price term -------- “reasonable price at time for delivery” (UCC 2-305)

Delivering multiple items ------ Good to be delivered at once, not sequentially. (UCC 2-308)

When to deliver ------- Default of "reasonable" shipment times (UCC 2-309)

Variety of goods ------ Buyer has option of selecting assortment of goods. Seller has option of setting shipping specification and arrangements.

Method of shipment ------- Must be good faith and w/in commercial reasonableness standards. UCC 2-311

Where to deliver ------- Delivery place is seller's place of business or residence. (UCC 2-308)

When to pay ------- Payment of price due on receipt of goods

Seller warrants good title conveyed.

Merchant seller warrants good are "merchantable." (UCC 2-316)

Duties/rights may be assigned to third parties.

o Essential terms

UCC will fill in missing price with reasonable price

UCC'*will not fill in missing QUANTITY terms'*.

Statute of Frauds allows for de facto default quantity of ZERO.

"Penalty" or "information-forcing" default

o Rationale: Want parties to reveal all info available to each other and courts

Blinn v. Beatrice Community Hospital (Nebraska 2006)

Facts: P has offer for better pay + job guarantee elsewhere. D tells him they "want him to stay" and "have at least 5 more years of work to do", assure he can stay until retirement. P then gets fired and sues for promissory estoppel.

RULE: Promissory estoppel allowed for indefinite promise (hence no K claim) as long it creates reliance that is (a) reasonable and (b) foreseeable

Promisee’s reliance acts as a substitute for consideration typically needed for contract.

In contract claim, must show promisor's intent for binding promise. But not necessary for promissory estoppel.

HOLDING: No contract claim here. Potential promissory estoppel claim.

No contract -- D's promise was not sufficiently definite to be offer for unilateral contract.

"5 more years of work to do" =/= manifest intent to employ P

P's understanding of words doesn't form a contract

**F. Pre-Contractual Liability (Agreement to Agree/Negotiate)[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=14)**]**

MGM v. Scheider (New York 1976) – agreement to agree enforced

o Facts: Actor D promises to perform series if picked up by network. Films pilot and gets paid. K doesn’t specify start date. Series picked up and D refuses to perform.

o HOLDING: Agreement to agree is binding. D must perform.

o RULE: Objective method of determining factor (ie industry custom) can be used to make contract enforceable, AS LONG AS essential terms exist + performance has begun on the good faith understanding that agreement on unsettled terms will follow.

Objective method can be express/implied in agreement, commercial practice, or custom

Ex: Industry standard of start date after pilot

Deli v. Schumacher (New York 1981) – agreement to agree not enforced

o Facts: Real estate lease deal for 5 years, with agreement to determine price for renewal later. Disagreement.

o RULE: Mere agreement to agree is unenforceable. For REAL ESTATE K, must specify price, method of calculating price, or external circumstance to determine price (like judge determination).

Importance of objectiveness.

Parties could have agreed to base the price on something (like current market value), but they based the future price on nothing

o C/L services do not get price gap filled --- different from UCC goods, where price gets gap-filler

Agreement to Agree

o (1) Must be able to fill essential elements. No basis in Schumacher, but yes in Scheider (industry custom).

o (2) Must find INTENT of willingness to agree. No in Schumacher, but yes in Scheider (performance/conduct of filming pilot and was paid).

Hoffman v. Red Owl Stores (Wisco 1965) – agreement to agree not enforced, but yes promissory estoppel

o Facts: P seeks to open store. P invests $18k, relocates, and closes his bakery. Then D draws K requiring another 20k.

o HOLDING: No agreement to agree (lacked essential terms) à no K. But reliance granted.

o Restatement 90: RULE: Promissory estoppel allowed EVEN IF agreement lack essential terms SO LONG AS

(a) reliance of substantial/definite character was (i) reasonable + (ii) reasonably expected by promisor

(b) reliance was actually induced by promise, and

(c) injustice can only be avoided by enforcement of the promise.

o Note: for reasonableness, more strict on big player than small player. Even though D arguably should have known to create K before investing so much.

Teachers Insurance v. Tribune (New York 1987)

HOLDING: No K for signed letter of commitment with some terms included but lots not negotiated.

No intent to be bound – open terms + letter said "subject to approval" beyond what was done.

RULE: To determine if agreement to negotiate, look at parties' intent at time + manifestations that understanding was reached.

5 factors to find intent:

Language of agreement

Context of negotiations (particular attention to parties' motives)

Number of open terms

Extent to which agreement had been performed

Usage of trade

Empro Manufacturing Co v. Ball-Co Manufacturing (7th Cir 1989)

o Facts: P sent D a "letter of intent" to purchase D's assets. The letter stated the proposal would be subject to satisfaction of shareholders and board of directors of P. This left P a free way out.

o HOLDING: P did not intend to be bound, so no K.

Limits approval to shareholders with repeated "subject to" language + (b) repeated "general terms/conditions" w/ right to alter open terms. D also had power to add additional terms, and D's lawyer noted needed clarification on terms

o RULE: Both parties’ objective manifestations of intent to be bound must be shown for a binding contract to be formed. No intent when there is free way out + right to alter terms.

o RULE: No reliance damages for costs "normally associated with pre-contractual efforts" (ie negotiation, investigation, preparation to acquire")

Frank Dixon v. Wells Fargo (Mass 2011)

o Facts: P wants to pay mortgage over longer time or at lower rate. P and D agree to take steps to “take necessary steps” to modify mortgage. P does requested actions, but D doesn’t modify.

o HOLDING: No K to actually modify, just K to negotiate (consider in good faith) à no contract damages.

o HOLDING: D induced reliance (held out XYZ for consideration), and P relied. Reasonable + foreseeable.

Changes Mass law to recognize promissory estoppel during negotiation even if no definite terms.

o RULE: Promissory Estoppel allowed if negotiations induce reasonable + foreseeable reliance.

Policy: No chill on commerce. Companies may exit negotiations or pursue other negotiations, but just pay for reliance.

Goal of promissory estoppel = justice and morality in business.

Breaking promise need not be in bad faith, just against fair dealing/good conscience (eg pattern of conduct stringing someone else along.)

o RULE: Agreement to negotiate must specify (a) what's to be negotiated, (b) boundaries of negotiation, (c)

TEST

Agreement to agree

If you don't agree to agree --> no contract

If you agree to agree

If open terms that can be filled by gap-filler --> Contract (Scheider)

If open essential terms that can't be filled --> No contract (Schumacher)

B/c no intent

But potentially promissory estoppel (Hoffman)

Agreement to negotiate --> no contract, but binding to negotiate in good faith (e.g. to keep option open).

Understanding that failure to reach agreement is no recovery

If fail to negotiate in good faith à get reliance damages (Wells Fargo)

Promises during negotiation that reasonably + foreseeably induce reliance

Not necessarily exclusive negotiation.

**G. Unjust Enrichment[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=15)**]**

*Aka Implied-In-Law Contract / Quantim meruit*

Overview

o Considered quasi-contractual. No actual contract made, but implied in contractual basis.

Rationale: If one party benefits, remedy should be had by conferring party.

Bailey v. West (Rhode Island 1969)

FACTS: West (D) refused to purchase lame horse. Original seller won't accept it back, so D's trainer just gives it to Bailey (P). P aware of disputed ownership. P cares for horse, then bills D for care. D refuses to pay.

RULE: K Implied-in-Fact

Elements

(a) mutual agreement btw parties,

(b) intent to promise,

(c) Agreement/promise based on conduct NOT word --- only seen through CONDUCT, not verbal

Qualities

Expectation dmgs

Consensual = mutual INTENT of parties to agree

RULE: K Implied-in-Law / Unjust Enrichment

Elements:

(a) P confers benefits on D

(b) D accepts and appreciates benefit

(c) Would be unfair to retain benefit w/o payment

Reasonable expectation of compensation? (Bailey)

No opportunity to get consent for payment (Kossian)

Qualities

NO K requirement = just based on justice.

NOT consensual = can be CONTRARY to intent of parties.

Not same as moral obligation case (Mills)

But if the father has benefited from son's saving, then he would have to pay or would otherwise be unjustly enriched.

HOLDING: No K implied in law

P didn’t know who was getting benefit

D denied horse even after care (no accepted benefit)

No prior relationship btw parties à no obligation to care

P didn’t know who would pay, D refused to pay à no agreed intent to pay à no K implied in fact

Kossian v. American National Insurance (Cali 1967)

RULE: Unjust enrichment if D gets double benefit from the same loss to the detriment of P.

FACTS: Inn owned by third party burns down. Insurance co D gets double benefit: fire insurance money + clean-up from P who had been hired by owner before property defaulted to D.

HOLDING: Unjust enrichment. If D had just gotten property interest for clean-up, it wouldn't have counted. But D also got insurance interest for provision that was IDENTICAL about clean-up.

Irrelevant that no direct relationship btw P and D. D was unjustly enriched by work that P had already done.

Note: If the insurance policy can't be read to cover the same beneficial activity that P did, then there's no case against D.

Can you claim promissory estoppel in alternative to contract claim?

**Formation Defenses[**[**edit**](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=16)**]**

Overview

Once agreement already established between parties, party can raise defense to make contract non-enforceable.

Types of Defenses

Absence of Required Writing

Capacity (minor, drunk)

Typically unable to contract.

Minor contract voidable at their insistence, even if performance already completed.

No restitution against minor - they just need to give back the item.

Mistake

Contract voidable unless one party has assumed risk.

Misrepresentation = fraudulent (intentional) or negligent

Nondisclosure

o Duress

o Unconscionability

o Illegal

o Public Policy

Justification for restricting freedom of contract?

o Paternalism -- protect parties in contract

o Negative externalities -- protect outside parties

o Revealed preferences ensure value creation

Terms

o Void -- Original transaction included no contractual obligations

o Voidable -- One of both parties have power to dissolve legal relationship

Rescission/disaffirmance/avoidance = exercise of dissolution power

Until party exercises dissolution power, voidable contract remains in effect

o Unenforceable -- Contract remains in existence, but court can not enforce it under some circumstances

A. Statute of Frauds / Absent Required Writing[[edit](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=17)]

**RULE'***:'* Oral contracts are generally enforceable, however, *Statute of Frauds* requires that for certain types of contracts to be enforceable, must be (a) memorialized in writing and (b) signed by “the party to be charged”

o What contracts this applies to?

Non-UCC

Suretyship (surety guarantee)

Sale of land

Contract that cannot be performed within 1 year (ex: 5 year contract)

o Note: No 1-year rule for sale of goods. Or if there’s a law on point that doesn’t mention.

Archaic -- marriage contract

UCC

THRESHOLD = Contracts over $500 (DE: $100k)

o Inefficient to force people to incur costs of drafting doc for K less than $500

o Higher cost = higher stakes, so courts want formal documentation

o SoF does not MAKE a contract, it just tells you whether formerly made contract is enforceable

UCC 2-201

o (1) Must be SOME writing + only **QUANTITY** must be stated

Writing does not need to be formal contract, can be memo

Missing material terms is fine.

Just needs evidence of transaction, on which oral agreement w/ material terms intended to rest.

Use UCC for **gap-filler** for missing terms (don't use oral agreement)

o If quantity term disagrees with oral agreement, you enforce quantity term up to stated amount

o Ex: If quantity set, but no price -- Use FMV gap-filler.

If unit being accepted is unclear, apply reasonable external standards

If you know FMV of all potential units being considered, just use reasoning to determine which one is being referred to.

No PER (Prohibits oral evidence when written agreement in place, UNLESS written agreement is incomplete and oral evidence needed)

o (3) If contract fails (1) but otherwise valid contract, can enforce if:

**Custom goods** – goods made specially for the buyer (even if not by seller) and can’t otherwise be normally sold + already substantially begun performance before notified of repudiation

Admission of contract in court – (ie admitted but claims unenforceable due to quantity missing)

ISSUE: For sale of goods, if party against whom enforcement is sought wants to reject, but brought to trial, then party must either (a) admit contract falling outside SoF - normally would be unenforceable, but now it is or (b) perjure à so K enforced up to stated quantity

**Payment made and accepted OR goods received and accepted**

o (2) Confirmation of contract between merchants

**Merchant** = one who holds himself out as having knowledge of field + deals in good of a kind

RULE: Between merchants, both bound if: confirmation (of oral agreement) sent w/in reasonable time + signed by sender + recipient has reason to knows of content

EXCEPTION: Recipient may object w/in **10 days of receipt** --> Recipient not bound

o So recipient only becomes bound after the 10 days w/o objection

o **Test for objecting** to confirmation under UCC:

(1) Is it Sale of Goods?

(2) Are parties merchants?

(3) Objections met?

(a) **affirmative** objection, (b) w/in 10 days, (c) object to CONFIRMATION not just objection to contract

o Good objection: I object to these terms; I reject this confirmation

o Bad objection: I never ordered; silence

Signature for SoF need not be ink, can be any symbol or stamped/typed intended to designate person

UCC: Signed means "any authentication which identifies party to be charged," can be any symbol with implied or actual intent to authenticate writing as that of signer

E-Sign Act (2001): Electronic signature has legal force. Can be any sound, symbol or process intended to act as person's signature. Preempts most state laws.

Policy

o Memorialize agreement in writing à enforcement from clarity

Preemptively motivate people to put stuff in writing for most important transactions

Compare costs of drafting VS costs of adjudicating

o Signature authenticates assent à reduces area for disagreement, no faulty memory

Small business owners don't need law to enforce contracts b/c they are often repeat players with each other -- so don't need formal contract or quantity

Non-compliance to agreement does not make contract VOID, but court won't enforce it (unless you start performance)

2nd Restatement 139 = Allow promissory estoppel when falling under SoF if (a) promise reasonably induces reliance, (b) actually induces, (c) injustice only avoided by enforcement. Remedy limited to justice.

o RULE: Factors if promissory estoppel required by justice, consider: (1) availability and adequacy of alternate remedies, especially cancellation or restitution, (2) definite and substantial character of forbearance, (3) extent to which forbearance corroborates evidence of making and terms of promise, or otherwise have clear and convincing evidence of terms, (4) reasonableness of forbearance by promissee, (5) foreseeability of forbearance by promisor.

o Requirement of consideration is lesser than requirement of writing

B. Capacity[[edit](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=18)]

2nd Restatement: Unless statute says otherwise, person has capacity to incur only voidable contractual duties until beginning of day before 18th birthday.

RULE: Minor can avoid contractual duties by timely/appropriate **disaffirmance**, and then has choice to ratify (affirm) contract upon coming of age. But adult contractor is bound to contract.

EXCEPTIONS: State legislatures allow minor capacity to enter into specific types of contracts (eg military enlistment, higher ed loans, sometimes for insurance, sometimes for housing if homeless minor)

Minor can be silent about age. Duty of adult contracting to ascertain that the other party isn't an infant.

If minor is deceptive about their age, courts split.

Mass Rule (Minority): Minors not liable for tort of deceit.

Middle rule: Misrepresentation doesn't stop minor from disaffirming, but justifies damages for tort (Ohio, Conn)

Strict Rule: Estoppel when minor falsely represents self and sufficiently mature. Minor accepts benefits of contract and estopped to deny that he was of age to be bound (Missisippi, Indiana)

Bowling v. Sperry (Indiana 1962)

RULE: The contracts of minors are voidable and may be disaffirmed while he’s minor or upon reaching adulthood.

EXCEPTION: **“Necessary" goods or services** for minor's support, use, or comfort.

Ex: food, clothing, lodging, medical care, education, and personal comforts appropriate for the minor’s condition and circumstances in life.

Car not considered “necessary,” even if minor has job, if they can get ride from friends.

Minor need not return the money or property before suing for value. But then must return.

Adult is bound to repay, even if he is in worse position than before.

FACTS: Minor purchases car via oral agreement with D. Returns it after noticing its messed up; disaffirms and demands repayment.

Minors can’t contract. Adult shouldn't have contracted with minor for non-necessary item.

Irrelevant that minor was accompanied by adult, money came from adult, or car problems due to minor's mistake in operating it.

Emancipation of minor -- Minor can lose his minor status if he's emancipated (eg gets married).

Disaffirmance and Ratification

Can only ratify after coming of age, via manifestation of intent to regard bargain as binding.

No new consideration needed for ratification

Silence/inaction does not amount to ratification.

Must disaffirm within reasonable time after coming of age.

Factual determination

Bobby Floars Toyota (North Carolina) = 10 months is sufficient time to make decision

Keser (Colorado) = 60 days driving after coming of age does not equal ratification.

Doesn’t matter how they disaffirm

C. Mistake[[edit](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=19)]

Mistake = "belief that is not in accord with the facts." (2nd Restatement)

o Contract exists, but is voidable by adversely affected party

Misunderstanding = parties attach "materially different meanings" about what they’re agreeing to (2nd Restatement)

o No contract exists

o Party should have no reason to know that info is wrong. If they do have info to know what they’re agreeing to, then contract mistake (Frigaliment).

o Ex: Two ships leaving port with same name. Parties contract for cargo of ship name, but one thinks its ship A and other thinks its Ship B

If A knew that info was wrong and B would me fooled, then terms are what B thought they were.

Sherwood v. Walker (Michigan 1887) -- **mistake**

Facts: Barren cow becomes breeder. Dispute over whether it’s a difference in substance (no K) or quality (K).

Substance (majority) = Price goes to essence of consideration. Worth 10x more as breeder.

Quality (dissent) = it’s the same cow and both thought it was barren.

RULE: When contract made based on mutual mistake about **material fact** (eg subject matter of the sale, price, etc.), the parties may rescind the contract once they learn of the mistake.

Unless

Lenawee County Board of Health v. Messerly (Michigan 1982)

Facts: Real estate purchase, but discover that sewage system is faulty.

RULE: Rescission allowed when mistake relates to basic assumption + materially affects agreed performances of the parties.

Overrules Sherwood -- value doesn't go to essence of contract (unless some ESSENCE of contract is changed)

RULE: Rescission not allowed for party who assumed the risk of loss in connection with the mistake.

When both parties are innocent, risk of loss goes to purchaser.

P assumed risk because expressly contracted to (a) inspect property and (b) take property "as is"

D. Misrepresentation[[edit](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=20)]

Restatement 164: If party justifiable relied on either fraudulent OR material misrepresentation such that it induced manifestation of assent, contract is voidable by the recipient.

o **Material**= likely to induce reasonable person to manifest assent

o Fraudulent = made intentionally or recklessly

o Misrepresentation = falsehood, "assertion that is not in accord with the facts" (generally negligent)

o RULE: Must be assertion or affirmation of existing facts - NOT opinion, promise, or prediction of future event

EXCEPTION: Statement of opinion can be misrepresentation if parties are in special relationship of trust or speaker has superior knowledge (so it’s not their actual opinion / prediction)

Vokes v. Murray (Florida 1968)

o Facts: Woman takes dance classes and invests a bunch while her teachers keep telling her she’s doing great, even though she sucks.

o RULE: Based on special relationship between parties, if a party has superior knowledge that lets them know puffery is not true (while other cannot know), they have duty to disclose whole truth.

Misrepresentation can exist for puffery when (a) party has fiduciary duty, (b) some trick used, (c) parties not dealing at "arms length", or (d) when parties don’t have equal oppt to verify statement as true/false

Opinion must reflect what you believe to be genuine fact. You can misrepresent by giving opinion you know is not in accord with facts.

Types of fraud: Half-truths, Failure to correct, Concealment

E. Nondisclosure[[edit](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=21)]

**OLD RULE**: Caveat emptor = buyer beware. Seller has duty not to misrepresent, but no duty to disclose

o Assumption that parties contracting "at arm's length". If not at arms length, duty can exist.

NEW RULE: Restatement 161: Vendor has affirmative duty to disclose where: --**EXCLUSIVE LIST**: only in these 4 areas:

o Necessary to prevent previous assertion from becoming misrepresentation or fraud (eg partial disclosure)

o Corrects mistake of other party about basic assumption of contract + nondisclosure would be failure to act in good faith per reasonable standards

o Corrects mistake of other party as to contents or effect of writing of agreement

o Entitled to know fact because of relationship of trust/confidence (eg parent-child, attorney-client, etc.)

Laidlaw v. Organ (1817)

o RULE: No duty to disclose when both parties have equal access to extrinsic info, but may not say or do anything to mislead the other party when asked.

Parties were on unequal footing, but generally want to incentivize good biz practice of info gathering within your trade.

o FACTS: D doesn’t say anything when asked if he knows info that will raise tobacco price, even though he knows the War of 1812 just ended and will raise price. D buys at lower price, war ends. Holding: Question of whether or not he misled P through silence is jury Q.

Hill v. Jones (Arizona 1986)

o RULE: For real property, seller has duty to disclose existence of facts that materially affect the value of the property and are not readily observable and known to the buyer, but known to seller.

Materiality = objective reasonable person.

o FACTS: House seller doesn't inform buyer that there are termites, despite D having done some repairs for termite damage -- so D was aware of past termite damage. Upon questioning, D tells P that "ripples" in the wood are just water damage, not termites. Termites may materially affect property value. Question for jury.

This is case of correct mistake of basic assumption + nondisclosure breaks good faith.

Factors to determine if nondisclosure violates good faith requirement: nature of undisclosed fact, accessibility of knowledge, nature of contract, trade customs and prior course of dealing, conduct of party in obtaining knowledge, status and relationship of parties.

Remedy = restitution or Recission

F. Duress[[edit](https://www.wikilawschool.net/w/index.php?title=Contracts_Ayres_9th_ed.&action=edit&section=22)]

Restatement 492-95: Elements

o Wrongful Threat -- can be physical, mental, emotional, economic,

Need not be illegal, can be bad faith (disproportionate) use of civil suit

o Overbears their will to manifest assent

Must be subjectively credible to overcome

More subjective element of contract law – we care about their feelings from external force

Note: Court moving away from objective reasonableness. As long as this person feels forced and no reasonable alternatives

o Leaves victim with no reasonable alternative – ie NO CHOICE

Restatement 174: Threat of physical harm = VOID (no contract to begin) (Rubenstein)

Restatement 175: Wrongful economic threat = VOIDABLE (Austin)

Rubenstein v. Rubenstein (NJ 1956)

o Wife threatens poisoning, father in law in prison for it.

o Contract is voidable for duress if one party wrongfully induces the other party to act by improper threat -- creating fear of loss of life, loss of limb, mayhem, or imprisonment. (Restatement176. When a Threat is Improper)

o Subjective test—moral compulsion or psychological pressure may constitute duress if, thereby, the subject of the pressure is overborne and deprived of the exercise of his free will

Unlike fraud, duress does not necessarily depend on intent of person exercising it or consider if reasonable person would be coerced

Austin Instrument v. Loral Corp (NY 1971)

o P threated to not deliver on its first contract unless it got the second one.

o RULE: A contract is voidable for economic duress when:

Wrongful threat -- threat to "immediate possession of needful goods" / party threatens to breach agreement and withhold goods unless other party agrees to new demands.

No possible alternative source of supply (within reasonable time)

Breach of contract remedy insufficient -- would force the aggrieved party to violate its contracts (eg here D would violate US Navy contracts and lose future biz)

Harmed party may choose to keep K in place or revoke.

o **COMPARE:** Alaska Packers -- No new consideration here, but UCC does NOT REQUIRE new consideration for contract modification

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Undue Influence

o Doctrine: Unfair persuasion (not a threat) induces assent of party who is under domination of the person exercising persuasion, the contract is voidable by the victim

Easier to satisfy than duress

Unfair persuasion = pressure on someone's mental, moral, or emotional weakness

RULE: Undue influence comes in when relationship of parties is usually one of trust and confidence

Idea that dominant party is expected to act in best interest of submissive party

Ex: Parent-child, husband-wife, attorney-client

**COMPARE**: Zehmer -- If Lucy intentionally gets him drunk to sell his farm that he normally wouldn't, it might be undue influence. However, no special relationship.

o Odorizzi (Cal 1966): Factors of over-persuasion include: discussion of transaction at inappropriate time, consummation of transaction at unusual place, insistent demand to do business at once, extreme emphasis on consequences of delay, use of multiple persuaders against single submissive party, absence of third-party advisors, statements rushing party not to consult finance/legal advisors.