

UCC OR COMMON LAW?

- Goods → UCC
  - o Goods = movable, tangible property
    - Growing crops to be severed by seller
    - Unborn animals
    - Fixtures that can be removed without material harm to the land
- Services → Common law
- Real Property → Common law
- Mixed → Predominant purpose test or split it up

WAS THERE AN OFFER?

- Elements of a valid offer:
  - o Objective intent to be bound
  - o Definite and certain terms
  - o Communication to offeree
- Preliminary negotiations v. offers
- Advertisements v. offers
- Invitations to deal v. offers
- Real estate offer must identify LAND and PRICE
- Goods offer must have QUANTITY (or req./output)
- Employment offer must have DURATION

WAS THE OFFER REVOKED?

- Possible means of revocation:
  - o Direct communication to offeree (effective on receipt) OR
  - o Offeree finds out offeror acting inconsistently with the offer being open
- Published offers → revoked by same means of publication
  - o Offeree receipt irrelevant
- Irrevocable offers
  - o Merchant's firm offer under the UCC
    - No more than 3 mos
    - Signed by a merchant
    - Promising to hold offer open
  - o Option for value
  - o Detrimental reliance on offer
    - Offeror must have reasonably expected reliance
  - o Unilateral offer where offeree has begun performance
    - Must get a reasonable time to complete performance
    - Mere preparation doesn't count

DID THE OFFER TERMINATE?

- Lapse of time
  - o Reasonable time if no time specified
- Offeree dies or goes insane
- Destruction of contract subject matter
- Subject matter becomes illegal

WAS THE OFFER REJECTED?

- Rejection by making a counteroffer
  - o Mere inquiry v. counteroffer
- Rejection is effective when received
- Options → Offeree can reject and then still accept later until option expires
  - o Exception: Offeror detrimentally relies on offeree's rejection

WAS THERE AN ACCEPTANCE?

- Only offeree may accept – no assignment of offers
  - o Exception: Options for value can be assigned
- Common law → Mirror image rule, otherwise counteroffer

- UCC → Acceptance =
  - o Objective intent to accept UNLESS the acceptance is made expressly conditional on the offeror's taking new or different terms (counteroffer) OR
  - o Both parties start to perform
- Mailbox rule
  - o No mailbox rule for option acceptance
  - o Letter must be properly addressed and stamped
  - o Invalid if offer expressly said no mailbox rule
- Inconsistent responses from offeree
  - o Sends acceptance, then rejection → mailbox rule applies, offer accepted UNLESS rejection arrives first and offeree relies
  - o Sends rejection, then acceptance → whichever arrives first is effective
- Acceptance by unauthorized method still an acceptance, if actually received by offeror while offer is still open
- When silence can be acceptance
  - o Offeree agreed to it in advance
  - o Offeree silently takes offered benefits

IF THERE IS A CONTRACT, WHAT ARE THE TERMS?

- UCC → 2-207
  - o Additional terms not in offer:
    - At least one party not a merchant → terms of offer govern
    - Both merchants → Additional terms become part of contract UNLESS:
      - New terms materially alter contract
      - Offer expressly said acceptance limited to terms
      - Offeror objects w/in a reasonable time
      - Offeror has already said he wouldn't accept those terms
  - o Different terms from those in offer:
    - At least one party not a merchant → terms of offer govern
    - Both merchants → Split of authority
      - Same as additional terms
      - Knockout rule
  - o No contract but performance begins → terms are the ones on which the writings agree plus UCC gapfillers
- Common law → will always be terms of the offer b/c of mirror image rule
- Parol evidence rule

IS THERE A THIRD PARTY INVOLVED?

- Intended beneficiary
  - o Traits:
    - Identified in the contract OR
    - Receives performance directly from the promisor (manure in the pool) OR
    - Has some relationship with the promisee evidencing intent to benefit
  - o When rights vest:
    - When his assent is requested by the parties, and given
    - When he brings a suit to enforce the promise
    - When he detrimentally and justifiably relies
  - o Only creditor, not donee, beneficiary can sue promisee
- Assignment
  - o Assignment only permitted if it does not substantially change obligor's DUTY or RISK
  - o Clause forbidding assignment v. clause voiding attempted assignments
    - No-assignment clauses construed as not covering assignments of rights to get paid
  - o Gratuitous assignments are revocable UNLESS:
    - Obligor has already performed
    - A token chose is delivered
    - An assignment of a simple chose is put in writing
    - The assignee can show detrimental reliance
  - o A gratuitous assignment may be AUTOMATICALLY revoked by:
    - Death of assignor

- Bankruptcy of assignor
- Notice of revocation by the assignor to the assignee or the obligor
- Assignor takes performance directly from obligor
- The same right assigned to someone else instead
- Serial assignments of the same right for consideration:
  - First in time to give consideration usually wins.
  - BUT someone else may win IF he's a BFP w/o notice AND:
    - Subsequent assignee gets the first judgment against the obligor
    - The obligor pays the subsequent assignee directly
    - Subsequent assignee gets delivery of a token chose
    - The subsequent assignee is a party to a novation releasing the assignor
    - The subsequent assignee has an estoppel claim against the prior assignee
- Delegation
  - Delegating party remains on the hook unless there's a novation
  - Duties that may not be delegated:
    - Those that involve personal judgment and skill
    - Delegations that would substantially change the obligee's required performance (esp. requirements contracts)
    - Ones involving a special trust of delegating party
    - Those contractually restricted
  - Obligee becomes a third-party beneficiary of the contract between delegator and delegate

IS THERE A DEFECT IN CONTRACT VALIDITY?

- No consideration
  - Irrelevant for UCC
  - Exception: "Moral" obligation
    - OK for consideration IF:
      - Old promise unenforceable b/c of a technical defense AND
      - New promise is made in writing
      - OR is partially performed
      - OR the past act was made at promisor's request
    - If this is a new promise to pay an old debt, enforcement limited to amount of NEW promise.
  - Promise not to sue is consideration IF:
    - Claim is valid OR
    - Person believed in good faith she had a valid claim
  - Seal → minority of states. Seal is BS.
- Illusory promise
  - Condition entirely within promisor's control
  - Right to cancel with no notice
  - Gratuitous suretyships before debtor gets the \$
  - Promisor can choose several options and one is of no detriment
- Pre-existing legal duty w/ no new consideration
  - Irrelevant for UCC so long as change was made in good faith
  - Exceptions to pre-existing duty rule:
    - "New" promise is a ratification of an otherwise voidable contract
    - The pre-existing duty is owed to a third person
    - There is an honest dispute over whether the pre-existing duty is really owed
- Illegality
  - If the purpose behind the contract was illegal (boat rental to run drugs), contract is voidable by the innocent party IF:
    - He was unaware of the purpose at first OR
    - Did not facilitate the purpose and it did not involve serious moral turpitude

WAS PERFORMANCE DISCHARGED?

- Condition precedent never occurred → No duty
  - One party prevented condition from happening → condition is excused
  - Waiver of condition
- Accord and satisfaction → Old duties discharged

- Material breach → other party's duties discharged
  - o Minor breach may allow other party to delay, but not completely abandon, performance
  - o IF PARTY A HAS SUBSTANTIALLY PERFORMED THEN PARTY A CANNOT ALSO HAVE MATERIALLY BREACHED (exception: perfect tender rule)
  - o Breach as to one unit of a divisible contract still entitles the party to payment for other, performed units
    - Divisible contract:
      - Performance is divided up in the TERMS of the contract
      - Same number of parts for each party
      - The performance of each part is the agreed equivalent of the corresponding part
  - o Breach of one unit of an installment contract is a material breach as to the whole contract *only if it substantially impairs the value of the entire contract.*
- Anticipatory repudiation → other party's duties discharged
  - o Must be a definite repudiation, not mere expression of doubt
- Reasonable request for an adequate assurance of performance, which is not given → other party's duties discharged
- Impossibility
  - o Discharges both parties if NO ONE could have performed on the contract due to intervening impossibility, not just the obligor.
    - Exception: Impossibility discharges a contract requiring an individual's unique personal service if the individual to perform is incapacitated or dead. Exception does not apply to non-unique services (mechanic contracts to service your car)
  - o Parties can be reimbursed for part performance in quasi-contract
  - o Contract to build a house → house destroyed after part performance → no impossibility
- Frustration of purpose
  - o Elements:
    - A supervening event
    - NOT reasonably foreseeable at the time of contracting
    - Completely or almost completely destroys the purpose of the contract
    - AND the purpose was understood by BOTH parties.
- Discharge by lapse
  - o When there is an executory contract and neither side ever performs, eventually their duties lapse.

#### WAS THERE A PRE-EXCHANGE BREACH?

- Material breach discharges other party's performance, but minor breach only allows suit for damages.
  - o Considerations for major v. minor breach:
    - Amount of benefit received by non-breaching party
    - Adequacy of compensation for damages
    - Extent of part performance by the breaching party
    - Hardship to the breaching party
    - Negligent or willful behavior
    - Likelihood that breaching party will complete performance
- To put someone into material breach, non-breaching party must show he was willing and able to perform.
- Special breaching rules under the UCC for sales of goods:
  - o Perfect tender rule
    - If not perfect, can reject all or any commercial units
    - MUST NOTIFY S OF REJECTION!
    - Must take care of the goods until S gets them
  - o Must reject before acceptance occurs
    - Acceptance cannot occur before reasonable opportunity to inspect
  - o Revocation of acceptance
    - B can only revoke acceptance IF:
      - He accepted them on reasonable belief defect would be cured OR
      - The defects were latent.
      - Must revoke w/in a reasonable time AND before any substantial change in the condition of the goods.
  - o Seller right to cure
    - Must notify B of intent to cure

- If time for performance has passed, S can still cure IF he reasonably believed B would accept the goods. Then he has a reasonable time to cure.
  - Installment contracts
    - B CANNOT reject a defective installment if the defect can be cured.
  - Shipment of non-conforming goods is a simultaneous acceptance and breach UNLESS S includes a notice that they are offered as an accommodation (counteroffer)

WAS THERE A POST-EXCHANGE BREACH?

- Goods destroyed – risk of loss issue
  - Seller is a merchant → Risk passes when the buyer takes physical possession of the goods
  - Seller a non-merchant → Risk passes on tender of delivery
  - Shipment contract → Risk passes upon delivery to the carrier
  - FOB/destination contract → Risk passes when tendered to buyer
  - Defective goods → Risk of loss doesn't pass until goods are accepted despite defects OR defects are cured
  - Rightfully revoked acceptance → Risk of loss is on S from the beginning of the transaction, to the extent of deficiencies in B's insurance
  - Breach by buyer → ANY loss occurring within a commercially reasonable time after S learns of the breach falls on B to the extent of any deficiency in S's insurance
- Breach of warranty of title/infringement
  - B who provides specifications for custom goods to S holds S harmless against patent infringement claims
- Breach of implied warranty of merchantability
  - For merchants only
  - Fit for ordinary purposes
  - Disclaimers must be conspicuous and used the word "merchantability"
- Breach of implied warranty of fitness for a particular purpose
  - Can be disclaimed by language like "as is"
- Breach of express warranties
  - Express warranty = Became part of the basis of the bargain
  - A visual sample is an express warranty

IS THERE A DEFENSE TO ENFORCEMENT OF THE CONTRACT?

- Statute of Frauds
  - MYLEGS contracts must be in writing signed by the party to be charged
    - In consideration of **M**arriage
    - Contracts that can be performed in one **Y**ear
    - Interests in **L**and (leases more than a year)
    - **E**xecutors' promises to pay estate debts out of their own pockets
    - Sale of **G**oods for \$500 or more
    - **S**uretyships
  - SWAP removes it from the Statute of Frauds
    - **S**pecially-made goods
    - **W**ritten merchant's confirmation
    - Party **A**dmits the contract in court
    - **P**erformance
  - Requirements of writing
    - Identity and signature of party to be charged (or his agent's)
      - Letterhead OK
    - Identification of contract subject matter
    - Terms and conditions of deal
    - Recital of consideration if required
  - UCC ONLY: Merchant's confirmatory memo will suffice
    - Parties reach oral deal, one sends confirmatory memo to the other, this is enough even though not signed by the party to be charged
- Fraud
  - Contract is voidable if innocent party reasonably relied on a material misrepresentation
  - Puffing v. fraud
- Unconscionability

- Shocks the conscious
- Contracts of adhesion
- Unconscionability tested at the time the contract was made
- Usually wrong MBE answer
- Mutual Mistake
  - Elements:
    - Mistake by BOTH parties
    - Concerns a basic assumption on which the contract was made
    - Nobody assumed the risk of mistake
      - Fixed-price contract is per se assumption of risk that prices will change
  - If satisfied, contract is voidable
- Unilateral Mistake
  - No defense, BUT no snap-ups → Offeree knew or had reason to know of the mistake
- Latent ambiguity
  - Neither party aware of ambiguity → No contract unless both parties intended same meaning
  - Both parties aware of ambiguity → No contract unless both parties intended the same meaning
  - Only one party aware of ambiguity → Binding contract based on what the ignorant party reasonably believed was the meaning (Frigalment)
- Statute of Limitations
  - 4 years from breach of UCC contract

WHAT REMEDIES UNDER THE CONTRACT?

- Sales of goods
  - Buyer breaches → Seller gets deficiency in resale plus costs
  - Seller breaches → Buyer gets difference between cover and contract price
  - Specific performance for unique goods UNLESS already sold to a BFP
  - Lost volume sellers get lost profits
  - Replevin of goods:
    - B can replevy identified, undelivered goods from S IF:
      - B has made at least part payment AND EITHER
      - S becomes insolvent w/in 10 days of receiving B's payment OR
      - The goods were for household purposes.
    - S can replevy from B when:
      - The goods were bought on credit AND
      - B was insolvent when he bought them AND
      - S makes demand w/in 10 days of B's receipt.
- Sales of land
  - May get specific performance since all land is presumed unique UNLESS already sold to a BFP
  - Seller can also get specific performance even though \$\$ not unique
- Services contracts
  - Specific performance never available BUT court may enjoin D from working elsewhere
- Liquidated damages clauses
  - Valid ONLY if:
    - Damages were difficult to ascertain when the contract was formed AND
    - The amount agreed upon was a reasonable forecast of actual damages OR
    - (UCC ONLY) The amount is close to what the actual damages really were.
- Remember duty to mitigate damages
  - Employment contracts: Employee must use reasonable diligence to find a like position.
  - Construction contracts: Must cease work, not keep building and racking up costs.

IF NO CONTRACT OR UNENFORCEABLE CONTRACT, IS QUASI-CONTRACTUAL RELIEF AVAILABLE?

- Promissory estoppel
  - Promisor must have reasonably expected promisee would detrimentally rely AND
  - The reliance is of a definite and substantial character
- Unjust enrichment
  - One party has conferred a benefit on the other
  - With a reasonable expectation of being compensated and
  - The benefits were conferred at the request of the other person and

- o Not rewarding damages would result in unjust enrichment.
- Quasi-contractual relief may exceed the contract price!

REMEDIES FROM REMEDIES LECTURE

1. DAMAGES
  - a. EXPECTATION DAMAGES
  - b. CONSEQUENTIAL DAMAGES
    - i. Must have been foreseeable at the time the K was entered into.
  - c. LIQUIDATED DAMAGES
    - i. Valid so long as, at the time of contracting:
      1. Actual damages would have been hard to guesstimate AND
      2. the amount stipulated was a reasonable forecast of the actual harm.
  - d. PUNITIVE DAMAGES are NEVER allowed in K actions.
2. RESTITUTION/UNJUST ENRICHMENT
  - a. MONEY RESTITUTION
    - i. Nonbreaching party can recover the value of her performance, even if greater than the K price!
    - ii. Breaching party can recover benefit conferred minus damages to non-breaching party
3. RESCISSION
  - a. Grounds for rescission:
    - i. Mistake
      1. Mutual
        - a. Always will grant rescission
      2. Unilateral
        - a. Sometimes will grant rescission IF:
          - i. Mistake goes to the basis of the bargain AND
          - ii. Hardship to the mistaken party outweighs harm to the other party
    - ii. Misrepresentation
      1. Innocent
      2. Fraudulent
    - iii. Illegality
    - iv. Impossibility of Performance
    - v. Lack of capacity
      1. Minors
  - b. Defenses
    - i. Laches – unreasonable delay by P in initiating his claim, that results in prejudice to D
    - ii. Unclean Hands – P cannot be guilty of unfair dealing w/respect to the transaction sued upon
    - iii. Election of Remedies
      1. A suit for damages affirms the K if sought first (so P can't then ask for rescission).  
BUT no problem if K seeks rescission first.
    - iv. Estoppel
4. REFORMATION
  - a. Grounds for reformation
    - i. Mistake
      1. Mutual
      2. Unilateral
    - ii. Misrepresentation
  - b. Defenses
    - i. Laches – unreasonable delay by P in initiating his claim, that results in prejudice to D
    - ii. Unclean Hands – P cannot be guilty of unfair dealing w/respect to the transaction sued upon
    - iii. Sale to BFP
    - iv. Parol Evidence rule, Statute of Frauds and negligence are NOT good defenses
5. SPECIFIC PERFORMANCE – “I’m Doing Fine Mom & Dad”
  - a. A valid K must exist, with all conditions satisfied.
  - b. Are the legal remedies **inadequate**?
    - i. Damages too speculative
    - ii. Damages too small to compensate for injury
    - iii. Irreparable injury

- iv. Unique chattle or sale of land involved
- c. Are the terms of the contract sufficiently **definite and certain** to grant specific performance?
  - i. Must be able to tell how it was supposed to be performed.
  - ii. Greater certainty than required in an action for damages.
- d. Is a specific performance decree **feasible**?
  - i. Is there jurisdiction over the parties and property? Watch for land outside state.
  - ii. Too much need for supervision by the court?
  - iii. Personal services contract can't get specific perf.
- e. Is there **mutuality** of obligation?
  - i. Old rule – could only get specific perf if other party would be entitled to it as well.
  - ii. New rule – mutuality of performance – court must be able to ensure counter-performance by P.
- f. **Defenses**?
  - i. Laches – unreasonable delay by P in initiating his claim, that results in prejudice to D
  - ii. Unclean Hands – P cannot be guilty of unfair dealing w/respect to the transaction sued upon
  - iii. Freedom of speech (would prior restraint violate 1<sup>st</sup> Amend?)
  - iv. Hardship – terms of K are onerous
  - v. Statute of Frauds – no valid K

REMEMBER THE UCC ALWAYS REQUIRES GOOD FAITH!