

Contract Mini Outline

Basics: Unilateral K: offer expressly requires performance as only means of acceptance; Bilateral K: exchange promises to perform; A **contract** is a **legally enforceable agreement** that is created with an **offer + acceptance** (mutual assent) + **consideration** (or consideration substitute) **Gateway Issue: What is the applicable law?** → **Goods**: Art. 2 of UCC applies; **Real Estate/Services**: Common Law applies; **Mixed K's**: include both goods & services; Apply the **predominant purpose test** – Apply the law applicable to the part of the K that plays a bigger role; **Exception: Divisible K's** - If a mixed K divides payment between the goods and the services, apply respective law.

I. K FORMATION: Major Issue 1: Has an enforceable contract been formed? → **Look for agreement** (*offer & acceptance*/mutual assent) + **consideration** (bargained for exchange/ legal benefit or detriment) *or* consideration substitute.

OFFER: (1) an **objective** manifestation of a willingness to enter an agreement/ be bound that creates a power of acceptance in the offeree; Offer and Acceptance governed by an **objective** test → outward appearances of words & actions matter, not hidden intentions; [look for fact patterns of anger/humor/opinion b/c they may not manifest an objective intent to be bound]. (2) Offer must be communicated/directed to a specific offeree; **Exception: Contest Offers/Rewards** that promise something to anyone who accomplishes a certain task; **Ads**: gen. NOT offers, but invitations to deal *unless v. specific* (nothing to negotiate/indicate who may accept); (3) Offers *must* contain certain terms; **Common Law** – all essential terms (**parties, subject, price, and quantity**); **UCC**: provides gap-fillers/ need only **parties, subject, and quantity** [no price term req'd]; **Output K's** [*Seller agrees to sell entire production to buyer*] and **Requirements K's** [*seller agrees to sell as much as buyer will require*] are valid under the UCC b/c they provide a formula to calculate **Qty**. **TERMINATING OFFER:** 6 ways: 1) Revocation by *offeror* by **express communication** to offeree before acceptance; 2) **Constructive revocation** [offeree learns offeror has taken action **inconsistent** w/ a continuing ability to contract]; 3) *Offeree rejects* offer; 4) *Offeree* makes a **counteroffer** (“C/O” – operates as rejection and new offer) *note: distinguish c/o from counter-inquiry or indecision*; 5) **Death** of offeror; 6) A reasonable amount of time passes. Once terminated an offer can't be accepted. **Revival**: offeror makes new offer with exact same terms as before. **IRREVOCABLE OFFERS:** 4 kinds: **Option K**: a promise/agreement to keep the offer open in exchange for *Consideration*; **Firm Offers (UCC)**: a **merchant** can make a firm offer to buy or sell goods and will last as long as stated in the offer or for a reasonable period of time **no more than 90 days**; Firm offers **MUST** (1) be in **writing**; (2) contain an **explicit promise not to revoke**; **AND** (3) be **signed** by the **merchant**; **Detrimental Reliance**: offer can't be revoked if offeree **reasonably** and detrimentally relies on the offer in a foreseeable manner; **Offeree Started Performance**: In a **unilateral** offer/K, start of performance makes offer irrevocable & b/c unilateral K's can only be accepted by performance law gives promise/offeree the right to finish; *note: offeree need not complete/can stop any time*;

ACCEPTANCE: An objective manifestation of willingness to enter the agreement by offeree; Offeree must accept the offer according to offeror's rules (ex: unilateral where start of performance is acceptance vs. bilateral where start of performance only makes irrevocable – acceptance is only upon completion); Acceptance uses an **objective** test – outward appearances of words & actions matter, not hidden intentions. [Note: remember that if a seller tries to accept by shipping wrong goods, UCC treats as an acceptance and breach.] **Open-to-All contests & Reward offers**: must be known by the offeree a person **MUST** know of reward/contest to accept Acceptance is (1) an **objective** manifestation of **willingness to enter an agreement** by the offeree; (2) the offer was **specifically directed** to the person trying to accept; (3) you must **communicate** your acceptance to the other party to be effective* likely to test: ➔ **Mailbox Rule**: An acceptance **sent by mail** is **valid** when **sent** (dropped in mailbox/at post office); [*if you send a rejection and acceptance at the same time/day and they are received on the same day, it depends on which is opened first*]

Exception – the mailbox rule doesn't apply (a) if offeree sends something else first (i.e. rejection, counteroffer); (b) to other types of communication (revocations, rejections) or (c) to **option K's** <no time extension>; **Exception 2: Acceptance by silence or without communication**: The following do **NOT** require communication and include (a) unilateral reward offers or contests; (b) unilateral offers in which the parties are geographically close so that offeror sees performance occurred; OR (c) past history of silence as acceptance; or (d) offeror says acceptance must come via silence and offeree intends to accept by silence.

➔ **Implied-in-Fact K's**: accepted /communicated through gestures/actions (i.e. without writing or speaking) [ex: sit down in a barbershop chair, barber comes and cuts your hair] you have an implied in fact K.

COUNTEROFFERS & UCC 2-207: A **counteroffer** offer w/ new or different terms is a rejection + new offer; The **common law** uses the **Mirror Image Rule** where terms in the acceptance must match the terms of the offer **exactly**, or it will operate as a counteroffer; *note: treat conditional acceptance as another form of counteroffer – look for this language: “if” “only if” “on condition that” “but,”*; **UCC 2-207 → Battle of the Forms**: if an acceptance does not match the terms of the offer exactly can still count as legal acceptance; **2-207(1): Issue: whether acceptance will operate as an acceptance or counteroffer** [a] A definite and seasonable expression of acceptance – or written confirmation – [b] that is sent within a reasonable time [c] operates as an acceptance even though it states additional or different terms from those offered or agreed upon [d] **UNLESS** acceptance is expressly made conditional upon assent to the additional or different terms.

2-207(2): Function/Issue: Determine whether the new term(s) in acceptance will control vs. UCC gap fillers. The **new terms** will govern if (1) both parties are merchants; (2) the new term does **not** materially alter the deal; (3) the initial offer did not expressly limit acceptance to its terms; **AND** (4) offeror does not object w/in a reasonable time to the new term. H/E it is difficult for new terms to govern;

➔ If there is not a **REAL K**, but parties still act as if there is an agreement, only the terms both writings agree upon become part of the K and other terms are supplied by UCC default rules; 2-207 also governs where 2 parties have a K (often a verbal agreement) and

1 party sends a confirming memo w/ additional terms that go further than the earlier agreement. *Do these come in? apply test above!* [note: if a fact pattern of early agreement + written confirmation with new terms, work through the 2-207(2) analysis, but the new terms will rarely come in]. **The "Knockout" Rule:** applies when there is a K between merchants and the offer and acceptance contain conflicting terms. **CONSIDERATION:** consideration will be found to be adequate if there is (1) a deal between the parties (*bargained for exchange between parties*) **AND** (2) the exchange involves a **legal benefit** (to promisor) or a **legal detriment** (to promisee; Legal Detriment: refraining from something that you are legally entitled to do). [note **gift promises and conditional gifts do NOT count as bargained-for consideration**]; **Adequacy of Consideration:** consideration must be adequate – nominal consideration (ex: \$1) or a pretense of consideration is insufficient! ***CONSIDERATION ANALYSIS*** → on exam determine whether there is a problem with consideration/it missing follow these steps: 1.) who is making the promise that needs to be supported by law (i.e. who is the promisor)? 2.) Is there a **benefit** to the promisor **OR** a **detriment** to the promisee? 3.) was this bargained for/ did pty think they were making a deal when exchanging promises? [note: most cts find consideration where there is detriment to promisee regardless of if there was benefit to promisor]

Consideration	Not Consideration
Satisfaction Contracts are NOT illusory, but are real K's with consideration ; Promising Not to Sue (or settlement of a legal claim) <i>WILL</i> act as consideration as long as there is an (a) honest or good faith belief in the validity of the claim AND (b) a reasonable basis for that belief.	Illusory Promises – promises where there is no obligation to perform – are NOT consideration; Past Consideration is not consideration

^Remember, there must be a way for the promisor to breach; look for situations where 1 side is not really committing to the deal under the objective test. Watch for language such as: "I would like to buy your car when I have more money," or "When the economy gets better, I will pay you 5k for your car."

CONSIDERATION SUBSTITUTES: Promissory Estoppel/Detrimental Reliance: promises that lack consideration may still be enforced by the cts under this doctrine if (1) a promise is made that would **reasonably expected to induce reliance** (2) **Promisee** takes **detrimental** action in **reliance** on the promise; **AND** (3) **Injustice** can be avoided by **enforcing the promise**. [note that charities do not need to prove detrimental reliance when pursuing a reliance theory to collect on a charitable gift promise]

Quasi-Contract: Not a full contract, an **equitable remedy** that usually arises when there is an unenforceable agreement but one side has obtained a **benefit** so K may be enforced to avoid **unfair results!** **Elements of Quasi-K:** (1) P conferred a measurable benefit to D; (2) P reasonably expected to get paid; (3) D knowingly kept/accepted the benefit **AND** (4) it would be unfair to leave D unjustly enriched if P is not compensated. Damages here usually limited to the fair value of the benefit conferred

Moral Obligation + Subsequent Promise: Few jx have case law that a moral obligation and subsequent promise can be binding, where normally that type of promise would be *past consideration*.

MODIFICATION & PREEXISTING DUTY RULE Common law follows the **preexisting duty rule** (PDR) which states that a promise to do something that you are already legally obligated to do, by contract or otherwise, is **NOT** consideration.

Exceptions include 1) change in performance; 2) a 3rd party promising to pay, or 3) unforeseen difficulties that would excuse performance. **ISSUE TO WATCH FOR: Is promising partial payment for release from a debt obligation binding? ANALYSIS: ask whether debt is currently due AND undisputed. If so, modification is NOT binding.**

UCC Modifications: UCC does not follow the PDR. Instead **the issue is whether a modification is made in good faith**. If made in **good faith**, it's binding **WITHOUT** new **consideration**. Under UCC-2, **NO** consideration is required for a modification, but it must be in **writing** if it falls within the statute of frauds (ex: A K modification for a sale of goods for \$500 or more).

DEFENSES TO K FORMATION: If any of these defenses (to K formation or enforcement) are established, ct. may choose not to enforce an otherwise valid K. 7 defenses + Statute of Frauds (SoF) is an 8th for some K's.

Misunderstanding: K terms ambiguous/pty's attach diff. meanings to K terms | Test: 1) parties use **material term** open to 2 or more reasonable interpretations; 2) each pty attaches a different meaning to the term; and 3) *Neither* pty knows/should know of misund.

Incapacity: Minors, Intoxicated ppl, Mentally ill (MIM's) | K is *voidable* by incapacitated pty's. Minors under 18 get highest protection; Mentally Ill get intermediate protection. **2 standards:** (1) person can't *understand* the *nature & consequences* of his actions; *or* (2) the person can't act in a *reasonable manner* re: the K/transaction and other pty knows; Intoxicated ppl: lowest lvl of protection, only applies if the other side knew/should have. Exception: Necessities: If K is for necessities, incapacitated pty's **must** still pay the **fair value** for them (food/clothes/shelter); Ratification: A pty w/o capacity can ratify a voidable K by keeping its benefits after capacity is obtained.

Mistake: *Possible issue* → **Unilateral Mistake vs. Mutual Mistake!** **Mutual Mistake** is when both pty's are mistaken as to a basic assumption/underlying fact of the agreement/K; Adversely affected pty may rescind if: **{TEST}** (1) **both** pty's were mistaken at time of deal/K formation (2) about a basic assumption of fact/the K (3) that **materially** effects the deal **AND** (4) the adversely affected pty did **NOT** assume the risk. **Unilateral Mistake** is when 1 pty makes a mistake unknown to other pty; adversely affected pty may rescind if **{TEST}** → (4 prong mutual mistake test) **AND** (5) the mistake would make the K unconscionable OR other side knew, had reason to know of, or caused mistake.

Fraud/Misrepresentation/Nondisclosure: A stmt made at the time of contracting that is not true. 2 types: fraudulent (in the induce. or in execution) & accidental; **MISREP/FRAUD IN INDUCEMENT {TEST}** (1) a misrepresentation of a present fact (2) that is material or fraudulent [intentional] **AND** (3) is made under circumstances justifying reliance on the representation (note: *voidable* if

P is induced by D into the K by reliance on misrepresentation); **FRAUD IN THE EXECUTION** is when D is tricking P into unknowingly signing K; **NONDISCLOSURE** is when P doesn't know the truth and D remains quiet → need active concealment or fiduciary relation. **Duress & Undue Influence**: **DURESS** is an improper threat that deprives a party from making meaningful choice to contract; **Economic Duress** (K voidable) withholding what someone wants/needs **{TEST}** (1) a party threatens to commit a wrongful act (2) that would seriously threaten the other party's finances **AND** (3) no adequate means are available to prevent loss threatened; **Physical Duress** (K void) - D gets P assent by improper physical threat; **UNDUE INFLUENCE**: when a party puts v. intense sale pressure on another party who seems weak-minded or susceptible to high pressure tactics → K is voidable when induced by duress & undue influence.

Unconscionability: K is unfair or oppressive to a party that shocks the conscience of the ct. & suggests abuses during formation. 2 types: **Procedural**: defect in bargaining process or an absence of meaningful choice; **Substantive**: Deal's terms are grossly unfair & 1-sided in favor of 1 party (note: some JX req. BOTH, some jx only 1)!

Statute of Frauds: K's "in" the SoF MUST meet the SoF requirements/ K is invalid unless they do. K's within SoF: **SOY RUM!**

Suretyships, **One Year** (K's that can't be performed w/in), Real property, UCC (K's for goods \$500 or more) & **Marriage** K's;

Suretyship: K promising to guarantee the debt of another → **Main Purpose Exception**: if main purpose in agreeing to pay another's debt is for surety's own economic advantage, SoF does NOT apply. **One Year**: K that by its terms can't be completed in 1 year – **One**

Year Rule: interpreted narrowly – must be no possible way to perform K w/in a 1 yr. **ISSUE BECOMES 'whether there is no possible way K can be performed in 1 yr.'** [note: sof doesn't apply to "lifelong deals" or K's that say nothing about time for perf. b/c they are capable of being performed w/in 1 yr.] **Real Property**: K made for the sale of an interest in real prop. & [leases < 1 yr usually not in SoF]; **UCC**: Ks for goods \$500 or more; **Marriage**: K's in consideration of marriage (prenups, etc.)

SoF satisfied in 2 ways – writing and performance (depends on K); **SATISFYING THE SOF BY WRITING**: A writing signed by the party against whom K is asserted (i.e. a writing containing the signature of party asserting SoF as a defense) satisfies the SoF if writing covers fundamental facts by (1) indicating a K has been made; (2) Identifying party's; **AND** (3) containing the essential terms of the deal [price, qty, etc.]; **SATISFYING THE SOF BY PERFORMANCE**: **SERVICE Ks**: **FULL PERFORMANCE** of a svc K by either side satisfies SoF (**part performance does NOT**); **REAL PROPERTY**: Satisfied by **SIGNED WRITING** (above) **OR PART PERFORMANCE** can satisfy SoF if any 2 of 3 are met: (1) Possession; (2) Payment; **AND/OR** (3) Improvements to the land; **SALE OF GOODS K'S**: **PART PERFORMANCE** on a goods K satisfies SoF **only** for the qty delivered and accepted; **UCC WRITING REQ'S/RULES**: Signed writing will satisfy SoF under the UCC (slight difference in req's): (1) no need to mention price but (2) writing MUST mention qty of goods sold [note: K is only enforceable under SoF for the QTY mentioned]; ***Special Case: When 1) both party's are merchants and 2) party asserting SoF as defense received a signed writing memorializing the agreement & its essential terms and fails to object (or respond) within 10 days satisfies SoF.**

Custom-Made Goods Exception: Custom-made or specially manufactured goods are exempt from SoF so a manufacturer can satisfy SoF once it makes a **substantial beginning** toward manufacturing the goods. **Misc. SoF Issues**: **Equal Dignity Rule**: for **AGENCY purposes** a signed writing is required to authorize an agent to form K falling within SoF; **MODIFICATION ISSUES**: If a K is subject to the SoF & meets its requirements, and party's modify the deal **must the modification also satisfy SoF?** Not automatically. **ANALYSIS**: Ask whether the K with the alleged modifications is subject to the SoF! If so, must satisfy SoF; if not no SoF req. even though initial K was.

II. PERFORMANCE → **PAROL EVIDENCE RULE**: *What to Do/What to Look For: determine what agreement entails. If a written K that the court finds is the final agreement and earlier oral or written statements about the same deal think PER!* **Applicability**: The PER applies to **earlier** written documents; it does **NOT** apply to **later** written or oral statements [this is modification!].

GATEWAY ISSUE: Have the parties created an Integrated Writing? → How do you distinguish an unintegrated agreement from one partially or completely integrated? **COMPLETE INTEGRATION**: The K expresses all terms of the agreement/ Exists when party's to a K express their agreement in writing with the **intent** it embody the **final expression** of their bargain, the writing is a complete integration – all other agreements, expressions, negotiations, or statements, written or oral made **prior** to the writing **AND** any oral expressions made **contemporaneously** with the writing are **inadmissible**; **PARTIAL INTEGRATION** exists when there's a final writing, but some terms aren't included – other expressions or statements, written or oral made **prior** to the writing + any oral expressions made contemporaneously w/ writing are **admissible** to supplement the writing **provided that** the evidence does **not** contradict the terms of the writing. **TO DETERMINE, LOOK FOR: Merger Clause** as strong evidence of complete integration and recites the agreement is a complete agreement. [note: If a ct. asks whether under the circumstances an extrinsic term would 'naturally be omitted' from the writing and it may not violate the PER and can be introduced as evidence if it does not contradict the writing – i.e. additional terms would ordinarily be in a separate agreement] **UCC SPECIAL RULES**: UCC presumes that a writing is only a **partial integration** unless the parties would have **certainly** included a disputed term in the writing. **Exceptions the PER does NOT apply when**: generally, PER does NOT apply to agreements made between parties after execution of writing (these would be mods.) **OR (A) to Defenses** (PER doesn't bar evidence relevant to a defense against K formation; **(B) Ambiguities & Interpretation**: even if writing is totally integrated, party can introduce evidence of **prior communications** for purpose of interpreting/clarifying ambiguities in the agreement; **(C) Separate Deals**: even if a writing is totally integrated a party can offer extrinsic ev. If it represents a distinct/separate K; **(D) Condition Precedents**: may offer extrinsic ev. If a party asserts there was an oral agreement that the written contract would NOT become effective until a condition occurred. **{PADS escape the PER – conditions Precedent, Ambiguities & interpretation, Defenses, and Separate deals}** **WARRANTIES**: a **warranty** is a promise about a term of the K that explicitly shifts risk to the party making the promise (note: all warranties can be disclaimed); (under the UCC) **EXPRESS WARRANTIES** by seller (S) are created when S makes promises or describes facts about a product or its use and is breached if the product falls short of S' promise/description. (1)

Affirmation of Fact or Promise by S to B which relates to goods and becomes part of the basis of the bargain ('BoB') (express warranty [EW] that goods shall conform to affirmation or purpose!); (2) **Description of Goods**: any description made part of the BoB (creates E.W. that goods shall conform to description); (3) **Samples or Models** made part of the BoB (creates E.W. that the whole of the goods shall conform to sample or model); [note: **Disclaimer(s)** that grossly conflict with E.W.'s are **unenforceable** (broad disclaimers such as 'all warranties, express or implied, are disclaimed' are **not enforceable** - disclaimers don't limit liability for EW's); S is **liable** for breach if S violates an E.W.; **IMPLIED WARRANTY OF MERCHANTABILITY (IWM)**: Under UCC all **merchants** selling goods make an implied warranty (automatically) that goods being sold are fit for their ordinary commercial purp. Merchant is liable for breach if this is violated. **Exception: DISCLAIMERS** limit liability - only for **implied warranties**; Merchants may disclaim IWM if language that's v. **conspicuous** - look for language like "as is" or "with all faults" that puts B on notice suffice for disclaiming IWM; disclaimer may be oral if "merchantability" is used. **Inspection**: if B has **examined goods** or a sample as fully as B desires or **refused** to examine goods, **NO IWM** re: defects an examination ought to or would have revealed to B.

IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE (IW-FPP): IW-FPP is implied when S warrants goods are fit for a particular purpose IF: (1) B has a particular purpose; (2) B relies on S to select suitable goods; **AND** (3) S has reason to know of B's purpose and reliance (or when B relies on S expertise to select a special type of good that will be used for special purpose);

Applicability: pty is liable for breach if pty violates this warranty. [Note: nonmerchants can extend this I.W. as long as buyer relies on any seller's expertise. **DISCLAIMERS**: IW-FPP can be disclaimed by general language ("as is") but it **must be in writing and conspicuous**; **CONDITIONS**: Another way to shift risk by stating that 1 pty's K obligations kick in **only** if a future event takes place (i.e. agreed-upon limitations of perf.; conditions make obligation to perf. contingent on occurrence of future even/condition. Conditions May be **express** or **implied**. [note: **promise v. condition** - failure of promise = breach, failure of condition relieves pty's performance oblig.] **Express Condition**: express conditions in K make performance **conditional** upon the completion of the condition. **Creation**: language in K such as "only if" "provided that" "only in event" "on condition that"; **Standard/RULE**: Express cond's must be **STRICTLY SATISFIED** unless the condition is excused (such as by waiver). 2 ways to waive: (1) pty receiving protection of the condition may waive condition by words **or** conduct; (2) if the other pty wrongfully interferes with/hinders the occurrence of the condition [judged on good faith stand]; **Satisfying Conditions**: K's w/ conditions may be met by assessing the **NATURE** of performance! **Analysis**:

***Preferred Approach* A.) apply an OBJECTIVE standard to determine satisfaction - i.e. would a reasonable person be satisfied? Secondary analysis B.) for K's involving aesthetic taste (i.e. art), apply a subjective standard** [note: pty must use good faith to avoid breach; if pty act in bad faith → claim of dissatisfaction is breach by pty; **Implied Conditions & Constructive Condition of Exchange ("CCE")**]: 1 pty's performance is conditioned on the other side's performance **COMMON LAW**: CCE doesn't need to be satisfied perfectly b/c **Doctrine: SUBSTANTIAL PERFORMANCE** states a pty will satisfy CCE if **NO material** breach! If there is material breach, non-breaching pty perf. is excused; [note: to satisfy CCE by substantial perf., the failure must **NOT be willful**]; CCE/issues occur most often in **construction & employment** K's (ex: ct implies the builder or employee must perform first - at least **substantially** - before the other side's perf. becomes due (payment). **ISSUE: can nonbreaching pty recover damages for deficiency?** If payments must be made b/c problem minor, the nonbreaching pty can recover **damages for the deficiency**; MEASURE DMGS: cost to complete the performance (sometimes dmgs lmt'd to **diminution in market value** "DMV"). [note: **GOOD FAITH AND FAIR DEALING: ALL K's contain implied obligation requiring pty's to K to act in good faith and fair dealing w/ each other without a) breaking their word; b) using deceptive means to avoid obligations; or c) Denying what the other pty obv. understood**]; **ISSUE: Can a BREACHING pty who fails to satisfy CCE due to material breach get paid anything?** Not on the K, but possibly via **Quasi-K** **ISSUE: Can a breaching pty who fails to satisfy an EXPRESS condition get paid in quasi-contract?** Not usually. **Divisibility**: K's that are clearly divisible get broken down into mini-K's to determine if there has been substantial requires performance. **Remember not to discuss substantial perf. or material breach if goods K → UCC PERFORMANCE - PERFECT TENDER**: UCC Perfect Tender(P/T), meaning S must deliver **conforming goods** per K terms [perfect tender requires (a) perfect goods + (b) perfect delivery]; **EXCEPTIONS (to P/T)**: (A) pty's can **contractually change default rules** to include substantial perf. instead of PT; (B) **Installment K's** - agreement for delivery in separate lots - do not have to satisfy PT; B can reject specific installment delivery when there is a **substantial impairment** in installment that **can't be cured** (note: default method of delivery under UCC is 1 delivery) (C) **Chance to Cure**: If S fails to tender perfect goods B **MUST** give S the **chance to cure** nonconformity if (1) there is time left on the K/time for perf. not expired; **OR** (2) S had reasonable grounds to believe B would accept a replacement (for nonconformity); **METHODS OF TENDER/DELIVERY (GOODS K)**: **Tender at S' Place of Business**: IF goods are tendered at S place of business THEN S needs to give goods to B! **Shipment & Destination K's**: **SHIPMENT K's**: If it is a shipment K (language: "FOB Seller's place of bus."), S **MUST** do 3 things for **perfect delivery**: 1.) Get goods to a **common carrier** 2.) make **arrangements** for delivery; **AND** 3.) **Notify B!** **DESTINATION K's**: [language - FOB Buyers place of Bus.], Seller **MUST** 1.) get goods to B's business and 2.) **Notify B!** **RISK OF LOSS (ROL)** **ANALYSIS: situation: goods K followed by DAMAGE or DESTRUCTION of goods before B receives them; ISSUE: who bears the loss, B or S? Follow steps in order: (1) Have the pty's dealt w/ risk of loss in K? If so, the AGREEMENT controls; If NOT, (2) ask whether/ if either pty breached → if YES, the breaching pty bears the risk of loss, even when breach is totally unrelated to delivery damage; If NO breach & goods are being shipped then (3) ask what type of delivery K was it? Shipment K: Risk of loss during delivery rests with B; Destination K: Risk of loss during delivery is on S! All other cases: (4) Is S a MERCHANT? YES → risk loss stays w/ S until B receives goods; NO → risk of loss to B when S tenders goods. Do analysis when goods K follow by dmg or destruction of goods BEFORE B receives them. **Revocation of Acceptance (of K, not offer)**: B may revoke an acceptance of the goods; [situation: occurs when goods seem ok & are accepted at delivery, but a defect is discovered within a reasonable time] **Rule 2**: If B **fails to reject** nonconforming goods after having a **reasonable opportunity to inspect** goods, B**

deemed **ACCEPTED** goods; **{TEST} B May Revoke Acceptance IF:** (1) The nonconformity **substantially impairs** value of the goods; (2) Revocation occurs w/in a **reasonable time** after B discovers or should have discovered the ground for nonconformity and before any substantial change in condition of goods not caused by their own defects; **AND (3)** The buyer accepted the goods (a) on the **reasonable belief** that S would cure the nonconformity & S has failed to do so; **OR (b)** without discovery of the nonconformity if acceptance was **reasonably induced** either by difficulty discovering nonconformity before acceptance **OR** b/c S gave assurances that goods were conforming. **EXCUSES:** Remember ***I SAND IF excused*** {**Impossibility, Accord & Satisfaction, Novation, Death, Impracticability, Frustration of Purpose**} Excuses arise when there is a K but something happened preventing 1 side from having to perform. **Impossibility and Impracticability (Test):** A pty's duty to perform under a K is discharged if: (1) An **unforeseeable event occurs** that makes **performance extremely & unreasonably difficult or impossible**; (2) The **nonoccurrence** of the event was a **basic assumption** of the K; **AND (3)** The pty seeking discharge was **not at fault**; *look for FP's where: perf. becomes illegal after K is formed; subject matter of K is destroyed; or svcs K with "special person" (i.e. uniquely skilled; artist ex!) and performing pty dies or is incapacitated.* **Death:** doesn't act to excuse liability on a K that has been made; the **estate** is normally held to K obligations **EXCEPTION:** if something special/unique about person performing K such that it makes no sense to continue if they die; **Frustration of Purpose {TEST}** A pty's duty to perform under K is discharged if: (1) **unexpected events arise** that destroys 1 pty's **purpose** in entering K (even if perf. of K not rendered impossible); (2) The event is **NOT** the fault of the **frustrated pty**; **AND (3) nonoccurrence of the event** was a **basic assumption** of the K [*note: perf. can still occur but something undermined the entire reason for K; FP is V. RARE -event need be extreme and not allocated to 1 of pty's*] **Accord & Satisfaction:** Pty is excused from its obligs under a K when there has been Accord & Satisfaction (when ptys to an earlier K agree perf. will be satisfied by completion of diff. perf.); **Accord** is the **new/alt. performance** that pty's agree to accept to discharge the preexisting duty; **Satisfaction** is the **subsequent performance** of the **accord**; *If satisfaction doesn't occur bc accord not performed, other pty can sue on EITHER the original obligation or the accord (new promise); [note: different from modification – mod immediately discharges PDR, A&S doesn't do so until satisfaction occurs]* **Novation:** Arises when both ptys agree a substitute person will take over K obligations. If novation Valid, original promisor excused from perf., substitute becomes 100% liable; [**note: Stipulation of Pty's = both ptys can agree to just walk away from K as long as each side has some perf. remaining;*]

III. REMEDIES → **ANTICIPATORY REPUDIATION:** **ISSUES – (1) What are remedy options when the other side says not going to perform on the K (i.e. REPUDIATES) before performance is due? (2) Do you still have to go along w/ your part of deal and see if he really breaches? COMMONLAW:** AR occurs when promisor **clearly & unequivocally** repudiates a promise before time for performance is due (by words or conduct); **ISSUE- CL Retraction of Repudiation? RULE:** repudiation may be retracted until promisee: (1) acts in **reliance** on the repudiation; (2) signifies **acceptance** of the repudiation/materially changes position; or (3) **commences an action for breach** of K (LAWSUIT); **UCC:** AR occurs when (1) the B or S makes an **unequivocal refusal** to perform; **OR (2) Reasonable Grounds for Insecurity arise** regarding either pty's ability or willingness to perform, **AND** the repudiating pty **fails** to provide **adequate assurances** w/in a reasonable time (no longer than 30 days) upon the *non*-repudiating pty's **demand for adequate assurances** of perf. **ISSUE – Retraction of Repudiation under UCC;** AR may be retracted until the non-repudiating pty cancels the K or materially changes its position; **RULE:** When AR occurs, non-repudiating pty may either: (A) Treat repudiation as a breach and sue immediately for dmgs [h/e if date of perf. has not passed and only perf. left is payment, non-repudiating pty must wait until perf. is due and the actual breach occurs before filing suit]; or (B) ignore the repudiation, urge performance, see what happens [h/e if ignored, continued perf. by non-repudiating pty must be suspended if it would increase dmgs (duty to mitigate)! **MONEY DAMAGES: EXPECTATION DMGS:** ordinary measure of dmgs for breach of K. **Goal:** put non-breaching P in **same economic position** as it would be if K were performed as promised; **Measure:** compare **Value of Performance WITHOUT breach** to **value of perf WITH breach** **LIMITS:** (1) Expectation dmgs must be proven w/ **reasonable certainty**; *look for new unproven business that have trouble proving lost profits – if too speculative go to RELIANCE DMGS!*; (2) Unforeseeable Consequential dmgs **AREN'T** recoverable unless breaching pty had reason to know abt possibility of unforeseeable conseq. dmgs. (**see ↓**); (3) **Duty to Mitigate:** a breached against pty must take reasonable steps to reduce dmgs from breach; If P fails to do so, ct will reduce total dmgs by amount that could have been avoided had P taken steps to mitigate. [*note: D bears burden of proving failure to mit., and efforts MUST be reasonably similar to original K.*]

Contraction K: Consequential vs. General Damages Issue: General Damages: type of losses almost anyone would suffer from breach; include incidental dmgs! (*look for: cost of storing rejected goods, finding new buyer, replacement vendor*) **Consequential:** losses unique or special to the P [*losses arise indirectly from breach due to p's special circ.*]; **Special Issues** → **Lost Volume Profits (LVP):** Paying pty breaches, normally selling pty needs to mitigate by reselling goods or svcs to another P, but if S is **retailer** who sells this type of product all the time, S can try to argue for LVP; **Incomplete Performance:** ***construct/building K's*** if *paying* pty breaches a partially completed building K, builder **CANT** continue work (run up dmgs); **MEASURE:** K price – amount paid – amt needed to finish; **Economic Waste & DMV:** Normal measure of dmgs is "cost to complete" job (*think building K's*) but when that will *dramatically overcompensate* P, cts may award DMV at their discretion **Measure:** **how much lower is the market value of what you got v. what wanted?** **Reliance Dmgs:** **Goal:** Put nonbreaching pty in same economic position if K had never been created i.e. *what loss has P incurred that would never have taken place if K wasn't breached?* Pty cannot get both expectation & reliance dmgs, must pick 1! **Restitution:** goal → give P amt equal to **economic benefit** conferred on D (prevent unjust enrich.) Measure based on value of benefit, (usually arises in quasi-K); **Liquidated DMGS:** dmgs set in the K as a negotiated, specific amt due upon breach; cts. Are wary of these/ awarding if too punitive in nature so will only award them if **{TEST} (1)** amt was reasonable at time of K; **AND (2)** actual dmgs would be uncertain in amt & difficult to prove; **Punitive Damages:** gen not allowed in K law; only recoverable if tort

EQUITABLE REMEDIES: Specific Performance: Awarded when money dmgs are considered inadequate for some reason (look for transX w/ unique goods or custom made items) to compensate injured pty; PRESUME AVAILABLE in **real estate k's** but NOT for personal svc K's **Injunctions:** for svc K's, injunctions preventing breach of svc K may be available (non-compete clause); **Rescission:** cancelling K to restore ptys to positions they had before K made; pty's may seek to rescind for defenses (mutual mistake fraud misrep unilateral mistake <if other pty knew or should have known of mistake>, OR can occur by mutual agreement of pty's. **Right of Reclamation/Replevin:** remedy for unpaid S to reclaim goods when credit is extended & B insolvent; **RULE:** S may reclaim goods sent to B when: (1) B is **insolvent** & receives goods on credit (& S learns that B is insolvent), S may reclaim goods if (2) **demand** is made w/in 10 days after B's receipt of goods and (3) B still has goods (**Exception: 10 day limit doesn't apply if B misrepresented insolvency to S in writing w/in 3 months of delivery**); OR B pays with a **bad check** that is dishonored. S may then reclaim goods following demand w/in reas. time.

IV. 3rd PARTY RIGHTS 3RD PARTY BENEFICIARIES: MAIN ISSUE→Whether a 3rd pty can sue to enforce a K made by 2 other ppl; Pty's:

Promisor is the person making the promise that 3rd pty is trying to sue to enforce; **Promisee:** contractual counterparty to promise (could enforce the promise but isn't); **3rd pty Beneficiary:** outside pty suing promisor; **Creditor Benef.:** arises when promisee makes deal with promisor to repay earlier debt of 3rd pty – can sue!; **Donee Benef.:** arises when no preexisting obligation but promise clearly intends to confer gift of enforcement on 3rd pty (think life insurance) **ISSUE: Is 3rd pty an INTENDED or INCIDENTAL beneficiary?**

ANALYSIS: Did initial pty's intend to convey enforcement rights to 3rd pty in event of breach? **Intended 3rd Pty Ben:** NOT pty to K BUT has rights under the K b/c the 2 pty's are aware their performances are **intended** to benefit the identified 3rd pty, who has the right to sue | **Test**→Intended TPB if a) expressly designated; b) directly benefit from some performance under K; OR c) have a relationship to promisee under K that intent to benefit 3rd pty can be inferred; **Incidental 3rd pty Ben:** NOT pty to K but benefits from it. **Incidental's have NO legal rights b/c the K's purpose was NOT intended to benefit them → NO RIGHT TO SUE; Revoking 3rd Pty**

Rights: (ISSUE: can initial counterparties revoke or modify away 3rd pty's right to enforce?); **RULE:** original ptys can revoke or modify away TPB right to enforce K **until** the rights **vest**. Rights vest when TPB has: 1) detrimentally relied on the K (like promissory estopp.); 2) Accepted the benefit under the K; OR 3) brought suit to enforce K [note: promisor can assert any K defense against 3rd pty that he could against the promisee]. Can only sue promisee if creditor beneficiary!

ASSIGNMENT & DELEGATION: Assignment: transfer of rights under K; **Delegation:** transfer of duties under a K; **Distinguished from TPB K's**→ gen. 2 steps: 1) K formation AND 2) Transfer of benefits of K from original counterparty to a third pty [note: almost all contractual benefits can be assigned in whole or in part UNLESS K explicitly **prohibits** or **invalidates** assignments]; **PROHIBITS:** if prohibits, assignor has breached the deal when he made assignment & is liable for dmgs but assignment still **valid and enforceable** by assignee. **INVALIDATED:** if invalidated, TPB **cannot enforce/recover** (b/c no power/right to assign existed); **recap: who can assignee sue? The obligor for nonperformance [every defense to enforcement that may be used v. assignor can be v. assignee; Assignor may sue Obligor only if assignor did not receive consideration] AND assignor for i.) wrongful revocation of assignment OR ii.) the breach of implied warranty; Consideration** is not required for an assignment, but if consideration provided = irrevocable Ass.!

What if someone assigns the same rights twice?→Depends on if assignee paid consideration! **ANALYSIS/TEST:** Rights assigned **without consideration** → **LAST** assignment controls; Rights assigned **FOR/WITH consideration** → **1st** assignment for consideration usually holds! **Minor Exception:** later assignment will take priority if 2nd assignee does not know of earlier assign & is first to obtain payment or judgment. **DELEGATION:** occurs when pty outsources duties under K to a 3rd pty. Generally acceptable if (1) K does not **prohibit** delegation; AND (2) other pty doesn't have some special int. in having a specific individual perform (like artist and painting). **Delegates** generally **NOT** liable for breach unless receive consideration from delegating pty (delegating pty not excused/remains liable for non-perf unless consideration present); **Liability:** delegator remains liable for delegates performance (**obligee** may sue **delegator** for non-perf by **delegatee**, **obligee** may only sue **delegee** if delegee **assumed duties** of entire K [remember diff. from novation b/c delegation arises when **ONE** pty independently decides to delegate duties to 3rd pty; novation is both parties agreeing to a substitute taking over K obligations). **UCC DAMAGES: Breach by S, Buyer keeps goods** → DMGS = Fair Market Value (FMV) of perfectly-delivered goods MINUS FMV of good actually delivered [if S breaches by delivering non-conforming but superior goods, B is NOT responsible/doesn't reduce B's dmgs; **Breach by S & S keeps or B returns Goods** → DMGS = whichever of the following is higher: (a) FMV of goods at the time of breach **minus** K price; OR (b) Buyer's cost of covering/replacing goods **minus** K price **Breach by B and B has goods** → DMGS = K price; **Breach by B & S has goods** → DMGS = either (a) K price **minus** market price at time of delivery OR (b) K price **minus** resale price **plus** lost profits (that are provable)