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Contracts

I. APPLICABLE LAW
   a. Two kinds
      i. CL
         1. real estate, personal services,
      ii. UCC Article 2: *read sales lecture*
         1. Governs transactions that involve a sale of goods, things that are moveable at the time of transaction (always inc. growing crops)
         2. Not applicable if goods to be severed by *buyer* and is sale of un-extracted oil, gas, minerals, timber or structures.
      iii. Mixed
         1. determine predominant purpose of the contract
         2. apply that law to the *entire* contract, UNLESS
            a. K divides payment based on goods and services

II. FORMATION OF CONTRACT
   a. Valid K must have: mutual assent; consideration; no defenses to formation
   b. OFFERS
      i. Offer is a manifestation of intent to be presently bound to a specific undertaking communicated to offeree creating power of acceptance in offeree, unless offer terminates
      ii. General RULE: offer need NOT contain all material terms
         1. but, terms must be *definite and certain* enough to be capable of being enforced
         2. Except: sale of real estate must have price and land desc.
         3. UCC[1]:
            a. Must contain quantity
            b. If no price, then offer if parties so intend (agreement can be shown by *conduct*)
            c. CL Mirror-image rule abandoned
         4. If ambiguous on price (eg, "a fair" or "reasonable") price, then no offer under CL or UCC
         5. Output/Requirements contracts:
            a. Offer can be vague
            b. Increased quantities so long as not "unreasonably disproportionate"
            c. Parties must use *best efforts* to perform
         6. Employment Contracts
            a. Must have duration of employment

[1] "A contract for the sale of goods may be made in any manner sufficient to show agreement."

7. Advertisements
    a. General RULE: An advertisement is not an offer, UNLESS
        i. Promise in nature of a *reward*
        ii. Specific as to quantity and expressly indicate who can accept

c. TERMINATION OF OFFERS
    i. <u>Lapse of time</u>
        1. reasonable time
        2. stated time
    ii. <u>Words or Conduct of Offeror -- Revocation</u>
        1. unambiguous statement by offeror to offeree of unwilingess or inability to contract
        2. unambiguous conduct by offeror indicating an unwillingness or inability to contract that offeree is aware of
    iii. When is revocation effective?
        1. RULE: Revocation of offer sent through the mail is not effective until received
        2. RULE: An offer cannot be revoked after it has been accepted
    iv. Offers that cannot be revoked:
        1. Option contract
            a. Promise to keep offer open; and
            b. Promise supported by payment or other consideration
                i. Can accept until lapse or revocation
        2. UCC Firm Offer
            a. Cannot be revoked for up to 3 months (max) if:
                i. Offer to buy of sell goods
                ii. Signed, written promise to keep the offer open for state period or reasonable period;
                iii. Party is a merchant
                1. **merchant:** engaged in a business or profession or one who regularly deals in goods of the kind
        3. Detrimental Reliance
            a. Offer cannot be revoked if there has been detrimental reliance by the offeree that is *reasonably foreseeable*
        4. Executory Unilateral K
            a. Start of performance, *not mere preparation*, makes unilateral contract irrevocable for reasonable time
                i. NB: if only preparation, check detrimental reliance!!
    v. <u>Words or Conduct of the Offeree – Rejection</u>
        1. Counteroffer
            a. Terminates offer; and becomes a new offer
            b. Watch out for:
                i. Mere bargaining (Will you take $200?)
                ii. If a statement (I'll pay $200) = counteroffer

2. Conditional Acceptance
    a. Terminate offer; and becomes new offer
    b. "I accept" if, provided that, so long as, but, on condition that
3. Additional Terms
    a. *CL only* Mirror Image Rule
        i. An acceptance adding <u>new terms</u> is treated as a counteroffer
    b. *UCC* permitted alterations if
        i. <u>Seasonable expression of acceptance</u> creates a contract
        ii. Questions to ask?
            1. is there a contract? (seasonable issue)
            2. is additional term a part of the contract?
                a. If at least *one* party is NOT a merchant, then additional term is merely a proposal
                b. If *both* are merchants, then:
                i. Additional term is part of the contract, UNLESS offeror rejects within a reasonable time OR it *materially changes* the original offer OR offer *expressly limits* acceptance to original terms
    c. *UCC* Different terms ("Knock-Out" Rule)
        i. If acceptance contains contradictory terms, the K consists only of the terms on which the offer and acceptance agree.
        ii. Inconsistent terms replaced by **gap-fillers**
    d. *UCC* Written confirmation of Oral Agreements
        i. After oral agreement, written confirmation with additional terms treated same as alteration rule (non-merchant: proposal; merchant: reject or material change)

vi. <u>Death of Party Prior to Acceptance</u>
1. RULE: Death or incapacity of either party terminates offer
2. Exceptions:
    a. Option K
    b. Part performance of offer to enter into unilateral K

d. ACCEPTANCE
i. Who can accept?
1. Only a person who knows about the offer; or
2. the person to whom the offer was made
3. Look out for *assignment*:
    a. *Offers* canNOT be assigned

b. *Options* can be assigned UNLESS the option otherwise provides [thus, txfr ability to accept underlying offer]

ii. Method of acceptance? FIVE main types:

1. In response to offer, Offeree fully performs
   a. Full performance is **always** acceptance, UNLESS failure to notify of performance
      i. Failure to notify discharges contractual duty
      ii. NB: watchout for *geographic* separation of parties
2. If the offeree *starts* to perform
   a. RULE: If offer does not require a particular method of acceptance, then start of performance indicates acceptance
      i. NB: if states performance required to accept, then we have a unilateral K and *full performance* required for acceptance
3. offeree *promises* to perform
   a. RULE: most offers can be accepted by a promise to perform
4. offeror and offeree are at different places and there are conflicting communications ("mail box rule")
   a. RULE: a communication is effective when *received*.
      i. N/A to
         1. offer stipulating "accepted when received"
         2. option contracts
   b. RULE: but an <u>acceptance</u> is effective when sent IF
      i. Made in a manner and by a means invited; and
      ii. Offeree has not *already sent a rejection*
         1. Then, whichever arrives first is operative
5. UCC: acceptance may be in any reasonable manner and by any reasonable medium
   a. Buyer inspects and indictes goods conform or that will keep inspite of nonconformance;
   b. Buyer fails to reject within a reasonable time or fails to notify seller seasonably of rejection; or
   c. Buyer does anything inconsistent with seller's ownership
   d. NB: seller of goods sends the wrong goods
      i. RULE: a buyer's offer to buy seeking *prompt shipment* can be accepted either by seller's 1) promise to ship or 2) by shipment of conforming or non-conforming goods
      ii. RULE: Shipping the "wrong" goods is simultaneously an acceptance and a breach
      iii. **Exception**: Accommodation
         1. Shipping nonconforming goods with *explanation* of why different goods are sent and belief that they will be acceptable

2. Creates NO contract; and NO resultant breach; merely creates counteroffer

III. CONSIDERATION or a CONSIDERATION SUBSTITUTE

a. Def: bargained-for legal detriment
b. Analysis steps:
    i. Look at each promise separately
    ii. Identify each promisor and determine if detriment was incurred
c. Types of Consideration
    i. Performance, something not legally obligated to do
    ii. Forebearance, not doing something legally entitled to do
    iii. Promise to perform
    iv. Promise to forbear
d. Probable Bar issues (esp, v-vii)
    i. Was there anything <u>bargained for</u>?
    ii. Did the party incur a <u>legal detriment</u>?
    iii. Was the <u>promise consideration for another promise</u>?
        1. illusory promise exception: "I promise unless I change my mind."
    iv. Amount of consideration irrelevant
    v. <u>Past consideration is NOT consideration</u>
        1. exception: expressly requested <u>and</u> expectation of payment
    vi. *CL only:* <u>Pre-existing duty rule</u>
        1. RULE: doing what legally obligated to do is not sufficient consideration for consideration
        2. Exceptions:
            a. Addition to or change in performance
            b. Unforeseen difficulty so severe as to excuse performance
            c. Third party promise to pay additional money
        3. *UCC* has no pre-existing duty rule, but uses the <u>good faith</u> test for changes in existing sale of goods contracts
            a. NB: no need for new consideration
    vii. <u>Part payment of a debt</u>
        1. if debt is *due* and *undisputed*, then part payment is NOT consideration for the release of the debt
        2. if not due or is disputed, then part payment is consideration
e. Consideration substitutes
    i. *Written* promise to satisfy an obligation for which there is a defense to payment
    ii. A *seal* is not a consideration substitute (ie, no legal significance)
    iii. <u>Promissory estoppel</u> is the main substitute:
        1. promise
        2. reliance that is reasonable, detriment, and foreseeable
        3. enforcement necessary to avoid injustice

DEFENSES TO ENFORCEMENT

IV. PROMISSORS LACK OF CAPACITY

a. Who lacks capacity?
    i. Under 18
    ii. Mental incompetent/insanity
    iii. Intoxicated person, *if other party has reason to* <u>*know*</u>
b. Consequences of incapacity
    i. Right to disaffirm by person *without capacity*
        1. NB: incapable party may still sue for breach!
        2. if incapable is sued, then assert defense of incapacity
    ii. implied affirmation by retaining benefits after gaining capacity
        1. K made before capacity; person gains capacity; keeps subject matter of K without complaint after capacity gained
    iii. Liability for necessaries
        1. this is <u>quasi-contract</u> liability

V. STATUTE OF FRAUDS
a. Three main issues:
    i. Is the K within the SF?
    ii. If so, is the SF satisfied?
    iii. Is there a SF defense?
b. <u>Is the K within the SF?</u> (MY LEGS)
    i. Promise *in consideration of* marriage: eg, prenup, postnup
    ii. Promise by *estate rep* to pay debt of decedent: ie, look for a *personal guarantee* of payment
    iii. Promise to pay *debt of another*
        1. <u>Main purpose exception</u>: if guarantee has main purpose of benefiting the guarantor, then not in SF
    iv. Service contract not capable of being performed *within one year*
        1. look for specific time period mentioned
        2. specific date more than one year from date of K
        3. BUT,
            a. *task* mentioned but no time mentioned is OUTSIDE SF
            b. *lifetime* deal not in SF because could die in less than year
    v. Transfer of *interest in real estate* of a term of more than one year
        1. sale of land is forever
        2. easement/lease greater than one year
    vi. Sale of *goods for $500 or more*
c. <u>If within SF, is the SF satisfied?</u>
    i. If yes, then there is no SF defense
    ii. How to satisfy?
        1. Performance
            a. Services Contract
                i. <u>Full performance</u> by either party satisfies the SF
                ii. <u>Part performance</u> does NOT satisfy the SF
            b. Sale of Goods Contracts
                i. Ordinary goods
                1. RULE: Part performance of K satisfies SF to the extent of the performance

a. <u>delivered</u> goods: satisfies SF
b. <u>undelivered</u> goods: no satisfaction

ii. Specially Manufactured Goods Exception

1. SF is satisfied as soon as seller makes a *substantial beginning*: ie, enough work to know the good is custom made

c. Real Estate

i. Part performance requires 2 of the 3:

1. full or part payment;
2. possession; and/or
3. improvements

ii. NB: full payment alone does NOT satisfy the SF

2. A Writing/Memorandum

a. Non-UCC SF issue

i. Examine the writing for:

1. contents of writing to see if it contains *all material terms* and *subject matter of contract*;
2. recital of the *consideration*; and
3. *signed* by the person to be charged [ie, D]

b. UCC SF issue

i. Examine for:

1. the ONLY material term: QUANTITY
   a. if quantity incorrect, creates a "ceiling" on enforcement
2. *signed* by D, UNLESS
   a. both parties are *merchants* and party receiving the signed writing *fails to respond* within 10 days

3. Judicial Admission Rule [not very important]

a. Statement by D that there was an agreement; and
b. Statement is made either in testimony, pleading, or discovery

d. <u>Is there a SF defense?</u>

i. If SF is NOT satisfied, then YES, there is a defense.

e. Indirect Testing of the SF

i. Authorization to enter into contract for someone else

1. written proof not always required.
2. Required when:
   a. *Equal dignities doctrine*: if underlying K is within SF, then need written authorization from principal

ii. Contract Modification

1. when does law require written evidence of modification of a written contract?
   a. RULE: Would agreement, *as modified*, fall within the SF?
      i. Yes, need written evidence of modifaction

ii. Applies to CL and UCC

2. What if agreement in writing and requires that all modifications be in writing?
    a. Ignore K language at **CL**; apply above modification rule
    b. Under **UCC**, provision requiring written modification is valid unless waived

VI. ILLEGALITY, MISREPRESENTATION, DURESS
- a. Illegality
    - i. If *subject matter* is illegal, the agreement is void
    - ii. If subject matter is legal but *purpose is illegal*, the agreement is enforceable only by the person who did not know of the illegal purpose
- b. Misrepresentation[2] [words before contract]
    - i. False assertion OR concealment of fact that
        1. can be an INNOCENT misrepresentation
    - ii. *Induces* the contract
- c. Duress
    - i. Physical or economic
    - ii. Economic duress most common: elements:
        1. bad guy
        2. threat to breach a contract
        3. vulnerable guy (no reasonable alternative)

VII. UNCONSCIONABILITY
- a. Not heavily tested
- b. Empowers court to refuse to enforce all or part of an agreement
- c. Unfair surprise or oppressive terms
- d. Tested at time agreement was made

VIII. AMBIGUITY
- a. No contract if:
    - i. Parties use a material term that is open to at least two reasonable interpretations; and
    - ii. Each party attaches different meaning to the term; and
    - iii. Neither party knows or has reason to know the term is open to at least two *reasonable* interpretations
- b. If one party knows of the ambiguity, then
    - i. There is a K under the terms as understood by the OTHER party

IX. MISTAKE OF FACT EXISTING AT TIME OF CONTRACT
- a. Mutual Mistake [words in contract]
    - i. There will be no contract if:
        1. both parties mistaken; and
        2. basic assumption of fact; and
        3. *materially* affects the agreed exchange; and
        4. not a risk that either party bears
    - ii. Bar Exam fact patterns
        1. subject matter mistake

[2] NB: on MBE, if issue is recission of contract, then it is a contracts question; but if it is about money damages for the misrepresentation, then we have a torts question

a. eg, painting turns out to be fake
b. this is material

2. value mistake
    a. no matter how much difference in price, value never meets materiality requirement

b. Unilateral mistake
    i. RULE: no legal significance, UNLESS
    ii. Other party takes advantage of obvious mistake by other party

TERMS OF THE CONTRACT

X. PAROL EVIDENCE RULE
    a. Policy: final writing of deal is more reliable than things said earlier
    b. Vocabulary
        i. *Integration*: written agreement that is final agreement
        ii. *Partial Integration*: writing is final, but not complete
        iii. *Complete Integration*: writing is final and not complete
        iv. *Merger clause*: "this is the complete and final agreement"
        v. *Parol evidence*:
            1. words of a party/parties to contract
            2. came before integration
            3. oral or written
        vi. *Reformation*: equitable action to modify written K to include parol evid
    c. Triggering facts:
        i. Court finds a final agreement; AND
        ii. Oral statement at time of agreement OR earlier oral or written statement by the parties (prior or contemporaneous)[3]
    d. Four possible fact patterns:
        i. <u>Changing</u> the written deal ("**reformation**")
            1. court cannot even consider parol evid where there is attempt to change the written deal
            2. *Mistake in integration exception* (scrivener's error)
        ii. Is there a <u>defense</u> to enforcement (ie, misrepresentation, fraud, duress)
            1. here, P will ask for **rescission**, not reformation
        iii. <u>Explaining</u> term in the written deal
            1. notwithstanding parol evid, earlier info can be considered to *resolve ambiguities* in the final agreement
        iv. <u>Adding</u> to the written deal
            1. only fact pattern where level of integration matters
            2. fully integrated: can't consider parol evid
            3. partially integrated OR that the additional terms would ordinarily be in a separate agreement: may consider parol evid

XI. CONDUCT AND COURSE OF PERFORMANCE (use in UCC parol evidece case)
    a. Important vocabulary: listed in order of persuasive force; used as **gap-fillers**
        i. *Course of performance*: same people, same contract (ie, installment K)

[3] NB: parol evidence rule does not apply to POST-CONTRACT statements or writings

ii. *Course of dealing*: same people, different but similar contract
iii. *Custom and usage*: different but similar people, different but similar contract

XII. UCC TERMS IN SALES OF GOODS CONTRACTS ("gapfiller" terms)

a. Delivery Obligations of a seller of goods
    i. No place of delivery has been agreed upon
    ii. Delivery obligations of seller if delivery by a common carrier
        1. <u>Shipment contracts</u> [highly tested]
            a. Seller completes obligation when:
                i. Gets the goods to a common carrier;
                ii. Make reasonable arrangements for delivery; and
                iii. Notifies the buyer
        2. <u>Destination contracts</u>
            a. Seller does not complete delivery obligation until goods arrive where buyer is
        3. determining which
            a. FOB city name
                i. If city is where seller is, then shipment contract
                ii. If city where buyer is, then delivery contract
            b. FAS
                i. Free alongside a vessel

b. Risk of loss [UCC issue]
    i. K is formed but before buyer gets goods
    ii. Goods damaged
    iii. Neither party is at fault
    iv. <u>Four risk of loss rules</u> listed in order of application (if unsatisfied, go to next rule)
        1. Is there and agreement on loss allocation?
        2. A breaching party liable for uninsured loss even if breach is unrelated to the real problem
        3. Delivery by common carrier other than seller [often **tested**]
            a. Risk of loss shifts from seller to buyer *at the time that the seller completes its delivery obligations*
            b. Seller must give Buyer <u>notice of shipment</u>
        4. Is *seller* a merchant? (buyer's status is irrelevant!!)
            a. Risk stays on merchant-seller until buyer receives goods
            b. If not a merchant, then risk shifts to buyer when he "tenders" the goods
                i. Tender = anytime seller tells buyer where something is and how to get it
    v. Effect of Breach on ROL
        1. if tender so non-conforming that Buyer had right to reject, then ROL remains on seller until *cure* or *acceptance.*
        2. if Buyer wrongfully rejects, ROL remains on buyer for a reasonable time

c. Miscellaneous terms

i. Price: a reasonable price at time of delivery
ii. Place of tender: seller's location
iii. Time for performance: within a reasonable time
iv. When payment Due: time of delivery

d. Warranties of Quality
   i. Express
      1. words that promise, describe, state facts OR use of sample or model (non-verbal express warranty) and become *basis of the bargain*
      2. not mere opinion or **puffing**
   ii. Implied warranty of merchantability
      1. added by operation of law. Elements:
         a. purchase good from a merchant (special def here: "deals in goods of the kind")
         b. Means the warranty is: goods are fit for ordinary purpose
   iii. Implied warranty of fitness for a particular purpose
      1. Added by operation of law. Elements:
         a. Buyer has a *particular purpose*;
         b. Buyer is *relying on seller to select* suitable goods; and
         c. Seller has *reason to know* of purpose and reliance

e. Contractual Limitations on Warranty Liability
   i. Disclaimer: eliminates only *implied* warranties
      1. disclaim by "as is" or "with all faults"; or
      2. **conspicuous** *written* language of disclaimer mentioning merchantability
   ii. Limitation of remedies
      1. possible to limit remedies, even for express warranties
      2. general test is unconscionability
      3. prima facie unconscionable if breach of warranty on consumer goods causes personal injury

PERFORMANCE

XIII. COMMON LAW PERFORMANCE TEST
   a. Look to terms of contract

XIV. SALE OF GOODS PERFORMANCE CONCEPTS
   a. Six concepts of importance
      i. Perfect tender
         1. general std of Art 2
         2. seller obligated to deliver what K called for
         3. Creates three choices:
            a. Accept and sue for damages
            b. Reject everything and sue for damages
            c. Keep some and reject others and sue for damages
      ii. *Rejection* of the goods (always **seasonably notify** S when rejecting)

1. Must occur within a reasonable time after delivery or tender and before acceptance
2. Options:
    a. Reject the whole or any commercial units or retain and sue for damages
    b. Can also cure, installment contract, acceptance
3. Duty of Care:
    a. Buyer must take reasonable care of rejected goods and obey reasonable requests from seller for their disposition
    b. Can resell goods that are perishable or threaten to decline in value (B keeps fee for his trouble)

iii. *Cure*
1. seller's reasonable ground to believe the goods would be "ok"
    a. NB: normally with info about "prior dealings"
2. time for performance has not yet expired
3. S notifies B of intention to cure and tenders conforming goods

iv. *Installment Sales Contracts*
1. Def: requires or authorizes delivery in
    a. Separate lots to be
    b. Separately accepted
2. Buyer can reject ONLY where there is a *substantial impairment* in the installment that cannot be cured (imperfect tender not enough)

v. *Acceptance of the Goods*
1. if acceptance, can't reject
2. payment without opportunity for inspection is NOT acceptance
3. NB: <u>implied acceptance</u> if retention after opportunity to inspect and no objection made by buyer

vi. *Revocation of acceptance of the goods* [on MBE for sure]
1. nonconformity <u>substantially impairs</u> the value of the goods;
2. <u>excusable ignorance</u> of grounds for revocation or <u>reasonable reliance</u> on seller's assurance of satisfaction;
3. revocation NOTICE within a <u>reasonable time after discovery</u> of nonconformity; and
4. buyer can <u>return the good</u> substantially unchanged

b. Payment concepts
i. By any manner current in ordinary course of business
ii. Seller can demand cash, but
iii. If demand in cash, buyer gets additional reasonable time

REMEDIES FOR AN UNEXCUSED NONPERFORMANCE

XV. REMEDIES

a. Specific Performance/Injunction

i. Equitable remedy
ii. Look at equitable maxims:
1. does P have unclean hands? Laches? Sale to BFP?

2. are money damages adequate? If yes, no equitable remedy

iii. Areas where there is <u>specific performance</u>:
1. contracts for **sale of land**
2. when we have **unique goods**
a. antique; art; custom-made
3. **No** specific performance for **services contracts**
a. But may get injunction to bar other similar performance

iv. Areas where there is <u>reclamation</u>:
1. right of seller to get its goods back. Elements:
a. buyer was *insolvent* when receiving goods
b. seller demands return within *10 days* of receipt
i. NB: "reasonable time" if buyer expressly claims he is solvent
c. buyer *still has goods* at time of demand

v. Rights of good faith purchaser in <u>entrustment</u>
1. owner leaves goods with a person who sells goods of that kind
2. seller wrongfully sells goods to 3rd party
3. BFP of goods from seller cuts off rights of original owner/entruster
4. Remedy: owner sues seller for conversion

b. Money Damages

i. Damages vocabulary
1. expectation:
2. reliance:
3. restitution
4. incidental
5. consequential
6. avoidable
7. liquidated
8. limitation of remedies

ii. Measure of Damages
1. Default RULE: courts generally base damages on the protection of the *expectation interest* (ie, put P in same economic position as if contract had <u>been performed</u>)
2. Alternative RULE[4]: Protection of the *reliance interest* (ie, put P in same economic position as if the K had <u>never happened</u>)
3. Alternative RULE: protection of the *restitution interests* (ie, put D in the same economic position as if K had <u>never happened</u>)

iii. Damage rules for Sales of Goods (mainly expectation based)
1. Two relevant facts for the answer:
a. Who breached?; and
b. Who has the goods?
2. Seller breaches, buyer keeps goods
a. FMV if perfect minus FMV value *as delivered*
3. Seller breaches, seller keeps the goods

[4] Often used where expectation damages are too speculative

            a. Market prices at time of discovery of the breach minus contract price; OR
            b. replacement price (covering) minus contract price
                i. replacement must be reasonable
        4. Buyer breaches, buyer has goods
            a. Contract price
        5. Buyer breaches, seller has goods
            a. Contract price minus market price at time and place of delivery; OR
            b. Contract price minus resale prices
            c. In some situations, provable *lost profits* [aka "lost volume selling"]
                i. Regular inventory; unlimited supply; damages are lost profits
    iv. Additions and Limitations
        1. <u>Incidental</u> damages
            a. Costs incurred in dealing with breach
        2. Foreseeable <u>consequential</u> (special/unique to P) damages [essay question]
            a. Damages arising from P's special circumstances; AND
            b. Recoverable only if D had *reason to know* at the time of the contract
        3. Subtract <u>avoidable</u> damages
            a. No recovery for damages that could have been avoided *without undue burden* on P
            b. Burden of pleading and proof is on D
        4. <u>Certainty</u> test
            a. Proof of damages must be *reasonably certain*
    v. Contract provisions regarding damages: <u>Liquidated</u> damages
        1. if term exists, the key is whether it is VALID:
            a. damages were difficult to forecast at time K was made; and
            b. provision is a reasonable forecast
        2. ie, it can't be so high as to be a punishment
            a. where there is a "single number" to cover ANY and all situations of breach, always INVALID

c. **Quasi-contractual relief**
    i. If no valid contract was formed, then perhaps quantum meruit recovery where:
        1. P has conferred a benefit on D by redering services or expending properties;
        2. P conferred benefit with *reasonable expectation of being compensated* for its value by D;
        3. D *knew or had reason to know* of P's expectation; and
        4. D would be *unjustly enriched* if he were allowed to retain benefit without compensating P

EXCUSE OF NONPERFORMANCE OF CONTRACT BECAUSE SOMETHING HAPPENED AFTER CONTRACT WAS MADE

XVI. EXCUSE B/C OTHER PARY'S IMPROPER PERFORMANCE

a. CL and <u>material breach</u> rules; three general rules:
    i. Damages can be recovered for any breach
    ii. Only a material breach by one party excuses the other party from performing
    iii. Whether a breach is material is a FACT question:
        1. amount of benefit received by nonbreaching party;
        2. adequacy of compensation to injured party;
        3. extent of part performance by breaching party;
        4. hardship to the breaching party;
        5. negligent or willful behavior by breaching party; and
        6. likelihood that he breaching party will perform remainder of the contract
    iv. NB: Don't forget *divisible contract exception*

b. UCC and <u>Perfect Tender</u> Rule
    i. Less than perfect tender gives buyer option of rejecting goods (which is same as excuse not to perform)

XVII. EXCUSE B/C OF FAILURE OF PERFORMANCE CONDITION

a. What is a performance condition?
    i. If condition appears in *response* to an offer, then this is conditional acceptance (see above)
    ii. If condition is inside the agreement, then it is a performance condition.
    iii. Def performance condition: A mutually agreed upon promise modifier.
        1. Words that give it away: if, provided that, so long as, subject to, in the event that, unless, when, until, and on condition that.

b. What is the <u>standard</u> for satisfying an express condition?
    i. General RULE: strict compliance with performance conditions

c. How can an express condition be excused?
    i. Identify person who *benefits from* or is *protected by* the condition
    ii. The protected person has legal power to give up the protection

XVIII. EXCUSE OF PERFORMANCE BY REASON OF OTHER PARTY'S <u>ANTICIPATORY REPUDIATION</u> OR <u>INABILITY TO PERFORM</u>

a. Anticipatory Repudiation
    i. An *unambiguous* statement that
        1. the repudiating party will not perform
        2. made *prior to* the time that performance was due
    ii. Therefore, nonperformance of the OTHER party is excused by the anticipatory repudiation
    iii. Anticipatory repudiation
        1. gives rise to immediate claim for damages, UNLESS performance complete, then must wait until contract payment date
    iv. Retraction/Reversal
        1. of AR is possible, so long as

a. no material change in position by the other party

2. thus, duty to perform is reimposed, but may be

a. delayed until adequate assurance is provided

b. Waiver or Estoppel

i. A party may waive a condition by not insisting on it

ii. Waiver may be retracted at any time *unless*:

1. the other party relies on the waiver and
2. changed position to her detriment

c. Inability to Perform

i. Usually requires that other side's performance is unique and cannot be replaced by $$ (eg, a *barter* transaction for artwork)

d. **UCC right to demand assurances:**

i. If "reasonable grounds for *insecurity*[5]" arise;

ii. The other party may in writing demand adequate assurance of due performance; and

iii. May suspend his own performance for 30 days

XIX. EXCUSE BY REASON OF A LATER CONTRACT

a. **Rescission** (cancellation)

i. Is performance still remaining from each of the contract parties?

1. yes, it is *executory*, so valid
2. no, if one party has *completely performed*, then cannot rescind

b. **Accord and Satisfaction** ("if" and "then")

i. Definitions:

1. Accord: An agreement by the parties to an existing obligation to accept a *different performance*[6] in satisfaction of the existing obligation
2. Satisfaction: the different performance is completed

ii. Effect of Accord and Satisfaction

1. if satisfaction fulfilled, then parties' former performance is excused
2. if neither original nor satisfaction performance accomplished, then can sue on either contract, but not both

c. Modification/Substituted Agreement

i. Agreement by parties to an existing obligation to accept a *different agreement* in satisfaction of the existing obligation

ii. Once modification made, then old obligation disappears (unlike A & S)

iii. Know the difference just in case.

d. Novation

i. Agreement between BOTH parties to an existing contract to

ii. *Substitute* a new party

1. same performance, different party

iii. Effect

1. Excuses the contracted for performance of the party who is substituted for or replaced

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[5] ie, not AR because not an unambiguous statement of intent not to perform

[6] If the later agreement is to merely do LESS OF THE SAME THING, then we are going to look for a consideration answer (see #195)

iv. Vs. **Delegation**
1. no need for both parties to agree, but
2. does not excuse performance of original party

XX. EXCUSE OF PERFORMANCE BY REASON OF A LATER, UNFORESEEN EVENT
a. Bar exam: likely to get question where something bad happens, but is NOT an excuse to performance
b. Elements:
i. Something happens after contract, but before performance;
ii. It was unforeseen (**at time contract made**); and
iii. Makes performance impossible, commercially impracticable, or frustrates the purpose of the performance
c. Impossibility
i. Objective: unforeseeable and supervening event rendering performance impossible for anyone
d. Impracticable
i. Subjective
ii. Only be done with extreme and unreasonably difficulty and expense
e. Frustration of purpose
i. Supervening event that was not reasonably foreseeable which completely or nearly completely destroys the purpose of the contract as understood by BOTH parties
f. Types:
i. Damage or destruction of subject matter AFTER contract formation
1. Sale of goods: combine with *risk of loss rules*!
a. Risk of loss on seller:
i. If goods unique, then excused
ii. If goods replaceable, then not excused
b. Risk of loss passes to buyer
i. Nonperformance NEVER excused
ii. Death AFTER contract formation
1. General RULE: Death does not make contract obligations disappear
2. Exception: one party is a "special" person
a. Ie, if impossible to replace performance by money or another person (eg, famous painter), then performance is excused
iii. Subsequent law or regulation
1. later law makes <u>performance</u> of the contract illegal
a. excused by *impossibility*
2. later law makes mutually understood <u>purpose</u> of contract illegal
a. excuse is by *frustration of purpose*

THIRD PARTY PROBLEMS

XXI. PERSON TRYING TO ENFORCE A CONTRACT SHE DID NOT MAKE: <u>TPB</u>
a. Five elements need

i. Identify a problem as TPB problem
ii. Use vocabulary of TPB law
iii. Deal with efforts to cancel or modify a TPB contract
iv. Figure out who can sue whom
v. Assert any available defenses

b. Vocabulary: Master This!

i. Third-party beneficiary
ii. Promisor: person making promise that benefits the third party and who renders performance to Beneficiary
iii. Promisee: person who obtains the promise that benefits the third party
iv. Intended/incidental Beneficiary
1. unlikely on bar; highly fact specific
2. if TPB named, then intended and has K rights
3. if TPB not named, then incidental and NO K rights
v. intended donee beneficiary or creditor beneficiary
1. donee: majority
2. creditor: if money owed prior to formation of contractor

c. Efforts to cancel or modify

i. Does third party know of, has relied on, or assented as requested
ii. If so, then rights have **vested** and K cannot be
1. cancelled or modified without TPB's consent UNLESS
2. K provides otherwise

d. Who can **sue** whom?

i. Beneficiary can sue promisor
ii. Promisee can sue promisor
1. but, no recovery by TPB if promisee recovers
iii. Donee beneficiary cannot sue promisee, <u>but</u> creditor beneficiary can sue promisee on pre-existing debt

e. Defenses

i. If TPB sues promisor, promisor can assert any defenses that he would have if had been sued by promisee, if Promisor has not made an ABSOLUTE promise to pay (CMR, p. 18)

XXII. PERSON TRYING TO ENFORCE A CONTRACT SHE DID NOT MAKE: <u>ASSIGNEMENT</u> OF RIGHTS

a. What is an assignment?

i. Transfer of rights under a contract in **two steps**: [TPB: one step]
1. contract between only two parties
2. one of the parties' later transfer of rights under that contract to a third party

b. Vocabulary

i. Assignor: party to K who later transfers rights under K to another
ii. Assignee: not a party to original K; can enforce K due to assignment
iii. Obligor: other party to original contract

c. Limitations on Assignment

i. Contract provisions
1. prohibition: "rights hereunder not assignable"

            a. RULE: prohibition takes away the *right* to assign, but not *power* to assign.
                i. Therefore, an assignment would be a breach, but assignee who does not know of prohibition can still enforce K
        2. invalidation: "all assignment of rights under this K are void"
            a. RULE: takes away BOTH the *right* and the *power* to assign.
                i. Therefore, breach by assignor and no rights in assignee
    ii. **Common Law**: common on MBE
        1. Even if K says nothing about assignments, CL
            a. Prohibits assignment that *substantially changes* the <u>duties of the obligor</u>
            b. Examples:
                i. Assignment of *right* to payment [permitted]
                ii. Assignment of right to contract *performance* other than right to payment [often prohibited]
    iii. **UCC**
        1. unless indicated to contrary, a prohibition on assignment means only bar to *delegation* to assignee of assignor's performance
d. Requirements for Assignment
    i. General RULE: consideration is NOT required
    ii. Watch for *present assignment*, not a **promise** to assign
        1. if promise, then we need consideration
    iii. distinguish *existing but conditional rights* from *future rights*
        1. existing may be assigned
        2. future, non-existent rights, CANNOT be assigned
e. Right of Assignee
    i. Assignee can sue obligor
    ii. Obligor has same defenses against assignee as it would have against assignor
    iii. Payment by obligor to assignor is effective until obligor *knows of* the assignment
        1. similarly, modification agreements between obligor and assignor are effective if the obligor did not know of the assignment
    iv. **Warranties** of assignor IN AN ASSIGNMENT FOR VALUE
        1. exception to notion that no consideration needed
        2. assignor warrants that he will not do anything to *impair the value of the assignment*
f. Multiple Assignmets
    i. Gratuitous assignments
        1. General RULE: *last* assignee in time wins
        2. Exception: detrimental reliance or writing indicating ownership
    ii. Assignments for consideration
        1. General RULE: *first* assignee for consideration wins

2. Limted Exception:
    a. Later assignee does not know of earlier assignment and is first assignee to receive payment/judgment/novation/indicia of ownership.

XXIII. DISPUTES ARISING FROM A PERSON'S PERFORMING A CONTRACT SHE DID NOT MAKE: DELEGATION OF DUTIES

a. What is delegation?
    i. Party to a K transfers work under the K to a 3rd party
b. Relationship of assignment and delegation
c. Which duties are delegable?
    i. General RULE: all duties are delegable, except:
        1. delegations prohibited by K
        2. assignments prohibited by K
        3. changes the obligee's expectancy
        4. K calls for very special skills
        5. person to perform has very special reputation
d. What if third party does not perform?
    i. Where mere duty is delegated, delegatee cannot recover from obligee if obligee refused to pay
    ii. Delegating party **always** remains liable
    iii. Delegatee liable only if she receives consideration from delegating party
        1. NB: a delegation for consideration creates a TPB contract

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