Contracts I Final Exam Outline

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1. **Contract?**

   1. **Offer** — §24 (“Manifestation of willingness to enter into a bargain, so made as…”)
      a) **Option**: §87 (Option binding if in writing, recites consid., proposes exchange…), §63(b) (exception to mailbox rule of acceptance)
          i) **UCC firm offer**: §2-205 (No consid. needed for <3 mos. UCC option)

   2. **Acceptance / Revocation** — §32 (When in doubt, offeree can accept by promise or performance), §36 (Termination of acceptance), §69 (Silence as acceptance)
      a) **Unilateral**: §45 (Part performance/tender -> option)

2. **Promissory Estoppel?**

   1. **Promise** — §90 (“A promise which the promisor should reasonably expect…”)
      2. Promisor reasonably expects promisee to rely
      3. Promisee does rely in such a manner
      4. Injustice results from non-enforcement

3. **Restitution?**

   1. P conferred benefit on D — Restit. §116 (“A person who has supplied…”)
      2. D had knowledge of said benefit
      3. D accepted or retained said benefit
      4. It would be unjust/inequitable for D to retain said benefit

      (a) **Emergency services** (§116)
          1. P acted unofficiously w/ intent to charge
          2. Things/services were necessary to prevent D from serious bodily harm
          3. P had no reason to know that D would not consent to receiving if competent
          4. D could not consent / b/c of youth or mental impairment, consent is immaterial

      (b) **Preservation of property** (§117)
          1. P was in lawful possession/custody of things or took possession, and services/expenses were not necessary by breach of duty to D
          2. Reasonably necessary for services to be given before communicating w/ owner
          3. P had no reason to believe that owner did not desire him to act
          4. P intended to charge for services or retain things if owner were not found
          5. Things have been accepted by owner

      (c) **Material benefit** (Restatement §86)
          1. If person gets (1) material benefit from another, (2) non-gratuitously, (3) subsequent promise to compensate for benefit is enforceable (4) to extent to prevent injustice
ATTACK SHEET 2

**Battle of forms, esp. w/ UCC:**

Under common law *mirror-image rule*, acceptance that varies the terms of an offer becomes counter-offer, = rejection of original offer

- If offeror proceeds w/ contract, his performance is an acceptance of the terms of the counter-offer
- UCC changes this and converts CO into acceptance even if it has additional or different terms; responding form must contain definite/seasonable expression of acceptance
  - Any additional terms become proposals for additions to the contract
  - But when the transaction is between *merchants*, additional terms become part of the K unless 1) offer is specifically limited to its terms, 2) offeror objects to new terms, or 3) additional terms materially alter offer
- If acceptance expressly conditions acceptance on offeror’s assent to offeree’s terms, forms do not result in a contract unless offeror gives unequivocal expression of assent
  - If no assent but parties proceed as if K, then there is K

1. Identify **offer** and **acceptance**
   - (a) Purchase orders generally are offers
   - (b) Price quote is not an offer—it’s a solicitation for an offer
     Unless the quote is:
     - (i) sufficiently detailed; and (ii) communicates that the offeree’s assent is all that is needed to form the contract

2. Determine whether the terms of the acceptance are incorporated into the K
   - (a) **Common Law**: Mirror Image Rule and Last Shot Rule
     - (i) But if both parties perform (anyway), they form a contract, in which case, apply Last Shot Rule
   - (b) **UCC**: § 2-207: Has there been an “expression of acceptance” (i.e., a document), or has K been formed by performance only?
     - (i) Acceptance with differing terms: Use §2-207(1)
     - (ii) If either party is not a merchant, UCC §2-207(2) applies
     - (iii) If the writings don’t establish a K, but the parties perform anyway, apply §2-207(3) Knockout Rule
ATTACK SHEET 3

RELEVANT RESTATEMENT SECTIONS—CROSS-REFERENCED W/ CASES

I. Restatement (Second) of Contracts

Offer

§24: Offer Defined—Manifestation of willingness to enter into a bargain, made to justify another in understanding that his assent is invited, will conclude it

Acceptance

§32: Invitation of Promise/Performance—When in doubt, offer invites o’ee to accept by promise or by rendering performance, as o’ee chooses

§35: Power of Acceptance—An offer gives to o’ee a continuing power to complete mutual assent by acceptance of the offer

§36: Termination of P.o.A.—P.o.A. can be ended by 1) rejection/counter-offer, 2) lapse of time, 3) revocation by o’er, 4) death/incapacity, 5) non-occurrence of acceptance condition

§42: Revocation by Offeror to Offeree—O’ee’s P.o.A. ends when o’ee gets from o’er a manifestation of intention not to enter into proposed contract

§43: Indirect Comm. of Revocation—O’ee’s P.o.A. ends when o’er takes definite action inconsistent w/ intent to enter into proposed contract, o’ee gets reliable info about it

§45: Option K Created by PP or Tender—Where offer invites O’ee to accept by rendering performance and does not invite promissory acceptance, option K is created when o’ee tenders/begins invited performance, or tenders beginning of it; o’er’s duty of performance under option K is conditional on completion/tender of invited performance

§58: Mirror Image Rule—Acceptance must comply with req’s of offer as to promise to be made or performance to be rendered

§59: Mirror Image Rule Pt. 2—Reply to offer which purports to accept but is cond. on o’er’s assent to addl. or diff. terms is not acceptance but counter-offer

§63: Time when Acceptance Takes Effect—Acceptance made in manner/medium invited by offer is operative as soon as out of o’ee’s possession, but acceptance under option K not operative until received by offeror

§69: Acceptance by Silence—When o’ee fails to reply to offer, silence = acceptance only when 1) o’ee takes benefit of offered service w/ reasonable opportunity to reject, 2) o’er has given o’ee reason to understand that assent can be given by silence/inaction, 3) Prior conduct indicates such

Consideration

§71: Requirement of Exchange—Performance/return promise is bargained for if sought by p’or in exchange for his promise and is given by p’ee in exchange for promise; performance = action, forbearance, creation/modification of legal relation; can be given by/to p’or/p’ee or other person
§79: Adequacy of Consideration—If consideration exists, no addl. req. 1) of gain/advantage to p’or or loss/detriment to p’ee, or 2) equivalence in values exchanged.

Reliance on a Promise

§82: Promise to Pay Debt—Promise to pay antecedent debt or quasi-contractual debt owed by p’or is binding if debt is still enforceable or would be save for statute of limitations.

§86: Promise for Benefit Received—Promise made in recog. of benefit prev. received by p’or from p’ee is binding to extent to avoid injustice; not binding if given as gift or disproportionate.

§87: Option Contract—Offer is binding as option K if it is in writing, signed by o’er, recites consid., proposes exchange w/in reasonable time; or, offer which o’er should reasonably expect to induce action/or forbearance by o’ee before acceptance and which does induce it, enforceable when necessary to avoid injustice.

§90: Promissory Estoppel—Promise which promisor should reasonably expect to induce action/or forbearance by p’ee or 3P and which does, enforceable when necessary to avoid injustice.

Statute of Frauds

§110: Statute of Frauds—K not enforceable unless there is written memo. or exception; true for executor-admin. Ks, suretyships, Ks w/ marriage as consid., K for sale of land, K not to be performed w/in one year from making.

II. Restatement of Restitutions

§107: Effect of Existence of Bargain—One of full capacity who, pursuant to K with another, has performed services or transferred property to the other or has conferred benefit upon him, is not entitled to compensation other than in terms of such bargain, unless transaction is rescinded for fraud, mistake, duress, undue influence, illegality, or other has failed to perform his part.

§116: Preservation of 3P Life/Health—One who has supplied things/services to another, even acting w/o other's knowledge/consent, is entitled to restitution if: 1) he acted unofficiously with intent to charge, and 2) act was necessary to prevent other from suffering serious bodily harm or pain, and 3) actor had no reason to know that other would not consent, if mentally competent; and 4) it was impossible for other to give consent or, b/c of youth or mental impairment, other's consent would have been immaterial.

§117: Preservation of 3P Property—One who, even if acting w/o 3P’s knowledge/consent, has preserved things of another from damage/destruction, is entitled to restitution if: 1) he was in lawful possession or custody of the things or he lawfully took possession, and the services were not made necessary by his breach of duty to 3P, and 2) it was reasonably necessary that the services be rendered before it was possible to communicate with owner by reasonable means, and 3) he had no reason to believe owner did not desire it, and 4) he intended to charge/retain prop. if ID of owner were not discovered, and 5) things have been accepted by the owner.
I. MUTUAL ASSENT

(a) Intention to be bound

(i) Three justifications for contractual liability: 1) respecting private autonomy—what one owns is theirs; selling, using, investing, to maximize utility should be up to owner; 2) reliance—when a promise is breached, system tries to put person in position person would have been in had the promise never been made; 3) unjust enrichment—when person doesn’t fulfill a promise and becomes enriched because of that, wrongdoer should have to give back ill-gotten gains


Issue: Is subjective or objective intent the appropriate standard for the enforcement of a contract? If there was a contract, which pieces of paper constitutes that contract? Did Eurice & Bros. breach contract?

Facts: P entered into negotiations w/ D to build house, eventually agreeing to figure of $16,300. P worked with architect to develop Memorandum Specifications, and then P and D worked out specifications together over the course of weeks, agreeing that changes in specs must come as last resort due to material scarcity and be subject to P’s approval. When P sought mortgage loan, P and D signed copy of contract, drawings, specs that differed from version whose terms D thought D had agreed to. Months later, D stopped contact with P, refused to begin construction.

Holding: Intent to enter contract is understood to be objective intent of parties. There was a contract, which Eurice & Bros. breached.

Reasoning: Without duress, fraud, or imbalance in bargaining positions, intent is what a reasonable person would understand they are entering into. Unilateral negligence from one party does not fall under this umbrella; therefore, whatever is signed under these circumstances is enforceable as a contract. The Rays were not as knowledgeable about the construction business as the Eurice Corporation, but Mr. Ray had great attention to detail, and engaged thoroughly in negotiations. No asymmetry. No duress demonstrated in facts presented. No fraud attested by either party. Eurice was unilaterally negligent, but expressed objective intent. Therefore, building contract was valid.

(b) Offer and Acceptance — Bilateral

(i) Classical offer and acceptance process:

1. Parties engage in preliminary negotiation
2. One party makes offer, giving other party “power of acceptance”
3. Offeree may use power of acceptance, manifest acceptance in legally effective way (offeree may also make counter-offer, which may be accepted by original offerer)
   - If offeree delays too long, explicit or implicit termination occurs
Lonergan v. Scolnick

**Issue**: Must an offerer manifest a promise for the power of acceptance to exist and an enforceable contract to come into existence?

**Facts**: D advertised land in paper. P and D had preliminary negotiations and correspondence through letters. The content of D’s letters contained only information about the land, info that P would have to act fast, and confirmation that X bank would work as an escrow agent. The timing of the 3/26 (D), 4/7 (P), 4/8 (D), and 4/15 (P) letters is at the center of the issue of whether D was offering P time to respond to offer, whether P delayed, whether offer was made and contract existed. 4/17, P started an escrow fund with the bank.

**Holding**: Yes. There must be an offer, an explicit promise of performance, and a “meeting of the minds” for a contract to exist.

**Reasoning**: There must be a meeting of the minds for a contract. A meeting of the minds in this situation would be evidenced by an explicit offer, and acceptance, of certain terms from a certain seller to a certain buyer. Here that did not exist, therefore a binding contract was unable to come into existence.

(ii) Mailbox rule: The default rule under contract law for determining the time at which an offer is accepted, stating that an offer is considered accepted at the time that the acceptance is mailed.

Izadi v. Machado (Gus) Ford, Inc.

**Issue**: Does subjective intent of advertiser determine the meaning of language in an advertisement using bait-and-switch to bring in customers? Do such advertisements confer power of acceptance upon reader-offerees?

**Facts**: P believed D’s ad offered $3000 as a “minimum trade-in allowance” for any vehicle because this figure was placed at top of D’s ad as a portion of the consideration needed to buy a new Ford. D refused P’s attempt to purchase and pointed to the ad, arguing through fine print that the offer referred to a much smaller subset of cars not mentioned in the rest of ad. They refused to carry out the deal P sought to make.

**Holding**: No. Interpretation of offer or acceptance is what a reasonable person would think the terms mean. Deliberately misleading advertising meant to bring in customers does create a binding offer.

Normile v. Miller

**Issue**: If a seller rejects a prospective purchaser’s offer to purchase but makes a counteroffer that is not accepted by the prospective purchaser, does the prospective purchaser have the power to accept after he gets notice the counteroffer was revoked?

**Facts**: D owned real estate in Charlotte, NC; on 8/4/80, this property was listed for sale. On 8/4, Richard Byer, a real estate broker, showed the property to prospective purchasers Normile and Kurniawan; P made a written offer to buy; the paper had blanks and was
done in quadruplicate, signed by P. D signed under seal, with several changes in terms, including an increase in deposit and down payment. Byer presented D’s counteroffer to P. P lacked funds for bigger deposit, and did not want the new loan terms; P thought he had first option and didn’t have to act for a while and so he did nothing. On 8/5, Byer went to home of P Segal, who signed an offer similar to D’s counteroffer to P; this offer was accepted by D. Later that day, Byer informed P that D revoked her counteroffer. Then D initialed the offer-to-purchase form from D counteroffer, delivered it to firm w/ deposit

**Holding:** No. Prospective buyer loses power of acceptance after learning that an offer has been revoked.

**Reasoning:** No meeting of the minds. D’s counteroffer showed no intent to accept terms of Ps’ original offer. Ps’ deadline also did not become part of counteroffer. Ps never accepted counteroffer, therefore D was free to revoke counteroffer as well as power of acceptance and sell to another party.

(iii) **Basic option contract principles:** In a classic bilateral contract (promise for promise), revocation can come at any time; if A says B has N days to accept offer, and revokes offer before Nth day, offer is legally revoked

- But if A promises to keep offer open for N days, in return for X sum of money, then A loses power to revoke before Nth day

(c) **Offer and Acceptance — Unilateral**

**Petterson v. Pattberg**

**Issue:** Is the promise in a unilateral contract binding if the offeree appears to proffer performance and the offeror revokes before said performance?

**Facts:** John Petterson owned a parcel of real estate in Brooklyn. Pattberg, D, was the owner of a bond executed by Petterson, which was secured by a third mortgage upon the parcel. On Apr. 4, 1924, $5,450 remained unpaid on the principal; the plan was for $250/ month every three months for five year. The D wrote to the P, saying he agreed to accept cash for the mortgage: “I will allow you $780 providing said mortgage is paid on or before May 31, 1924” and that the $250 payment due Apr. 25 is paid when due. On Apr. 25, 1924, Petterson paid D his $250 installment. In May 1924. Petterson went to D’s home, knocked on the door, and said he came to pay the mortgage; D answered that he had sold said mortgage; P showed cash and said he was ready to pay according to the agreement; D refused to take the money. Prior to this conversation Petterson had made a contract to sell the land to a third person free and clear of the mortgage. Meanwhile D had sold the mortgage to a third party.

**Holding:** No, the promise in the unilateral contract is not binding; there is no contract in this situation.

(i) **Beginning or tendering of performance:** The drafters of the Restatements have attempted to ameliorate the harsh results sometimes reached under the classical analysis
- Restatement (Second) §45: When offeree begins/tenders performance in a unilateral contract, offeror becomes bound, cannot revoke offer if performance is completed; drafters used “option” concept to cover themselves

**Cook v. Coldwell Banker / Frank Laiben Realty Co.**

**Issue:** Did P accept D offer through substantial performance? Was there a unilateral contract?

**Facts:** P Mary Ellen Cook worked for D Coldwell/Laiben, an independent contractor, with Frank Laiben as her co-owner. At a sales meeting in 1991, D orally announced a bonus program. At the end of April 1991, P had made over $15,000 in earnings, making a $500 bonus. By September 1991, P had gathered over $32,400 in commissions. At a September meeting, Laiben notified the firm that bonuses would be paid in March instead of at the end of the year. P had planned to stay w/ D until the end of 1991 in reliance on the bonus promise. In 1991 P was contacted about joining Remax, and accepted a job there in Jan. 1992. She told Laiben, who said she’d not get a bonus

**Holding:** Yes. Offeror can revoke offer prior to acceptance unless offer is supported by consideration; however offeror cannot revoke when offeree has made significant performance, as P did here. Contract breached.

**(d) Agreement to Agree**

(i) **Limits of agreement to agree:** In some cases a contract may be incomplete; parties may be unaware of holding different understandings about unaddressed terms or the costs of bargaining may be too high; or some parties believe they will be protected by implications of law in disputes
- Sometimes matters are left for postponed decision-making
- Corbin: Communications that include mutual expressions of agreement may fail to consummate a contract for the reason that they are not complete, some essential term not having been included

**Walker v. Keith**

**Issue:** Did the option provision in the lease fix the rent with sufficient certainty to constitute an enforceable contract?

**Facts:** In July 1951, the appellants-lessees leased a lot to the appellee-lessee for a ten-year term at a rent of $100 per month; in the deal was an option to extend the lease for ten more years under the same terms and conditions, except for the rent, to be determined by prevailing business conditions at the time of renewal. Lessee gave the proper notice to renew the lease, but the parties were unable to agree on a new rent; the Chancellor fixed the new rent at $125 per month, with the help of an advisory jury.

**Holding:** No. The option provision offered no definite rental term, essential to the contract’s enforceability, and offered no unambiguous and agreed-upon method to arrive at the new rental term. Contract was unenforceable.
**Reasoning:** The contract was ambiguous, with no formula, decision-making mechanism, or anything. While some might say that the renewal option is for the benefit of the lessee, and that the lessee should not be deprived of his right to enforce his contract, this logic ignores that a party must have an enforceable contract before he has a right to enforce it. Parties cannot be said to be in agreement until deal is made. While some courts have said rent was “incidental and ancillary,” the present court finds this “startling”; rent is essential to a lease. Because of the lack of agreement, the lessee’s option right was illusory. The Chancellor erred in undertaking to enforce it.

(ii) **Open price terms:** The UCC takes a diametrically opposite position from *Walker*; UCC § 2-305 provides that an open price term will not prevent enforcement of a contract, if the parties intended to be bound by their agreement; the court may enforce the contract. If the parties later fail to agree, the court may enforce a reasonable price. Not all such Ks are enforceable, though

*Quake Construction, Inc. v. American Airlines, Inc.*

**Issue:** Did the letter of intent sent from Jones to Quake constitute an enforceable contract such that a cause of action could be brought by Quake?  
**Facts:** In February 1985, AA hired Jones, gen., to prepare bid specifications, accept bids, and award contracts for the construction of an expansion of AA facilities at O’Hare. Quake, sub (to be gen.), was invited to bid on employee facilities and an auto maintenance shop project. In Apr. 1985, sub submitted a bid to gen. Gen. notified sub. orally that they got the contract for the project. Gen. asked sub to provide the license nos. of their own subs; sub told gen. that their subs would not allow them to use nos. until sub submitted a signed subcontractor agreement to them. Gen. informed sub that they would get a written contract prepared by gen. Gen. sent sub a letter of intent dated Apr. 18, 1985 to induce sub and their subcontractors to enter into agreement, and get the license nos. Gen. and sub discussed and orally agreed to changes in the written form contract. Handwritten delineations were made to the form to reflect changes. Gen. advised sub that it would prepare and send the contract to sub for signature. No formal written contract was entered into, though. At a meeting on April 25, Gen. told sub, sub’s subcontractors, and government officials that Quake was the gen. On the same day, after the meeting, though, AA informed sub that sub’s involvement with the project was terminated. Gen. confirmed with a letter dated Apr. 25.  
**Holding:** The letter was ambiguous. The circuit court must allow the parties to present other evidence of their intent. The trier of fact should then determine, based on the evidence and the letter, whether the parties intended to be bound by the letter; in the concurring opinion, it was argued that a letter of intent could be a contract to pursue further negotiations in good faith
II. CONSIDERATION

(a) Defining Consideration

(i) If parties have mutually assented to form contract, is making of promises sufficient to result in contract? No. Additional requirement = consideration

(ii) History of consideration:
- Consideration traceable to 13th century English causes of action in covenant and debt
  - Covenant available only to enforce promise made in writing, under seal; formal
  - Debt was more practical, available for formal/informal promises; limited in that it was unavailable unless P claimed he was owed a sum of money; couldn’t be used if debtor had died
- Neither covenant nor debt was useful for improper performance of informal promise; they were replaced in 15th, 16th centuries by “assumpsit” action, general remedy for breach of promise
- Action in trespass on the case began to be used for breach of contract, with action known as assumpsit b/c pleading alleged that D had assumed obligation to perform; assumpsit over time superseded covenant
- Assumpsit was more advantageous for Ps than debt action; Ds fought against use of it; dispute ultimately resolved in Slade’s Case, allowing assumpsit whenever (1602)
- W/ covenant and debt actions replaced by assumpsit, question of scope came into play, and assumpsit developed consideration limit

Hamer v. Sidway

**Issue**: Was there consideration in this agreement, thus rendering it a contract?

**Facts**: William E. Story Sr. was the uncle of William E. Story 2d.; Sr. promised Jr. that if he would refrain from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years of age he would pay him a sum of $5,000. The nephew assented thereto and fully performed. When the nephew turned 21 he wrote to his uncle informing him that he had performed and become entitled. The uncle received the letter and a few days later sent another. The nephew received the letter and consented that the money should remain with his uncle in accordance with the terms and conditions of the letters. The uncle died without having paid over to his nephew any portion of the said $5,000 and interest.

**Holding**: Yes. There was consideration and it was a binding contract.

**Reasoning**: The trial court found as fact that there was an agreement, which Jr. performed. D said there was no consideration and the contract was invalid, because the P benefited from terms of agreement (abstention, etc.); unless D-promisor also benefited, there was no consideration. Consideration in 1875 was defined as “some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss...suffered or undertaken by the other.” A waiver of legal right at request of another party suffices.
Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom in the future as an inducement for the promise of the first. Thus it is sufficient that Jr. restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle’s agreement.

**Pennsy Supply Co. v. American Ash Recycling Corp. of Pennsylvania**

**Issue:** Did Pennsy’s relief of American Ash’s legal obligation to dispose of a material classified as hazardous waste suffice as consideration to form an enforceable contract?

**Facts:** PA school district entered into construction contract with Lobar, Inc. Lobar, in turn, subcontracted the paving of driveways and a parking lot to Pennsy. The contract included project specifications for paving work requiring Lobar, through Pennsy, to use certain base aggregates and permitted substitution of aggregates with alternate material. The specs also included notice to bidders of the availability of the substitute AggRite at no cost from American Ash. Pennsy contacted AA and requested 11,000 tons of AggRite; Pennsy picked up the AggRite and used it according to the specifications. Pennsy completed its work in Dec. 2001; the pavement developed extensive cracking in Feb. 2002; the district notified Lobar, Lobar directed Pennsy to fix the work, and Pennsy performed the remedial work during summer 2004 at no cost, as well as the removal and disposal of AggRite. AA did not remove or dispose of the AggRite. Pennsy alleged that the work cost $251,940.20 to perform, and $133,777.48 to dispose of the waste.

**Holding:** Yes, there was consideration and a contract.

**Reasoning:** We disagree with the trial court that the allegations of the complaint show only that American Ash made a conditional gift. AA provided AggRite in order to avoid $1000s in disposal costs it would have otherwise incurred. AA induced Pennsy to assume the detriment of collecting and taking the title to AggRite; this detriment induced AA to make the promise to provide free AggRite. The bargain theory of consideration does not actually require that the parties bargain over the terms of the agreement; promise and consideration must simply be reciprocal.

(iii) Benefit/detriment test: Consideration is the hinge of the bargain, w/ party offering something in consideration for something else (performance doesn’t have to actually be benefit to promisor; benefit to promisor OR detriment to promisee will suffice)

- Restatement appears to agree with *Pennsy* that actual negotiation is not required; in the vast majority of real-world vases, it will be unnecessary to worry unduly about whether a benefit/detriment or a bargained-for-exchange test for consideration is used, b/c the ordinary commercial contract will pass both tests easily
- The law regards the making of a non-illusory promise as sufficient legal ‘detriment’ to bind the promisee to perform a return promise of his own, under benefit/detriment test
- Restatement §79: If there is consideration according to §71, there is no need for old stuff like benefit/detriment or adequacy
(iv) **Functions of legal formality:** 1) Evidentiary function—to provide evidence of existence, purport of contract in case of controversy (e.g., writing, notary certification, stipulation); 2) cautionary function—to act as check against inconsiderate action; 3) channeling function—to mark/signalize enforceable promise; simple, external test of enforceability

(b) **Applying Consideration**

**Dougherty v. Salt**

**Issue:** Did the promissory note recitation count as consideration?

**Facts:** P, an 8-year-old boy, received from his aunt, the D’s testatrix, a promissory note for $3,000 payable at her death or before. On the printed form were the words “value received”. The aunt was visiting her nephew and said she was going to take care of him at that moment. The boy’s guardian, a witness for the ward, said she produced the note for his aunt at her request; it was signed. The aunt gave her nephew the note and said, “I have signed this note for you. Now, do not lose it. Some day it will be valuable.”

**Holding:** No. Therefore it was not an enforceable contract, it was a promise for a gift

**Reasoning:** Inference of consideration has been so overcome and rebutted as to leave no question for a jury. This is a case where the testimony in disproof of value comes from the P’s own witness. The note was the voluntary and unenforceable promise of an executory gift. There was no debtor/creditor relationship, just a gift. The formula of the printed blank was, in the light of the conceded facts, erroneous in itself.

(i) **Legal effect of a promissory note:** Would probably have no more success with a modern judge than it did with Judge Cardozo in 1919 (pretense of bargain; false recital of consideration so it’s just nominal, are not enough)

- Could client confer enforceable right on relative w/ sealed promissory note?
  - Varying effect according to jurisdiction
    - UCC abolished significance of seal in sales of goods; Restatement has rule for seals on instruments, but only where statute has not weakened it
- Property law says once gift has been executed, it is irrevocable
- Testamentary gift could be useful, since absence of consideration for the gift would be legally irrelevant, but it needs signing and witnessing, and debts to estate take precedence
- Gift in trust often used to create beneficiaries who gain control of money later

**Batsakis v. Demotsis**

**Issue:** Does mere inadequacy of consideration void a contract?

**Facts:** P sued D to recover $2,000 w/ 8% interest per annum due to an instrument from Apr. 2, 1942, stating: “I received today from you…$2,000…which I borrowed from you for the support of my family…and because it is impossible for me to transfer dollars of my own…I accept with the expressed promise that I will return to you again in American dollars either at the end of the present war or even before in the event that you might be
able to find a way to collect them...from my representative...to whom I shall write and give him an order...an eight per cent interest will be added and paid together with the principal.” P agreed to this and lent defendant 500,000 drachmae, which amounted to $25

**Holding:** No; inadequacy of consideration does not void a contract.

**Reasoning:** From D’s testimony it was clear that the parties’ understanding was that P would give D 500,000 drachmae if she would sign the instrument. The transaction amounted to a sale by P of the 500,000 drachmas in consideration of the execution of the instrument sued on, by D. It is not contended that the drachmas had no value; the trial court placed a value of $750.00 on them. Therefore the plea of want of consideration was unavailing; it amounts to a contention that the instrument never became a valid obligation. Mere inadequacy of consideration will not void a contract.

*Plowman v. Indian Refining Co.*

**Issue:** Was there consideration for the deal in question? Did VP have authority?

**Facts:** Ps attested that in 1930 D made separate contracts to pay each employee monthly sums equal to half the wages formerly earned for life; each claimant had been employed for years at fixed wages, hourly but sometimes payable monthly, but the firm needed to cut back due to business conditions. The VP and general manager of the refinery called the employees into their office and gave them the deal. Ps argue that consideration was the relationship then existing and the desire to provide future welfare. The only req. for the employees was that they would come to the office for the checks each pay day. Most employees were in group insurance, covered half by the employee as deducted from monthly payments, and half by the company. Payments made until June 1, 1931, when they were cut off, and the arrangement ended. D testified that the arrangement was included in a letter sent to employees about reducing the workforce due to business conditions requiring min. emps. There was no evidence of anything about natural life.

**Holding:** No. No contract. Just a gratuitous revocable arrangement. No authorization.

**Reasoning:** Even assuming the life fact is true, there was no authorization. The claim that the payments ratified the action is dubious and cannot create estoppel to deny authority. There was no ratification of the action. For consideration, the longtime service of employees is relied on by the Ps, but a past or executed consideration is a self-contradictory term. The morality of a promise does not lead to consideration, nor does Ps’ willingness to come to collect. W/o consideration there is no contract.

(ii) **Principals and agents:** If an agent has ‘actual authority’ to enter into a contract on behalf of the principal, the principal is bound by the agent’s actions in the same way as if the principal had engaged in those actions himself; the agent is not a party as matter of law

- Even in the absence of any actual authority, a principal may be legally bound by the acts of its agent if the principal has done/said something that leads the other party reasonably to believe that the agent has actual authority to do the act in question (apparent authority)
- Even if agent has no authority, a principal that later learns of agent’s action and approves of it will be liable due to ratification
III. UCC ARTICLE 2 CONTRACTS

(a) Mutual Assent Under the UCC

(i) **Goods definition:** Article 2 of the UCC deals with transactions in ‘goods’ generally defined as: Any tangible, moveable property, such as a car or a computer; this does not cover contracts for the sale of real estate, contracts to provide services, or contracts to lease goods; does not cover contracts involving patents, trademarks, or other intellectual property

- UCC Article 2 applies to consumer-consumer and consumer-merchant sales

**Jannusch v. Naffziger**

**Issue:** Was the agreement at hand a contract for sale of goods or business?

**Facts:** Ps operated Festival Foods from Apr. to Oct. each year. Their assets included a truck, trailer, fridges/freezers, chairs, lighting, etc. Ds wanted to purchase the business, met with Ps, and observed it in operation. On Aug. 13, 2005, P testified they entered into oral agreement to sell FF to Ds for $150,000, including the truck/trailer, necessary equipment, and opportunity to work at events gotten by Ps. Ds paid $10,000 immediately, with the balance to be paid upon securing a loan. Ds took possession of FF on Aug. 14 and operated for the rest of the season with insurance and titles still in P’s name because of the outstanding balance. P attended the first of D’s events, and D paid him wages/lodging for advisory services. After the end of the season, Ds returned FF to the storage facility formerly used by P; P said he’d canceled the lease with the facility; the facility called P; P attempted to sell FF and failed; Ds said the FF income was lower than they expected, that P asked them to run certain events but ran ones where he himself was present. D said P asked for his trailer back but didn’t have the money for inventory.

**Holding:** It was a contract for sale of goods, one whose essential terms were agreed on

**Reasoning:** Ds argued the UCC shouldn’t apply because the case involved the sale of a business, not just goods; the Court applied the “predominant purpose” test for scope in Article 2, saying that this was predominantly a contract for the sale of goods. The essential terms were agreed upon in this case. The purchase price was $150,000, and the items to be transferred were specified. The only action remaining was the performance of the contract. Ds took possession of the items to be transferred and used them as their own. The fact that Ds were disappointed in the income is not inconsistent with the existence of a contract. It is not necessary that parties share a subjective understanding as to the terms of the contract; conduct can indicate agreement. Governed by UCC §2-204.

**E.C. Styberg Engineering Co. v. Eaton Corp.**

**Issue:** Was Eaton’s small purchase order evidence of a larger contract to purchase, in the context of continuing negotiations toward that larger contract to purchase?

**Facts:** In Aug. 1998, Styberg began selling prototype I-brakes to Eaton; in Nov., Eaton began buying limited quantities of I-brakes to test the product in the marketplace. In
1999, the parties started negotiating for Styberg to make large quantities of I-brakes for Eaton. Styberg’s rep. kept in contact with an Eaton engineer and buyer. On May 27, 1999, Eaton engineer sent Styberg an email expressing Eaton’s willingness to make a minimum purchase—13,000. On Jul. 8, 1999, Styberg sent Eaton’s buyer a proposal for a 60,000 unit order, with a price quote for the first 13,000 units, including conditions for reevaluation of price/delivery rates and money to help Styberg get more capital, etc. On July 16, 1999: Styberg wrote: “Quote was received. We have the 13,000 order!” On Jul. 22-23, Eaton’s engineer visited Styberg and met with the VP for manufacturing. The VP asked the engineer for Eaton to make a commitment to buy 60,000 or 20,000 + capital investment; the Eaton engineer did not respond to the request; on Jul. 26, he emailed Eaton’s buyer saying Styberg indicated a need larger than 13,000 before they could increase production capacity. On Jul. 29, 1999 Eaton’s buyer wrote to Styberg with a $293K tooling investment and 13,000 minimum commitment; on Aug. 9, 1999: Styberg told Eaton’s buyer “thank you” but he testified later that he still needed more commitment. On Sep. 1, 1999 the two companies had a conference call. On Sep. 9, 1999 Styberg sent Eaton a production schedule plus a 13,000 price quote. On Sep. 27, 1999 Styberg left a message for Eaton’s buyer, but didn’t speak to her. Eaton did not issue a specific purchase order for the 13,000, but Styberg contended that Eaton told him to use existing purchase order. Styberg did not send Eaton a purchase order acknowledgment. In Apr. 2000 Eaton told Styberg it expected delivery of 240 units; Styberg shipped the units under an existing purchase order. On May 8: Eaton requested 240 more, but cancelled.

**Holding:** No. Negotiations were still ongoing with essential terms yet to be agreed on

**Reasoning:** Nothing in the Ohio or UCC codes eliminates the requirement for specific essential terms, including quantity and price. While Styberg identified three possible sources for a contract with such terms (the Jul. 29, 1999 letter, the Sep. 9, 1999 schedule, the spring 2000 request for I-brakes), the Court of Appeals found that none of these gave evidence of acceptance for the 13,000 minimum order. In previous case law, a price quotation is considered an invitation for an offer. Also, while a previous case required the buyer to accept full amount of merchandise because he had submitted a purchase order, in this case Eaton didn’t submit the full 13,000 order.

(ii) **Covenant for the International Sale of Goods (CISG):** Intl. equivalent to Article 2 of the UCC
- **Scope:** CISG applies only to those transactions that come with the scope of its provisions; applies to goods, but is significantly different from UCC
- CISG applies to goods contracts when parties have places of business in different countries that are signatories to CISG; but contract between, say, U.S. subsidiary of Chinese company and U.S company, does not come under CISG
- CISG excludes consumer transactions
- Parties to intl. contract can by contract agree that CISG does not apply; under UCC parties do not have power to exclude application of UCC entirely
(b) Irrevocability by Statute

§2-205: Firm offers, irrevocability by statute determined by six-part test
- Direct contradiction to common law, where offeree is empowered to accept unless offeror revokes

(c) Qualified Acceptance — Battle of Forms

Princess Cruises, Inc. v. General Electric Co.

**Issue**: Was the GE-Princess transaction a contract for the sale of goods within the scope of the UCC? Should courts draw on UCC or common law principles when assessing the formation of a maritime services contract?

**Facts**: Princess and GE entered into a contract for inspection and repair for Princess’ cruise ship. Princess scheduled the boat for services in Dec. 1994 and requested that GE perform services and provide parts. Princess issued a purchase order w/ proposed contract price of $260K and a description of services to be done by GE, along with T&C stating GE could accept through acknowledgment or performance.

On same day GE received purchase order, GE faxed a price quote to Princess, providing a more detailed description and work/materials list with a lower price. GE reviewed Princess’ purchase order and discovered that Princess requested work not contemplated by GE. On Oct. 28, 1994, GE faxed a final price quote to Princess, offering to provide all services, labor, materials for $232K. This quote had GE’s T&C which rejected Princess’ and limited GE’s liability for defective/damaged goods and claims. In a phone call, Princess gave GE permission to proceed based on price in GE’s final quote.

On Nov. 1, GE sent confirmatory letter to Princess acknowledging receipt of purchase order and expressing intent to perform services, restating $232K offering price and specifying GE’s terms/conditions governing contract. When boat came for inspection GE noticed rust on the rotor. GE messed up in the repair, causing delays and a cruise cancellation as well as further need for repairs. Princess paid GE full $232K, though.

Princess filed suit against GE. District court instructed jury on UCC §2-207, allowing it to imply warranty of merchantability, fitness for particular purpose, workmanlike performance, right to recover. Jury returned a $4.57 million verdict for Prin.

**Holding**: No, it was not a contract for sale of goods under the UCC. It is undecided whether courts should use UCC or common law for maritime service contracts.

**Reasoning**: The district court erroneously applied the UCC instead of the common law, saying that the UCC applied to maritime law. The Court disagrees under the predominant purpose test. Though the UCC applies to some mixed goods/services contracts, Coakley v. Williams provides 3 ways to determine the limit: 1) language of contract, 2) nature of supplier’s business, 3) intrinsic worth of materials. The transaction was mostly about services with incidental parts. The language of the purchase description requests a “service engineer”; and the final price quote is clearly one for services. The nature of GE’s business, which provided the quote, was mostly services. The cost of materials was
blended into the final services price, showing services dominated. Also, the complaint arose out of deficient services. The final price quote from GE changed Princess’ price and terms and was thus a counter-offer accepted by Princess by performance of paying $232K. Though the parties never discussed the differing terms between the purchase order and the price quote, Princess manifested assent. Jury’s award was derived from the purchase order, which is inconsistent w/ the limited liability in the final price quote.

(i) Common law mirror image rule: Offer and acceptance have to match (Restatement §58); unless acceptance is mirror of offer, offer is rejected

(ii) Common law last shot rule: Doesn’t make any difference how many times forms go back and forth; many jurisdictions say the last form is the one that matters; rejected by UCC

_Brown Machine, Inc. v. Hercules, Inc._

**Issue:** Did the parties agree to an indemnification provision in their contract for sale?  
**Facts:** Brown Machine sold Hercules a T-100 trim press. Negotiations began in Oct. 1975. Hercules engineer asked Brown sales manager to send Hercules a price quote. Brown submitted a proposal to Hercules describing the machine to be sold. Attached was a printed form captioned “TERMS AND CONDITIONS OF SALE.” The 8th paragraph said the purchaser would pay on Brown’s behalf any sums Brown would be liable for due to bodily injury or property damage resulting from use/misuse of the item. Hercules’ purchasing agent reviewed Brown’s proposal and phoned Brown’s sales manager, had prepared purchase order but objected to payment term requiring 20% deposit with order. Brown told Hercules that Brown could not waive the deposit, and an invoice for payment would be forwarded to Hercules. Brown issued work order for equipment, saying there was a verbal purchase order. Brown then received 2 copies of the written purchase order according to all but one prior machine specification. The purchase order also contained no indemnity provision in its T&C. Brown did not return an acknowledged copy to Hercules but rather sent an order acknowledgment, setting out its own original terms and conditions. Hercules responded with a letter saying that all provisions save for one on trim were correct. Brown confirmed the change and informed the shop of the change to be made to the machine. Hercules never paid the 20% deposit but did pay the agreed-upon purchase price. Miller, emp. of Hercules, sued Brown because of injuries from operating. Brown demanded that Hercules defend but they refused. Brown eventually settled and then sued for indemnification, claiming condition of original sales contract.  
**Holding:** No, they did not  
**Reasoning:** Article 2 does not define the term “offer” so the common law, when “offer leads the offeree to reasonably believe that an offer has been made,” is still relevant. The general rule is that a price quote is not an offer, but rather an invitation to enter into negotiations or a mere suggestion to induce offers. If detailed enough, though, they can amount to an offer creating power of acceptance. It must appear from the quote that assent is all that is needed to ripen into a contract. In this case, though, Hercules could not
have reasonably believed that Brown’s quote was intended as an offer (many provisions showed that no firm offer existed). Also there was no timely acceptance (price quote expired before phone conversation). If the acceptance of a price quote is not binding, then the purchase order is treated as the offer.

The question then arises whether Brown’s acknowledgment of the indemnity provision constitutes a counteroffer or acceptance with different terms. UCC § 2-207 says that an offeree’s response to an offer operates as valid acceptance of the offer even if it has different terms, unless acceptance is made conditional upon original offeror’s assent. There is nothing in Brown’s acknowledgement that reflects its unwillingness to proceed unless it obtained Hercules’ consent to the changed terms. Thus Brown’s acknowledgment did not operate as a counteroffer, but as acceptance of a purchase order that limited acceptance to the terms of the offer, which did not include the indemnity provision. Hercules’ final assent was to machine specifications, not terms and conditions of sale. There was no express consent to indemnity.

(iii) UCC § 2-207 and the mirror image rule: UCC §2-207 ameliorates the strict “mirror image” approach to contract formation, permitting nonmatching communications to form a contract if the parties apparently intended they should
- Courts have differed on when acceptance should be treated as expressly conditional and therefore function as a counteroffer
- § 2-207(2) provides for additional terms becoming part of contract when both parties are merchants and the terms in question are not “material”
- If both parties are merchants, a proposal to limit liability will become part of a contract unless excluded in §2-207(2) when other party objects to future changes
- Comment to §2-207(2) has examples of non-material terms

(iv) Effective assent to a counteroffer as conditional acceptance: Conduct alone should not suffice for assent to expressly conditional acceptance
- In the absence of real assent, actions including shipment and receipt of goods can establish contractual relationship under § 2-207(3)

(v) Statutory interpretation (additional or different terms): §2-207(1) mentions add./diff. terms while §2-207(2) addresses only additional terms as possibly becoming part of contract. Many courts read the omission of “different” terms in (2) to mean that different terms in acceptance or confirmation drop out altogether and cannot become part of contract
- But Comment 3 begins by stating add./diff. terms are covered by (2)
- Knockout approach: Some courts deal w/ situations where standard form offer has a term—e.g., seller’s limitation of warranty to 90 days—and standard form acceptance by a buyer of an unlimited warranty; under the knockout approach, both terms would drop out and the duration of the warranty would be determined by Article 2; favors neither offer nor acceptance in disagreement
- Neuters Last Shot rule
(d) Electronic / Layered Contracting

(i) Types of electronic contracting:
   1) **Shrinkwrap**: most logical/historical validity; terms and conditions included in shrinkwrap, telling purchaser to “READ ME FIRST”
      - Common terms: Pay money first, get terms later, read and agree w/ terms, if unhappy w/ terms, return product for refund
   2) **Clickwrap**: Buying product online, right before finalizing transaction, T&C are presented, click = affirmative signal of assent to T&C before order is completed
      - Shrinkwrap terms can be included with a click-wrap-bought product
   3) **Browsewrap**: No need to pass through T&C gate before user can use website
      - Most believe that clickwrap is more objective manifestation than browsewrap

(ii) Easterbrook approach: In *Gateway* line of cases, principle is that seller = offeror (via shipping), and buyer = offeree (via keeping product after seeing shrinkwrap terms); majority

*Hines v. Overstock.com, Inc.*: P sued not just because of $30 restocking fee but because arbitration terms mandated going to Salt Lake City, Utah; Court says P never really agreed to arbitrate; terms were *browsewrap* b/c they never popped up and made her pass through them, and there was no asked-for manifestation of assent, no proof of awareness; no meeting of the minds; internet contracting has not fundamentally changed common-law principles
   - Constructive (legal fiction) vs. actual notice—buyer P has no actual or constructive notice
   - No UCC citation in this case despite it being a sale-of-goods case; UCC not relevant even though it applies

*DeFontes v. Dell, Inc.*: Class members mostly complaining about tax company applied to product (sale of goods issue); clause in dispute: Arbitration provision, like *Hines; shrinkwrap*, as opposed to *browsewrap* in *Hines*; consideration in this case: Money for product; Court notes that UCC §2-206 says—Offeror = buyer; Offeree = seller, because order, being offer to buy goods, invites acceptance by seller; this helps the plaintiff tactically because the arbitration clause would = additional terms per §2-207(1), which means additional terms remain outside contract b/c buyer is not a merchant; seller’s acceptance by shipping includes shrinkwrap terms, but these are just proposals for addition to contract
   - Why didn’t buyer accept terms by keeping product? B/c not fair to buyer; before UCC, w/ last-shot rule, *Dell* would have had shrinkwrap T&C become binding
      - But this court talks about the modern trend, w/ Judge Easterbrook and the *Gateway* line of cases, where principle is that seller = offeror (via shipping), buyer = offeree (via keeping product after seeing shrinkwrap terms)
   - 2-207 not needed b/c no battle-of-the-forms. More classical approach; offer = T&C, acceptance = not returning
IV. LIABILITY IN THE ABSENCE OF BARGAINED-FOR EXCHANGE

(a) Promises Within the Family

*Kirksey v. Kirksey*

**Issue:** Did breached familial promise have consideration? Was it thus breach of contract?

**Facts:** P was wife of D’s brother, but had for some time been a widow. She had several children. In 1840, P resided on public land, under a contract of lease she had held over, and was comfortably settled. D resided in Talladega County, 70 miles away. On Oct. 10, 1840, D wrote to P a letter, which said he had heard of his brother’s death, advising her to get a preference on her land and come to live with him on his land with her children. In a month or two, P abandoned her possession w/o disposing of it, and went to D’s residence. D put her in comfortable houses and gave her land to cultivate for 2 years, at the end of which he told her to move, put her in house in the woods which he then kicked her out of.

**Holding:** No, therefore no

**Reasoning:** One justice thinks the loss and inconvenience experienced by P is sufficient consideration to support the promise to furnish her with a house and land to cultivate until she could raise her family. But others think D’s promise was a mere gratuity, and an action will not lie for the breach. Thus the lower court’s judgment is reversed

*Harvey v. Dow*

**Issue:** Can promise of land, not explicitly said and lacking consideration, be enforceable?

**Facts:** Ds are parents of P. Ds own 125 acres of land in Corinth in 2 adjoining parcels, one 50 acres and the other 75 acres. They and P and their son each have homes on the property. P and her brother had always talked about the houses they would like to build there. Ds saw the land as their children’s heritage that would be left to them. D said that when the children were teenagers, he believed that D had promised them some land in the future, and the subject was commonly discussed in the family. The Superior Court found that the Ds had a general, non-specific plan to transfer land to P at an undetermined time.

In 1999, P and her future husband installed a mobile home on the land with their permission near her brother’s. She did not pay rent or ask for a deed. In 2003, D and husband decided to build a house on the lot. At P’s request, Ds agreed to use their home equity line of credit to finance the house. P testified that part of the plan for repayment involved having them convey the site to her by deed when the house was completed. Same year, D’s husband died in a motorcycle accident. P decided to finance house w/ life insurance instead.

Before construction began, P and D went to get a building permit from the town. P testified that D told her he would execute a deed to her for the property after the house was built. D disagreed. Construction began and was completed in 2004 at cost to P of $200K. D did a lot of construction. In 2004 P lent $25K to her brother, and the family relationship began to deteriorate over repayment of this loan. P sued her brother for the
money and Ds filed a grandparents’ rights action to see P’s children. After moving into new house, P began to ask D for a deed to obtain a mortgage to finance other projects. It became clear the Dows would not do deed. At time of trial, P was paying taxes on house

**Holding:** Yes, if promisee foreseeably relies on promise and improves land based on it

**Reasoning:** P says that Ds, having made general promises and then assenting to her building a $200K house on their property, are estopped from asserting she has no rights to the land. The Superior Court said these promises were too indefinite to enforce b/c there was no agreement on basic elements of an agreement.

Promissory estoppel applies to promises that are otherwise unenforceable, and is invoked to enforce those promises. The court cites Restatement §90(1). Here the record supports the trial court’s finding that although general promises were made, they did not make an express promise. However, the evidence included the Dows’ acquiescence, support, encouragement of P’s construction of a house on the land, as well as the application of §90 to P’s motion for findings of fact. In promissory estoppel, the promise relied on by promisee “need not be express but may be implied from a party’s conduct.” For the land on which P’s house is, a promise from D could be implied. Since there is now an immobile asset on the land, and P improved the land based on reliance on D’s promise, refusal to enforce promise to make gift would be fraud upon P. A promise is thus enforceable despite a lack of consideration.

(b) Charitable Subscriptions

(i) Consideration vs. gift: If the bargain theory of consideration is designed to distinguish gifts from exchanges, charitable gifts will fall on nonenforcement side of the line; in many charitable cases, courts have found consideration in the subscriber’s promise, but the consensus is that these are unconvincing, reflecting a desire to uphold a gift more than a genuine finding of bargain

**King v. Trustees of Boston University**

**Issue:** Was the evidence sufficient to submit the question of charitable pledge to the jury?

**Facts:** A jury determined that MLK Jr. made a charitable pledge to BU of certain papers he had deposited with them. P, as MLK’s administratrix, appealed from that judgment, saying that the estate and not BU held title to the papers, which had been there since being delivered there at MLK’s request in 1964. In 1963, BU had commenced plans to expand its special collections. The director began efforts to get MLK’s papers. King, alumnus, was one of the first people they asked. He decided on BU in order to keep his papers safe from the turbulent South. He sent a letter to BU which named them the Repository of his letters, as well as some awards and other artifacts. He authorized the removal of most of the objects to BU, and stated his intention that after the end of each year, more materials should be sent to BU. All papers would remain his legal property until otherwise indicated but absolved BU of liability for damages if they took scrupulous care. He intended each year to indicate a portion of the materials to become BU’s outright
property as an absolute gift until all were given to BU. In the event of his death, all such materials would become BU’s property.

**Holding:** Yes, there was

**Reasoning:** A charitable subscription is ‘an oral or written promise to do certain acts or to give real or personal property to a charity or for a charitable purpose.’ Enforcement requires a promise to give some property to a charitable institution and consideration or reliance. To determine whether the case was properly submitted to a jury, the Court considers whether there was evidence to sustain conclusion that letter had promise for gift, and whether there was consideration or reliance. P said the promise to designate materials absolute property of BU each year was not enforceable b/c there was no bargained for exchange; it was a unilateral and gratuitous mechanism. The Court disagrees, saying letter showed intent to give personal property for charitable purposes, at the latest, by the time MLK died. P says there was no promise, simply a statement of intent, but the Court uses a bailor-bailee relationship to establish BU’s claim. Bailment is est. by ‘delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions…’ The bailee, having to take scrupulous care of the property, can be viewed as offering security for the promise to give a gift of the property, and thus evidence of intent by donor to be bound. BU’s further actions, incl. indexing, went beyond scrupulous care and constituted reliance on the gift.

(ii) Courts’ rejection of Restatement (Second) §90(2): “A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance”; despite rejecting §90.2, courts have generally been sympathetic to claims of charitable orgs. in enforcing pledges

- Comment b to §90 suggests that whether a promise should be enforced may depend in part on ‘the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met

(c) Promises in a Commercial Context

*Katz v. Danny Dare, Inc.*

**Issue:** Did D make a promise to P on which P acted to his detriment?

**Facts:** P began to work for D in 1950 and continued to do so until 1975. D president was the brother of P’s wife. P worked in many positions though he was not a board member at the time of his retirement. In Feb. 1973, Katz was opening a store operated by D and placed a bag of money on the counter. A man walked in, picked up the bag, and left. When P followed him and tried to get it back he was struck in the head, hospitalized, and returned to work with some difficulties. His walk was impaired and he suffered memory loss. D president testified to mistakes P made at cost to D. Pres. decided he would have to work out pension to induce P to retire; P’s earnings were $23,000 per year. Pres. started to
talk w/ P about retirement but P said he wanted to work. P was 65 and felt he could continue, but pres. said he was more liability than asset and continued negotiating w/ P for 13 months. Pres. first offered P $10,500 per year pension but P refused. Then pres. sent P a letter to show how P could get more take-home pay by retiring than working. He proposed a pension of $13,000 per year, which would be in addition to SS benefits and part-time employment of $2,250 (somewhere else). Pres. testified he sent this letter to get P to retire. P acceded to the offer of $13K per year for life, and on May 22, 1975 the board of D unanimously approved resolution to that effect. P retired at the age of 67 and D began paying the pension biweekly. P said he relied on D’s promise to pay the pension when he decided to retire. Pres. testified at the time the res. was passed, the board intended for P to rely on the res. and to retire, but P would have been fired if he had not retired. In fall 1975, P began working for another company part-time, and then also part-time for D. In Jul. 1978, D sent a semimonthly check for $250 instead of $500. P sent the check back and said he needed $500. Then D stopped sending any checks.

**Holding:** Yes

**Reasoning:** There are three elements to be satisfied to invoke promissory estoppel: 1) promise, 2) detrimental reliance, 3) injustice avoidable only by enforcement. The Court says the choice D gave P does not take this case out of promissory estoppel. P voluntarily retired but only after the board had passed the resolution. When Katz retired and gave up $23K/yr, he did so because of a promise made by D and to the detriment of $10K/yr in earnings. Injustice element is present b/c P could not now engage in full-time job to get earnings back which he gave up. This case is like *Trexler’s Estate*, where an employer promised fired employees pension of $50/month, and employees filed claim on his death against his estate for continuation. The court there observed that the employer had been loath to discharge his employees without providing for them, and found reliance by the employers. Here D negotiated w/ P for 13 months, showing hesitation in firing him.

*Hayes v. Plantations Steel Co.* (Rhode Island, 1982): P announced decision to retire in 6 months; one week before his date of retirement, P met with officer of D company, who promised that D would take care of him; after P’s retirement, D paid him pension for 4 years but then stopped b/c of financial conditions and ownership change; trial court ruled that company was contractually bound to pay pension, but Sup. Ct. reversed, holding no consideration or PE b/c P had announced decision to retire before he was given pension

*Aceves v. U.S. Bank, N.A.*

**Issue:** Did D make a promise to negotiate w/ P subject to PE?

**Facts:** P got a loan from Option One Mortgage Corp. in 2006. The loan was evidenced by a note secured by deed of trust on P’s residence. P borrowed $845,000 at initial rate of 6.35%. After 2 years, the rate became adjustable. Initial monthly payments were $4,857.09. In 2008, Option One transferred its interest under the deed to D and designated Quality Loan Service as trustee. In Jan. 2008, P could no longer afford the monthly payments. In Mar. 2008, QLS recorded notice of default. Then P filed for
Chapter 7 bankruptcy, imposing stay on foreclosure proceedings. P contacted U.S. Bank and was told that, once her loan was out of bankruptcy, the bank would work w/ her on mortgage reinstatement and loan modification. She was asked to submit docs to D for consideration. P intended to convert her Ch. 7 to Ch. 13, which allows defaulted homeowner to reinstate original loan payments, pay arrearages over time, avoid foreclosure, retain home. D filed motion in bankruptcy court to lift stay so it could proceed w/ foreclosure. P contacted AH’s counsel and was told they couldn’t speak to her before the motion to lift the stay had been granted. In reliance on D’s promise to work w/ her to reinstate and modify her loan, P did not oppose motion to lift bankruptcy stay and did not seek Ch. 13. In Dec. 2008 the court lifted the stay. Though D and AH had not contacted P to discuss reinstatement/mod., D scheduled P’s home for public auction in Jan. 2009. In Dec. 2008, P sent docs. to AH about rein./mod. Then AH told P that negotiator would contact her on or before Jan. 13, 4 days after the auction. On Dec. 29, P got call from negotiator from AH. AH said to forget about assistance in avoiding foreclosure because the file had been discharged in bankruptcy. In Jan. 2009, AH contacted P again, saying AH had mistakenly not assisted. AH thought P’s loan had been discharged, but P had only filed for bankruptcy. AH said it would reconsider loss mitigation. Day before auction, AH called P’s att’y and said new balance would be $965K, new payments $7,200, and $6,500 deposit. AH refused to put terms in writing. P did not accept. On Jan. 9, the home was sold to D. In Feb., D served P w/ 3-day notice to vacate, and then filed action against her and husband. They left.

**Holding:** Yes

**Reasoning:** In reliance on promise by D to work with her in reinstatement/modification, P did not attempt to save her home on Ch. 13. But D went forward with foreclosure and did no negotiation. To be enforceable, a promise need only be definite enough that court can determine scope of duty; limits of performance defined to assess damages. D agreed to work w/ P if P agreed not to pursue relief in bankruptcy court; this is unambiguous. D discussed *Laks*, a case where D’s promise was not enforceable due to indefinite terms, but that case had a promise for a loan; this case has only a promise to negotiate. This was broken here. P’s reliance on the promise was reasonable, and D reasonably expected her to rely, and it was foreseeable she would. There was detriment; restricting initial access to Ch. 13 increases foreclosure rates. Loss of homes hurts homeowner and family and neighborhood. Ch. 13 bankruptcies do not destroy interests of traditional mortgage lenders. Instead debtors get to cure delinquencies over time

(i) **Success rate of promissory estoppel:** Virtually all jurisdictions have adopted PE, some more than others; it is successful in <10% of cases where it is asserted, one source says; another says 53% of the time

(ii) **Construction in three levels:** Owner → prime/general contractor → subcontractor

- Contract between owner/general = prime contract (owner only has relationship w/ prime contractor, while prime contractor has relationship w/ subcontractor; subcontractor has no relationship with owner)
(d) Limiting Offeror’s Power to Revoke — Pre-Acceptance Reliance

James Baird Co. v. Gimbel Bros., Inc.

**Issue**: Was there a contract? If not, was there promissory estoppel?

**Facts**: D, a NY merchant, knew that the Dept. of Highways in PA had asked for bids for construction of public building. It sent employee to office of Philly contractor who had specifications, and emp. there calculated amount of linoleum required, underestimating by .5. D sent to 20-30 contractors an offer to supply all the linoleum required by the specs at two different lump sums depending on quality. Offers concluded: “If successful in being awarded this contract, it will be absolutely guaranteed...prompt acceptance after the general contract has been awarded...” P got one such letter on the same day D learned of its mistake and telegraphed withdrawal. The withdrawal reached P the same day, but only after it had bid at Harrisburg based on the D price quote. Pub. authority accepted P’s bid, D having written letter of confirmation of withdrawal, received next day. P formally accepted offer 2 days later and, as D persisted in declining to recognize the existence of a contract, sued on breach.

**Holding**: No, and no

**Reasoning**: P's acceptance was too late unless there are circumstances to take it out of ordinary doctrine since offer was withdrawn before it was accepted. Restatement §35. P argues that it was a reasonable implication from D’s offer that it should be irrevocable in case P acted upon it, thus putting it in position in which P could not withdraw w/o loss. But since linoleum was small part of total cost, it was unreasonable to expect loss of it to lose contract on that account. D, on the other hand, understood that contractors would use its offer in their bids, and thus committed themselves to buying linoleum at proposed prices. D must have known the predicament in which the contractors would be put if it withdrew after bids went in. But the contractors did not suppose that they accepted the offer just by bidding. There was no contract between them. Language: “if successful in being awarded this contract...”; “we are offering prices for...prompt acceptance after the contract has been awarded.” Further, an offer for exchange is not meant to become a promise until a consideration has been received, either counter-promise or whatever else. D offered to deliver linoleum in exchange for P’s acceptance, not for its bid, which it was indifferent to. No room for promissory estoppel here. No option either.

Drennan v. Star Paving Co.

**Issue**: Did P’s reliance make D’s offer irrevocable?

**Facts**: P, licensed gen. contractor, was preparing a bid in a school district. Bids had to be submitted before 8pm. P said it was customary for gen. to receive bids of subs by phone on the day set for bidding and rely on them in computing their own bids. P’s secretary received between 50 and 75 subs’ bids for parts of the job. As each bid came in she wrote it on a form. P posted it on a master cost sheet w/ names/bids of subs. His bid had to include the names of subs who were to perform .5% or more of the work. He also had to
provide bidder’s bond of 10% of his bid of $317K as guarantee. Later that day, D said he was bidding for paving work and that his bid was $7,131. He repeated his bid. P listened to the bid over the phone and posted it on the sheet. D’s was the lowest. P computed his bid accordingly, submitted it w/ D’s name. P was awarded the contract. P stopped in D’s office the next day. P met D’s engineer, introduced himself. Engineer told him they had made mistake in their bid and couldn’t do it for that price. P said he expected D to hold. D refused to work for <$15,000. P spent mos. getting + bid, for $11K

**Holding:** Yes

**Reasoning:** D contends no enforceable contract on ground that it made revocable offer and revoked it before P accepted D’s offer. There is no evidence that D offered to make its bid irrevocable in exchange for P’s use of figures in computing bid. No evidence that would warrant interpreting P’s use of D’s bid as acceptance. No option supported by consideration or bilateral contract. Section §90 applies here. D’s offer was a promise. D had reason to expect that if its bid proved lowest it would be used by P. It induced action. Had D’s bid stated it was revocable the Court would treat it that way. It was silent, though, so it’s up to the court. Restatement §45 says: If offer for uni. contract is made and part of consideration requested in offer is given or tendered by offeree in response thereto, offeror is bound by contract, and duty of performance is conditional on full consideration. There is an implied condition that the main offer promises that if part of requested performance is given, offeror will not revoke the offer. Part performance or tender = consideration. Acting in justifiable reliance can also make promise binding, as §90. In a case w/ similar facts §90 should apply to present facts. When P used D’s offer, he bound himself to perform in reliance on D’s terms. Though D did not bargain for this use of its bid neither did D make it idly. D had reason to expect P to rely and also to want him to. D had stake in P’s reliance.

D says bid was based on mistake and it was entitled to revoke. In previous cases, though, mistake was or should have been known by offeree. P had no reason to know that D had made a mistake. D could foresee harm of mistaken bid, had duty to calculate right

(i) **Traynor’s §45/§90 analysis:** Since *Drennan*, a majority of courts have accepted Traynor’s analysis; the revised Restatement also endorses *Drennan* analysis; the *Drennan* line has basic facts entitling P gen. to judgment more or less automatically unless D sub can take the case out of the ordinary by demonstrating additional factors (limitations: express statement of revocability, or inequitable conduct by gen. contractor, such as bid-shopping)

(ii) **Restatement (Second) §87(2):** A majority of courts are willing to apply PE-like analysis to sub offers to gens. based on prime’s reliance on those offers, limiting subs’ power of revocation

*Berryman v. Kmoch*

**Issue:** When offeror makes offer for sale of land, if the offeror, after making offer, sells or contracts to sell interest to another person, and offeree acquires info of that fact before he has exercised his power of acceptance, is the offer revoked?
**Facts:** P landowner’s option agreement was signed by P and addressed to D. The granting clause provided that, for $10 and other valuable consideration, P granted D or assigns an option for 120 days after date to purchase the real estate. The balance of the option set forth the terms of purchase, incl. price and growing crops, water rights, equipment, other provisions. P was the owner of the land. D was a CO real estate broker. 3P learned that P was interested in selling, talked about obtaining option on the land for D. 3P talked to D and D prepared option contract. D and 3P flew to KS where meeting w/ P had been set up. At this meeting the option agreement was signed by P. The $10 was not paid. The next conversation between P and D occurred next month. P asked D to be released from the option. Nothing definite was worked out. P sold land to another person. In Aug., D decided to exercise option and went to make arrangements to purchase. He was informed that land had been sold by P. D recorded the option and called P; this didn’t go well. D tried to exercise option in October. P responded by bringing an action to null/void option.

**Holding:** Yes

**Reasoning:** D says that, though $10 wasn’t paid, he should have had opportunity to prove other consideration, and time spent/expenses incurred in effort to get land. D also argues that PE should have been applied. An option contract must have consideration to be binding. Without that, it’s a mere offer to sell. For PE to substitute for consideration, evidence must show that 1) promise was made so promisor reasonably expected promisee to rely, 2) promisee reasonably acted on promise, 3) refusal by court to enforce would be injustice. Requirements are not met here. This was an option. D himself drew up the contract. He knew no consideration was paid, and it had the effect of a continuing offer subject to withdrawal. There was no special benefit to promisor. D’s acts could not reasonably be expected as result of extending option promise. No basis for estoppel. To be sufficient consideration, a promise must impose legal obligation on promisor.

(iii) Restatement §§42-43 typo: Opinion has the language from §43 put under number 42. While §43 talks about indirect communication of revocation (here, bank telling D that property was sold to 3P), §42 talks about revocation by communication from offeror received by offeree - §42 similar to §36(1)(c): PoA can be terminated by ‘revocation by the offeror’, but §42 builds on §36 (here, in July, P called and told D he didn’t want to exercise option)

*Pop’s Cones, Inc. v. Resorts International Hotel, Inc.*

**Issue:** Could jury conclude that D should have reasonably expected to induce action or forbearance by P based on D’s promise?

**Facts:** D showed P one location for a TCBY vending cart within Resorts Hotel. P said she and D discussed the boardwalk property, which was occupied by The Players Club. P was concerned w/ then-current rental fees, and D indicated that D and Merv Griffin wanted to have P as a tenant, and that fin. issues could be resolved, e.g., through %age gross income. D offered to permit P to operate a vending cart within D free during summer 1994 to test the traffic. The offer was considered and approved by the VP for Hotel Ops at
D. There were more meetings w/ D, and P contacted TCBY’s corp. HQ about a franchise site change. In July P opened the cart, and TCBY gave P initial approval of site change.

In Jul./Aug., P drafted written proposal about leasing the location and hand-delivered it to D. It offered D 7% of net monthly sales for the duration of the lease, for 6 years with a renewable option for 6 years. In Sep., P spoke w D about the proposal and pressed him to advise her of D’s position. P said that P had an option to renew for its current location and needed to tell its landlord no later than Oct. 1. In another conversation, D said D’s proposal was in the ballpark of agreement, 95% there. P admits knowing that D told her that “Belisle” would need to sign off on the deal, but also said that D had told her Belisle would simply follow his recommendation, which was to approve it. Relying on these advice and assurances, P notified P landlord in late Sep. that it would not be renewing its old lease. In Oct., P moved its equipment and put it in temp. storage. P then commenced site preparations including designs for new store and retaining attorney to finalize terms of lease.

In Nov. 1 letter, D general counsel forwarded a proposed form of lease for the location to P’s att’y. On Dec. 1 letter, gen. counsel for D gave written offer of terms on which D proposed to lease the space to P: 3 year term w/ 7% gross revenues as rent or 50K in year 1, 60K in year 2, 70K in year 3, whichever is greater, w/ 3 year renewal option. It also had a “boilerplate” provision and proposed addition to the form lease. It stated: “This letter is not intended to be binding upon Resorts...is subject to...negotiations and the execution of a definitive agreement.” In Dec., P and att'y met with general counsel and VP of D to finalize the lease. D informed P that they wanted to reschedule the finalizing meeting until after Jan. 1 b/c of a public announcement they needed to make. D again assured P that they wanted TCBY on the boardwalk.

On Jan. 30, P att'y got letter requesting confirmation of conversation where D withdrew its Dec. 1, 1994 offer. P said as soon as P heard that D was withdrawing, it undertook extensive efforts to reopen somewhere else. Its original location was not available. They found a new location but did not reopen until July.

**Holding:** Yes

**Reasoning:** PE will be justified if P satisfies burden of demonstrating 4 elements: 1) clear and definite promise by promisor, 2) expectation of reliance, 3) actual reasonable reliance, 4) detriment of definite/substantial nature incurred in reliance. In *Malaker v. First Jersey* (1979), the court found that implied promise to lend unspecified $ was not a clear/definite promise justifying PE. The *Malaker* court sought heightened proof, asking for “express” promise. More recent decisions have sought to relax the strict adherence to *Malaker* for prima facie case of PE. This is esp. true where P does not seek to enforce contract not fully negotiated, but rather damages resulting from detrimental reliance on promises made during negotiations despite failure thereof. Restatement (Second) §90 corroborates this, w/ a comment saying P could recover for losses incurred during negotiation period, but not from prospective losses from failed contract. P here showed that when TP informed PD of P’s option to renew its current lease, PD instructed TP to give notice that it would not renew. It said almost nothing remained to negotiate, and Belisle would sign. It also stored its stuff and retained att'y, + expenses. Clear jury Q.
V. LIABILITY FOR BENEFITS RECEIVED — RESTITUTION

(a) Restitution in the Absence of a Promise

Credit Bureau Enterprises, Inc. v. Pelo

Issue: Was D bound to a K implied in law to pay for his emer. invol. hospitalization?

Facts: Hardin County Magistrate was contacted early one morning by Hospital about patient D. D left his house after an argument with his wife and checked into a motel. Later D phoned his wife and made threats to self-harm and bought a shotgun. D was taken to the Hospital by police who had been advised of his threats. Pursuant to emergency hospitalization procedures in Iowa code, magistrate found probable cause that D was mentally impaired and likely to self-harm. He thus ordered EH and detention in psych unit ≤ 48 hours. During admission D was given hospital relief form and refused to sign. Later a nurse awakened him and told him to sign or else hospital could not insure safety or return of his effects. He read and signed it. It said he was liable for charges not covered by insurance. Then D’s wife filed for invol. hosp. and an order was entered. An evidentiary hearing was held on D’s status. Med. reports were received by referee, who found that D suffered from bipolar for years. It said he would gain from treatment but could not be subject to involuntary hosp. D was released. Hosp. later sought compensation ($2.75K). D refused to pay or authorize his insurance. Hosp. assigned its claim to P for collection. P filed petition in small claims court. P also named the county as D, on theory that D’s county would be liable. P admitted he was hospitalized at hearing but said he made no agreement to pay for services. He said he signed under duress.

Holding: Yes

Reasoning: The dist. court said D had entered into a valid contract to be financially responsible for the bill. In the alternative it said D was liable under theory of contract implied in law or quasi-contract. The Court here reviews statutes saying that an officer may take a person who is believed to be mentally ill and likely to self-harm or harm others imminently to a nearby facility; public or private is okay. Iowa statute says costs assoc. w/ EH at public hospital are paid in the same way as if person had been admitted to hospital pursuant to invol. proceedings. There are no other relevant provisions concerning payment of costs. Patient’s county is liable for costs at state hospital. The county could seek reimbursement from the patient. Where county does not have proper facilities it can provide for such care at county’s expense. Cerro Gordo made none here. No provision requiring payment for private hospital.

Irons v. Comm. State Bank: A contract implied in law is an obligation imposed by the law without regard to either party’s expressions of assent either by words or acts. These contracts don’t come from bargaining but from a legal fiction about unjust enrichment/restitution. A modern version of “constructive contracts.” Unjust enrichment: one cannot unjustly enrich self at expense of another or to receive property/benefits w/o making compensation for them. Where person performs services for another which are known to and accepted by latter, law implies promise to pay.
Restatement of Restitutions says that one who “officiously” confers a benefit on another is not entitled to restitution, since conferee did not accept under free will. There are certain exceptions, though. If person refuses to accept necessary services but is insane or not otherwise competent, person rendering services is entitled to recover. Implied contract theory has been used before for emergency medical services.

D doesn’t challenge hospital referee’s finding that he suffers from mental illness or the facts surrounding his hospitalization, or that $2.75K was the reasonable cost of services. He says he has no duty to pay because he did not ask to be hospitalized and did not benefit, though. He says this is true because the referee found no further authorized hospitalization. The Court disagrees. His opinions here are irrelevant. He lacked sufficient judgment. It also medically benefited him. Express contract based on D’s later signature not necessary to consider.

(i) Restatement of Restitutions §§107, 116: Person interfering unofficiously w/ intent to charge is entitled to compensation for services even if 1) providing them w/o other’s knowledge or consent, 2) to prevent serious bodily harm such that 3) provider had no reason to know that the other would not consent if mentally competent, and 4) it was impossible for the other to give consent due to mental impairment, and even if they could, it would be immaterial
- Not designed to compensate Good Samaritans
- In conjunction w/ Restatement of Restitutions §107(1): Person of full capacity who, pursuant to a contract, performs services, is not entitled to compensation outside of bargain terms; one who requests services bargains to pay (w/o mitigating circumstances)

(ii) Contract implied in fact: Lack of oral/written agreement but conduct shows understanding that payment will be made for services (it is an agreement that meets all the requirements of a contract except it’s implied rather than express)
- Essentially a real contract w/ expectation damages

(iii) Contract implied in law: Legal fiction not necessarily incl. factual predicate for agreement; obligation imposed by the law w/o regard to conduct; not coming from bargaining but from justice/unjust enrichment (see: quantum meruit)
- No real contract w/ only purpose to cause unjustly enriched to return value received

Commerce Partnership 8908, Ltd. v. Equity Contracting Company, Inc.

**Issue:** May a sub recover in restitution from an owner when owner has not paid the gen. contractor for the work performed and the sub has exhausted its remedies against gen.?

**Facts:** Commerce was owner of an office building. It contracted w/ general contractor World Properties, Inc., to perform improvements on property. Equity was the stucco/surfacing sub. Commerce inspected the job weekly, so it was aware of Equity’s work. Equity fully performed its sub w/ reasonable value of $17K. Equity says Commerce failed to pay the gen. the full amounts due for the job. The gen. did not pay Equity. Commerce, in its answer, says it did pay the gen. in full. Equity’s pres. said his company
had indicated at the start of the job he expected payment only from the gen. and not from Commerce. Both the gen. and a Comm. rep. inspected the work as it progressed. After completion, Comm. gave Eq. a list of remedial work. When Eq. asked for part payment, Comm. said they couldn’t do it. W/ no payment, Eq. did not do the remedial work. Eq. sued gen., who declared bankruptcy. Eq. adduced no evidence re: Comm.’s payments to the gen. After Eq. rested, Comm. moved for dismissal on grounds of no implied contract b/c Eq. had argued ‘quantum meruit.’ Comm.’s witness testified that contract price for gen. had been $257K, and identified 3 payments totalling $223K that it made to the gen. It also tried to introduce evidence it had paid $64K to 3 subs not paid by the gen. The trial court sustained Eq.’s objection on ground of relevance

**Holding:** Yes

**Reasoning:** A contract implied in fact is enforceable, based on a tacit promise inferred in whole or in part from the parties’ conduct, not just their words. When oral or written, contract is “express.” Contract implied in fact is not in promissory words w/ sufficient clarity so a fact-finder must examine/interpret conduct. Court should use fair/reasonable standard. Common examples: Person performs service at another’s request or without express request but w/ knowledge and circumstances raising presumption that parties understood/intended that compensation was to be paid. A contract implied in law is not based on finding of agreement, but a legal fiction, obligation created by law in order to prevent unjust enrichment.

Elements of contract implied in law: 1) P benefited D, 2) D knew of benefit, 3) D accepted or retained benefit conferred, 4) it would be inequitable for D to retain benefit w/o paying fair value for it. Recovery possible even where parties had no dealings at all w each other. Unlike a contract implied in fact which requires interaction.

There is a long and confusing history of contract implied in law terminology. D’s attorney understood ‘quantum meruit’ to mean contract implied in fact. P and trial court were proceeding under theory of quasi contract. Thus there was confusion in the courts. The distinction has been blurred between contracts implied in law and fact, since both can apply to the same facts. Enforceability turns on the implied promise, not whether D got something of value. Where there is neither but D still got value, recovery under quasi may be appropriate, if sub exhausted all remedies against gen. but was still unpaid, and owner had not given consideration to any person for improvements made by sub. But the law of quasi doesn’t require the owner to pay twice if the owner paid the gen. in full and the gen. didn’t pay the sub. The contractor w/ whom subcontractor is in privity is always the pocket of first resort. Owner can be liable only where it received a windfall benefit.

Here, Eq. did not prove that Comm. had not made payment to any party for benefits conferred by Eq. This was not an affirmative defense but an essential element of a quasi contract claim by a sub. against an owner. Had Comm. moved for invol. dismissal on this ground, motion should have been granted. Commerce’s attempt to prove it paid $64K to subs directly was relevant. If added to the $257K that Comm. paid to the gen. contractor, they paid more than the total contract price. There was consideration, and unjust enrichment remains an open question since it wasn’t fully litigated below
**Watts v. Watts**

**Issue:** May unmarried cohabitants raise claims based on unjust enrichment following termination of their relationships where one party attempts to retain an unreasonable amount of the property acquired through efforts of both?

**Facts:** P sued D over property accumulated during their nonmarital cohabitation. The case comes to this court before facts have been determined. P asked circuit court to order an accounting of D’s personal/business assets from 1969-1981 and determine P’s share. P rests her claim on theory that (1) she is entitled to equitable division of property under sec. 767.255, (2) D is estopped to assert as defense to P’s claim that parties are not married, (3) P is entitled to damages for D’s breach of express contract or implied-in-fact contract, (4) D holds property under constructive trust based on unjust enrichment, (5) P is entitled to partition of real and personal property pursuant to statutes, secs. 820.01 and 842.01(1), and common law. The circuit court dismissed, saying 767.255 did not apply to unmarried persons. It said legislature should provide relief, w/o further elaboration.

D persuaded P to move in with him, paid for by him, and to quit her job. D indicated to P he would provide for her. Thy began living in ‘marriage-like’ relationship, holding themselves out to public has H/W. P assumed D’s surname. She gave birth to 2 children also given D’s surname. They filed joint tax returns and maintained joint bank accounts. D insured P as his wife on insurance, and took out life insurance on her, naming himself as beneficiary. They purchased real/personal property as H/W, and P obligated herself on promissory notes to lending institutions as D’s wife. P contributed child care and homemaking, and personal property. She served as hostess for D’s events, sometimes cooked and cleaned for D’s employees. She also worked for 4 years part-time at his office as receptionist/typist/bookkeeper. In 1981 D made the relationship so intolerable she had to move out. Then D barred P from returning to the business. P says she never got paid for her contributions and D said to P through words and conduct she was his wife and would share equally in any wealth they got. D has not shared equally or paid her at all.

**Holding:** Yes

**Reasoning:** Sup. Ct. of Wisc. agreed w/ the dist. ct. that the legis. did not intend 767.255 to apply to unmarried couples, but disagreed that courts could not or should not act in cases like this. Courts have traditionally settled such disputes. The Court analyzes each of P’s legal theories. For (1), P asserts that 767.255 is part of chapter on “Actions Affecting the Family” which was changed from “Actions Affecting Marriage.” Legislature failed also to define family. P relied on *Warden v. Warden*, which was factually similar to this case. But most courts have declined to apply marriage dissolution statutes to unmarried cohabitants. The Legislature did not intend 767.255 to extend to unmarried cohabitants. Also 767.255 and other statute were in place before the chapter title change, which doesn’t change the the provisions themselves. Code also in general emphasizes marriage.

For (2), the Court concludes that ‘marriage by estoppel’ should not be applied because the legislature did not intend 767.255 to apply to property div. between unmarried cohabitants. Parties’ conduct should not make this application happen. For (3) Wisc. courts have long recognized importance of freedom of contract, but it won’t be
enforced if it violates public policy. Courts should be reluctant to frustrate P’s reasonable expectations, though, for policy argument.

D attacks P’s contract theory on 3 grounds: 1) recognition of contract would contravene Family Code, 2) legis. should determine prop./contract rights of unmarried couples, 3) relationship was immoral/illegal/against public policy. D relies on Hewitt v. Hewitt, where IL Sup. Ct. said that was true for IL by weakening the integrity of marriage. The Court agrees that Hewitt made an unsupportable leap there, applying public policy too broadly. Also, the IL statutes are distinguishable from WI statutes. In WI there is no fault divorce and no criminal sanction for non-marital cohabitation. WI’s Family Code does not restrict court’s resolution of property/contract disputes between unmarried cohabitants. On D’s 3rd point, courts refuse generally to enforce contracts for which sole consideration is sex, but a bargain between 2 people is not illegal just because there is an illicit relationship between the two as long as the bargain is independent of the illicit relationship, which itself is not part of consideration bargained-for. Result of refusal to enforce contract in cases like this is that one party beats the other while being no more or less ‘guilty.’ P’s quitting her job and abandoning her career on D’s promise may indicate agreement. Also, P’s services during their relationship can constitute adequate consideration independent of sexual relationship. Courts have held that arrangements like P and D’s strongly implies relationship in nature of joint enterprise. Thus P pled facts necessary to state a claim for breach of express or implied-in-fact contract.

P’s theory (4) involves unjust enrichment. D does not attack either legal theory or factual allegations made by P here. Claim like this is grounded on moral principle that one who has received benefit has to make restitution where retaining benefit would be unjust. In WI, there are 3 elements for this: 1) benefit conferred on D by P, 2) appreciation/knowledge by D of benefit, 3) acceptance or retention of benefit by D when it is inequitable for D to retain it. P cited no cases directly, and D had nothing against it. Steffes does have support for P’s position, though. Allowing no relief whatsoever to one party effectively provides total relief to the other. This is contrary to principles of equity. Thus P can have an unjust enrichment claim.

P’s theory (5), asserting claim for partition: Court holds that P alleged sufficient facts to state a claim for statutory or common law partition.

(b) Promissory Restitution

Mills v. Wyman

Issue: Is moral obligation, being a good substratum for express promises, equally good for implied promises?

Facts: P gave D’s son board and nursing services; D’s son had long been estranged from his family, had just returned from a voyage at sea and suddenly fell ill. P relieved him for about 2 weeks. D then wrote to P promising to pay expenses. There was no consideration for this promise, except what came from relation between D and his son.

Holding: No
Reasoning: The rule that a mere verbal promise w/o consideration cannot be enforced by action is universal and cannot be departed from for particular cases. The promise here was made w/o legal consideration. Kindness/services of P were not bestowed at D’s request. Son was not under D’s care and fell sick among strangers, one of whom was a good samaritan. D was transiently grateful and promised to pay, but he is now determined to break this promise. There has to be pre-existing obligation for promise to be morally enforceable. Public policy requires withholding the arm of law from duties of imperfect obligation, instead leaving the breaking of promises to a person’s conscience. Whatever debt a man’s son incurs when he reaches adulthood creates no obligation on the father.

(i) Revival of obligations: The court in Mills declares that moral obligation can → legal obligations in specific situations; if a person was subject to a legal obligation that has become unenforceable, a subsequent promise to honor or revive the obligation will be enforceable at law

(ii) Enforceability of expired debts: The court in Mills says that promises to pay debts barred by statutes of limitations are enforceable because the debt is a pre-existing legal obligation; modern version found in Restatement (Second) §82
- Part payment of principal or interest, delivery of note reflecting debt, transfer of security to creditor, etc., all suffice as conduct implying promise to pay
- Promises to pay debts previously discharged in bankruptcy also legally enforceable (§83); these must be express, unlike §82, which includes implied

(iii) Contracts made by minors: Contracts made before majority are unenforceable unless they are for necessary goods/services; after majority, minor becomes legally liable for K if they affirm

Webb v. McGowin

Issue: Can moral consideration create enforceable promise if the promisor has received a material benefit constituting a valid consideration for his promise?
Facts: Appellant, acting in scope of his employment, was clearing the upper floor of a mill. As he did so he was dropping a pine block from the upper floor to the ground below, as was usually done. The block was 75 lbs. As he did so, he was on the edge of the upper floor. As he started to loose the block, he saw Ds’ testator on the ground directly under where the block would have fallen. Had appellant turned it loose it would have struck McGowin and maybe killed him. The only safe/reasonable way to prevent this was for appellant to hold to the block and divert its direction and fall with it to the ground below. He did this and McGowin was not injured. Appellant got serious injuries, was crippled for life, and became unable to do physical or mental labor. In consideration for A’s life-saving act, McGowin agreed to care/maintain him for the rest of his life at $15/two weeks. This was paid up to McGowin’s death. The payments were stopped weeks after.

Holding: Yes
Reasoning: P-A’s saving McGowin was material benefit of infinitely more value than any $ aid he could have received. McGowin became morally bound to compensate P-A
for the service. Recognizing this, he expressly agreed to pay P-A and complied for more than 8 years. Had P-A been a doctor and McGowin accidentally poisoned, McGowin would have been bound if he had made the same promise. Here the promise is valid and enforceable. Previous case found that promise by D to pay for past keeping of a bull which had escaped from D’s premises and been cared for by P was valid even though there was no previous request (*Boothe v. Fitzpatrick*). On the same principle, a promise to pay for services rendered in saving life would be valid. Life and limb have monetary value, as evidenced by physicians charging for services. The same is true in negligence torts and life insurance. Even though mere moral obligation suffices for subsequent promise to pay for material benefit, the case here is distinguishable because promisor received material benefit constituting consideration for his promise. McGowin’s promise was an affirmation or ratification of what P-A had done raising the presumption that the services had been rendered at McGowin’s request. Also, benefit-promisor, detriment-promissee works here.

(iv) **Material benefit rule**: If a person receives a material benefit from another, other than gratuitously, a subsequent promise to compensate the person for rendering such benefit is enforceable; adopted in Restatement (Second) §86

(v) **Rationales for material benefit rule**: Fuller & Posner argue that promises based on moral obligation are enforceable, based on:
- Fuller: When we say D is morally obligated, we assert the existence of a substantive ground for enforcement; similar reasoning justifies status of exchange contracts
- Posner: When cost of enforcement is low, we should enforce promises where there was material benefit to promisor, even if no fresh consideration

**VI. THE STATUTE OF FRAUDS**

(i) **Statute of frauds and its history**: Failure to comply w/ statute of frauds, even if consideration, makes contract unenforceable
- SoF remained part of English law for nearly 300 years, most of its provisions being repealed by Parliament, but it has become part of the law of every American state
- At time of UCC drafting, courts regarded SoF as obstacle to justice; some wanted it abolished b/c of changes in law and procedure and its unpredictability; UK repealed it in 1954; UCC made its own SoF in §2-201
- In 2003, ALI and NCCUSL prepared revised Article 2, initially proposing elimination of UCC SoF but in the end retaining the text of §2-201 virtually unchanged except to clarify relation between Article 2 SoF and an increase in threshold amount for coverage from $500 to $5,000; b/c of opposition the revision was withdrawn in 2011, so it’s still $500
**Crabtree v. Elizabeth Alden Sales Corp.**

**Issue:** Did P’s employment contract satisfy the statute of frauds?

**Facts:** P sought a 3-year employment contract with D. P was leaving a secure job to enter a new field and wanted the agreement to be for a definite term. D instead offered P a 2-year contract w/ annual salary of $20K for the first 6 months, $25K for the next 6 months, and $30K for the second year. P called the offer “interesting.” D had the offer written down on a telephone order. A few days later, P accepted. He began working and received the first increase after six months, but did not receive the next increase. D’s comptroller and gen. manager each signed a payroll change card to remedy the situation. It was not approved and P left his employment with D.

**Holding:** Yes

**Reasoning:** B/c the contract cannot be performed in under 1 year, it falls under the SOF. It must therefore have a sufficient memo that is signed with the intent to authenticate the terms and evidences the terms. The memo does not have to be one document. It may be multiple if they are linked together expressly or internally by evidence of subject matter and occasion. The Court finds here that the memo written on the telephone order, the payroll change form initialed by D’s gen. manager, and the paper signed by D’s comptroller all refer to the same transaction on their face. These documents all comprised a sufficient memo. It’s fine that they were made after the execution of the contract. They were signed w/ intent to authenticate. They have all the essential terms of the contract, incl. parties, position, salary, minus duration. Unsigned doc. can be read w/ signed writings if they refer to same subject matter or transaction. Parol evidence is admissible for an ambiguous statement like ‘2 years to make good.’

(ii) Statute of frauds tests: 1) If there is a statute, and contract falls within it, and contract is not in writing, it is not enforceable (exceptions exist) (Then look at offer, acceptance, consideration), 2) If contract is covered, is there enough writing to meet the standard (sufficient memoranda)?
   - Exception: Restatement (Second) §110(e): If contract can be performed in less than 1 year, it’s not covered by statute of frauds
   - Writing need not be made at the time of the contract

**Beaver v. Brumlow**

**Issue:** In a verbal agreement to buy real estate, where buyer relies by taking possession and making valuable improvements, and buyer/seller, formerly business associates, do not agree on price, should a reasonable price be implied to prevent an inequitable result?

**Facts:** Buyer Brumlow worked for Sellers for 10 years (1994-2004). In 2000, Sellers bought 24 acres; in 2001, Brumlow asked Beaver if he would sell some of the land to put a home on. Beaver agreed; parties walked boundaries of property in question. Sellers allowed Buyers to rely on representation to Buyers that Sellers would sell. Buyers went into possession of land w Sellers’ consent. Buyer, in reliance, cashed in IRA and 401-K at substantial penalty to pay for home and improvements. They bought double-wide home
and put it on property and improved the home. Beaver signed the application/approval for septic system. Buyers spent $85,000 in reliance. Sellers sought legal advice for how to sell; a survey and contract or note/mortgage was required. Formal documents were not prepared and executed b/c Sellers discovered that their property was encumbered w/ a mortgage containing a due-on-sale clause. Buyers requested contract to be formalized, buyers said they’d “work it out.” A date was never determined, nor was a price, but Brumlow assumed he would pay market price. Sellers never attempted to interrupt Buyers’ quiet possession when they had it. In 2004, buyer gave notice of his termination to work w/ a competitor. Relationship deteriorated and Sellers changed their mind. Sellers tried to restructure agreement as a lease, and tried to terminate the lease and evict Buyers. Sellers prepared and required Buyers to sign an Agreement, requiring Bs to pay Ss $400 per month. Buyers complied, wrote “Land Payment” on checks. Sellers stopped cashing checks, alleged agreement was for rental, even though Agreement had no such terms. Buyers tried to pay fair market value of property and have it surveyed at their expense but Sellers refused. Sellers sought to eject Buyers from property on grounds of violation of rental agreement. They said their occupancy was pursuant to agreement to purchase.

**Holding:** Yes

**Reasoning:** Trial court said that even though there was no written agreement, verbal agreement was clear, cogent, convincing, and part performance by Buyers and Sellers was sufficient to remove it from SoF. Requiring cash payment of fair market value was determined to be a proper remedy. Buyers chose specific performance. On appeal, Sellers said that specific enforcement of oral contract is barred in SoF b/c 1) Buyers’ part performance was not ‘unequivocally referable’ to verbal agreement, and 2) verbal agreement was uncertain, and Buyers had adequate remedy in damages. The CoA disagrees, saying SoF is justified for 3 reasons: 1) evidentiary function, 2) reflection on importance of agreement, 3) easier to distinguish enforceable from unenforceable. Where oral contract not enforceable under SoF has been performed to such extent as to make it inequitable to deny effect, equity can consider contract as removed from SoF and order spec. performance. Sellers concede there is sufficient evidence, but say they didn’t give part performance. Though there is precedent that PP should be of character that makes it unreasonable to presume it was done on anything other than on faith of the presumed contract, the Court says that ‘unequivocally referable’ requirement means that there must be no other plausible explanation. An outsider must just be able to reasonably conclude that the contract actually exists. Taking possession and making improvements are key. Thus there was PP to take it outside SoF. Here, the sufficiency of the verbal agreement can come from part performance by transfer of possession. Finally, land has unique properties not reproducible in money, so specific performance may be what’s necessary.

(iii) ‘Unequivocally referable’ test: Restatement (Second) §129 criticizes the test, instead saying that if party seeking enforcement, in reasonable reliance on K + continuing assent of other party, has so changed his position that injustice must be avoided via enforcement, K must be enforced - Most courts have limited part performance exception to SoF to claims for specific performance rather than damages; Restatement (Second) §129 agrees with this
**Buffaloe v. Hart**

**Issue:** Is a personal check signed by P, describing property involved and containing amount representing partial payment, sufficient to constitute writing under SoF? Is there substantial relevant evidence that P ‘accepted’ the barns and Ds ‘accepted P’s check, taking the contract out of the SoF?

**Facts:** P, a tobacco farmer, rented tobacco and barns from D. The parties did not put the agreement in writing. P had purchased equipment from D and their transactions had never been put in writing. Pursuant to the agreement, D was to provide insurance for the barns in 1988. In October, P paid the rent for the barns and tobacco. P then began attempts to purchase the barns from D. P offered to pay $20K in annual $5K installments but did not offer interest. D accepted the offer. As in their prior dealings, the parties did not put their agreement in writing, but did shake hands. P already had the barns under the rental agreement and did not move them b/c P had agreed to farm D’s land.

P applied for a loan to pay for the barns and indicated to D that he would pay for the barns when the loan came through, but it was denied. The parties then reconfirmed that the installments were to be paid by P. P was unable to obtain insurance coverage for the barns. D agreed to provide insurance for 1989 if P reimbursed for it, which he did.

P gave evidence that he told multiple people of his purchase of the barns, paid for repairs, and made arrangements to sell them. D claims the evidence shows that P made a new deal to purchase the barns with the loan, a deal which fell through when P was unable to get the loan. Further, D says the $5,000 check was left at D’s home by P to entice D to sell the barns for the previous installment agreement.

P placed an advertisement for the sale of the barns, and received offers from several people. D asked P to “straighten up,” which P agreed to in the next few days and indicated that he was selling the barns. D responded that it would “be fine.” P wrote a check to D for the monthly installment and indicated on the check that it was in payment for the barns. D offered P a receipt, but P indicated that the check would operate as the receipt. The following day, D called P to tell him that the barns were already sold and would not be sold to him. P received the check submitted in payment back from D, but it was torn. P later learned that D sold the barns to the same parties P was to sell them to.

**Holding:** No, but yes

**Reasoning:** Trial court jury said there was a contract, and P accepted the barns under the T&C thereof, and D accepted payment under T&C, and Ds later breached it. There was no rental contract. The CoA says b/c the barns are goods, worth more than $500, UCC applies. Ds argue that P’s check fails to meet §2-201 SoF because it was not negotiated or endorsed by Ds and thus Ds’ signature was not on check. A check is sufficient writing if it has writing sufficient to indicate contract of sale between parties, and it is signed by party against whom enforcement is sought, and states a quantity. The only writing in this case is the personal check which does not satisfy this. D’s name is in fact totally absent from it. Oral contract is unenforceable under §2-201.

Ds also argue that part performance exception in §2-201(3) doesn’t apply b/c there was no overt action by P or D, and delivery of check by P to D did not constitute
part payment b/c it was never accepted legally by Ds. The Court disagrees here. For §2-201(3)(c), seller must deliver goods and have them accepted by buyer. Acceptance can be inferred from buyer’s conduct in taking phys. possession of goods. Buyer must deliver something accepted by seller as performance. Thus there is a jury question on what has been accepted. Here, the evidence most favorable to P shows that P told people about purchasing the barns, reimbursed Ds for insurance, paid for improvements, took possession, and got deposits. P also gave check for $5K to Ds, + check was not returned until days later. Reasonable mind could decide there was a K w/ both parties accepting

(iv) **Requirement of writing**: General contract law and UCC have been lenient w/ requirement of signed writing; Revised Article 1 recognizes existence of electronic transactions by creating concept of record, defined as ‘information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form’

(v) **UCC merchant confirmation exception**: UCC §2-201(2) applies only if transaction is btwn. merchants; one merchant must send confirmation of contract in writing within reasonable period
- Paradigm case: Oral contract between 2 merchants in person or by phone, which one or both parties confirms in writing
  - Confirmation must be received by other party; confirmation must be ‘sufficient against the sender’, must show existence of contract, be signed by sender, show qty. of goods; if sender’s confirmation does not meet these requirements, then merchant confirmation exception does not apply
  - If confirmation meets §2-201(2), it complies w/ SoF against recipient even though recipient has not signed any writing showing existence of contract