THEORY OF OBLIGATION

| Theory of Obligation | Agreement with Consideration | Promissiory Estoppel | Unjust Enrichment | Moral Obligation (Benefit Already Received)  |
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| Basic Definition/ Williston | THE LEADING THEORYBargained for DetrimentBargained for:* Given in exchange for the promise; [a process]
* Not a gift/gratuity

Detriments [a thing]:1. Act
2. Forbearance [forbearing from a valid claim only]
3. Creation, modification or destruction of a legal relationship
4. Return promise (both promises have to have teeth; can’t be illusory; must have mutuality)

(Restatement §75 calls this consideration)A promise is enforced if there is a detriment that has been bargained for. | Promise inducing reliancepp. 100-101Promise (Restatement §90)* PR should reasonably expect to induce action or forbearance (detriment or consideration)
* Of a definite and substantial character
* On the part of the PE
* Which does induce such action or forbearance
* Binding if injustice can only be avoided by enforcement
* Remedy may be limited as justice requires

The “inducement” has to be specific—in the strongest case, the PR has some idea of what’s happening and they want it to happenMake sure promise is not a gratuityGenerally: family promises; charitable gifts; or a reasonable belief in a completed contract that somehow fails | Enrichment (usually pretty straight forward, but measurement issues may show up)Unjust for D to retain(may be harder to show):1. Benefit conferred with an expectation of compensation or at least not gratuitously
2. Benefit was NOT thrust upon D without an opportunity to refuse or refine it. (Perhaps by an “officious intermeddler”)

Theory developed to deal with:* No promises made, or
* Contract failed for some reason, or
* Breaching party seeking return of value conferred on non-breaching party (limited circs when breacher can recover—acceptance of work by completed contract )

When services are provided for “free” courts are more likely to see them as gifts when they are personal in nature (such as a friend or family member might do) and not with a professional edge to them. (Common law wife with no rights under divorce law didn’t do well here either.) | Benefit conferred PLUS Subsequent promise to pay for itBenefit:* How definite?
* How substantial?Does the promise help support the reality, nature, and extent of the benefit?
* Is the benefit proportionate to the promise?
* Summary: how definite and substantial is the PR’s benefit and the PE’s detriment?

Promise:* How formal?
* How much time for deliberation btw the benefit and the promise?
* Has any significant part of the promise been performed?
* Has the PE relied on the promise?
* Summary: how clear, solid and reflective is the promise?
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| Fact Patterns | Hardesty v Smith (sale of rights to a lamp, which later turned out to be valueless)Lady Duff-Gordon (mutuality must be present) | Aretha Franklin (pretty equally matched)Hoffman v. Red Owl (franchise company kept leading couple deeper into obligation) (big disparity in knowledge)Knowledge base of both parties (reasonableness and experience)Uncle promises nephew $5K if he gives up smoking, drinking, billiards, cards for 5 years (pre-dates PE theory; nephew’s abstention was treated as “consideration” in classical model; so long, and written letter confirming promise) | Management of Nome Office Bldg (in Alaska). Son doesn’t want to pay manager, who thought he might buy the place.(DeLeon rule about payment plans—for policy reasons enforce that only the actual damages/loss are allowed to the Defendant. Most courts in DeLeonville b/c don’t want to allow punitive damages under contract theory (that’s for torts)Common-law marriage case where no protection under divorce laws | Laborer who injures self to protect patron, a while later patron promises him an allowance; pays allowance for 8 years before dying.Vs.Fighting couple, neighbor saves husband from wife wielding an ax, neighbor injured, husband promises money on the spot, makes 1 or 2 payments and stops |
| Fuller | Substantive Reasons (Why we enforce the K at all)1. Private autonomy
2. Reliance of PE
3. Unjust enrichment of PR
4. Morality of Promising
 | Reasons of Form (How we like to enforce)1. Evidentiary
2. Cautionary
3. Channeling (how you can make enforcement concrete)
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| Remedies/Damages | Expectancy; policy interest in carrying commerce forward; both parties expected completion. Efficient breach (Posner: if the goods end up where they are most valuable (getting the best price), even when paying expectancy damages, then that is the breach being “efficient” in facilitating that; p 400 | Harm to the PE is the focus of this theory, so expect that harm-based remedies apply first (reliance), only expectancy in rare case where there is no other way to monetize the consideration (non-smoking nephew)Remedy maybe limited as justice requires  | Restitution is the focus here (backward looking)Breaching parties can recover too: Contract price minus damages caused by non-completion (no punitive element in contract theory) | Expectancy generally |
| Newell | This is the classical model of consideration | Compared to Classic Consideration:* Detriment need not be “bargained for” (but it must be induced and/or expected)
* Consequences of the promise not quid pro quo
* Promissory estoppel has no application to purely executor bilateral contracts
* Detriment (harm) drives promissory estoppel, so we expect greater degree of harm
* Since harm is the focus , we should expect greater use of reliance damages
 | Compared to classic consideration (RB’s view)* Lack of mutuality
 | A weak unjust enrichment case (no opportunity to refuse) bolstered by a promise to pay (a post-facto agreement when I didn’t have chance to refuse pre-facto)Unlike classic contract theory because: * no-one asked anyone to do anything;
* no initial bargains;
* all based on past detriment
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| Notes/Misc | Mutuality: both sides have to be giving something up (or obligating themselves in some way). Promises exchanged must both have teeth, not be illusory. Per Cardozo, may be a promise to make reasonable efforts to achieve X.Executory Bilateral Contracts: a promise for a promise (Mutuality applies—both must have something they have to do or deliver). | Courts don’t want to support/ compensate relying on a deal before the formalities have been completedIt’s a tough cause of action when the change in position happened before the deal was completed (did P unreasonably jump the gun?) | This theory is also known as: quasi contract; restitution; implied in law contract. | Sequence of the promise and the benefit is backward (no expectation of payment, a more humanitarian quality—and benefitted party has no opty to say no)“mix and match” theories of exchange after the fact with large amount of detrimentThe “lived in” nature of the promise indicates acceptance of obligation by PRThis theory is also known as promissory restitution |

REMEDIES

| Remedy | Expectancy | Reliance | Restitution | Specific Performance |
| --- | --- | --- | --- | --- |
| Purpose | PRIMARY CONTRACT REMEDYPut injured party in as good a position as contract performance would have put them.Keep the market economy moving forward.If we only allowed reliance (which has to be proved) would make people too conservative in contracting.Forward looking.Consequential Damages (perfect expectancy):Hadley rule: lost profits (consequential damages) are only enforceable if they are foreseeable to the other party (tell the performing party; or performing party should reasonably understand the business well enough to foresee impact). Hadley: paying party did not inform performing party of the consequential damages; so not enforceable. In a similar shaft case damages were awarded b/c performing party was a mechanic who understood mill could not function w/o shaft). | Put injured party back into same position would have been in if contract had not been made Includes restitution of $ paid to D, but also other expensesProve damagesFocus on how injured party was hurtLost opportunity reliance and expectancy can merge sometimes (eg. Fee for missed doctors appt)Backward looking | Part of reliance but from the perspective of D. What did D get out of it? How do we give that back.Make whole; restore to position would have been in if contract had not been madeRestore whatever D got out of this.Value by FMV of performance by injured party, not enhancement of assets owned by breacherMay be limited as justice requires (R.2d.)Backward looking | Unusual. Reserved for unique situations.Court looks at “cover” and determines it isn’t appropriate.Often give spec. perf. for real estate, as our historical legal system treats land as unique; regular damages won’t do.Closest thing to perfect performance, aside from time and trouble. |
| UCC Sections | SEE PARALLEL REMEDIES MATRIX | Not a lot in the UCC for these, since it is based on forward-looking, market-moving sensibility. Might look at §2-715 for description of incidental or consequential damages. | §2-716 Buyer’s Right to Specific Performance or Replevin |
| Fact Patterns | Cost of completion v. diminished value (gravel extractors / strip mining on farm v. not putting garage door on house).Diminished value less useful for a unique propertyAsk “is this reasonable”?When evaluating cost of completion via cover, make sure that the two contracts (old breached one, new covering one) are comparableLost volume sellers (requirements):* “Replacement” sale
* 2nd customer would have been solicited—normal market, normal customer, seller not at capacity
* Sale would have occurred
* Seller had ample supply

Seller entitled to profit plus incidentalsIf buyer trades in commodities, it would be hard to trace whether a 2nd sale was a “replacement/ cover”“Consequential” damages usu. suffered by paying party (buyer) (lost profits, for example)Selling parties usu. sue for the money they expected to receive. | Promissory estoppel or simple breach of K where expectancy is problematic in some wayIncidental Reliance (normally Paying party; costs spent on the assumption K would be performed) v. Essential Reliance (normally Performing party; cost of doing the performance, to get the K price) Incidental:* Restaurant remodel completed late, missed holiday season
* Hard to prove lost profits
* Might seek recovery of holiday napkins, menus, etc
* Foreseeability to contractor?
* Can contractor show that Restaurant would not have recouped? Passing business losses along?

Essential:* Garden shed (10K price, 6K done when owner breaches)
* If contractor can prove job would have cost 9K to complete, then should get 7K of EXPECTANCY (6K + 1K profit)
* If can’t prove 9K, might seek 6K as RELIANCE
* Can owner show K was a loser for contractor?
 | 1. Non-breaching P (D has materially breached and due to K terms, P would do better to waive the entire K than seek expectancy, which can do now that D has breached)
2. Non-breaching P (a “losing” K—negative expectancy; since D has breached, P tries to waive K and seek restit). Majority view: allow restit.; Minority view: give % of K price based on % completion by P.
3. Non-breaching P cannot prove lost expectancy (distributor case)
4. P has conferred a benefit but K somehow unenforceable
5. P confers benefit then materially breached (to avoid unjust enrichment-DeLeon case)
 | Things were court has ordered spec. perf.* Real estate
* Controlling shares of a corporation
* Hand-trained roping pony
* Art work
* Custom yacht
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| Discussion | Consider:* What is goal in awarding?
* How do “cost of performance” and “diminished value” attempt to measure damages?
* In each case ask:
	+ What did P really lose? What perf. was actually expected?
	+ What is the difference, if any, in cost of perf. and diminution of value? Why is there a diff?
* There are two separate questions: Should enforce K?
* If so, is remedy to enforce it via cost of completion or dim. Value?

Problems in Expectancy:* Where remedy is hard to measure (vy. Speculative)
* Where P doesn’t like the expectancy—this would have been a bad venture if it had gone forward (P wants to recover by going backward, not forward)
* Expectancy is simply excessive
 |  | Fuller: reliance by PE plus resulting gain to PR is basis for restitution* Can’t prove expectancy but have spent a lot of $ so trying to recover something
* We don’t like expectancy results, let’s go back
* Breaching party has conferred some benefits on injured party>> can’t use K to go for expectancy (since they breached) but most courts today will allow restitution of benefit conferred minus damages caused by breach

Breaching Parties tend to get least generous remedy measure; injured parties more generous measureCraswell: many ways to measure how restit should be calc’d. Incomplete homebuilding. 1) inc market value of land; 2)cost to completion by another builder; 3) half the K price; 4)builder’s actual costs. | Trend to recognize/ award spec. perf. now—looking at entire context/ circs, not just the particular piece of material or property at issue.Concern about granting is that you block efficient breaches—bad for market.Problems:* Never able to get spec. perf. on a personal services contract (in limited cases may get an injunction to ban perf. for a competitor)
* Courts don’t want to have to supervise spec. perf.
* “Unclean hands”—if court doesn’t like P, may not get equitable relief
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| Liquidated Damages | When expectancy is hard to calculate in some way, maybe worthwhile to put LD clause in contract. LD must not be punitive.LD clause should not be a flat dollar amount; should be related to any variables that are in the K (amount of product, etc.). Tests (standard):* Are anticipated damages uncertain in amount or difficult to prove?
* Is the stipulated $ amount reasonable in light of anticipated or actual harm?

Newell Variation:* Is there a legitimate reason to have the clause?
* Is the $ amount reasonable under all the circumstances?
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| Limitations on Damages | Spectrum of Judicial Treatment:Prove AMOUNT of loss w/ reasonable certainty<<<1<<<<<<2<<<<>>>>>3>>>>>>>4>>>Prove FACT of loss with certainty. Greater latitude w/proof of extent of lossAlong the continuum: 1. Less than mathematical certainty in calculation of loss ; (2) Whatever the facts permit (calculation of loss); (3) At least approximate (calculation of loss); (4)Doubts resolved against the breaching party

Reasonable certainty>Preponderance of the evidenceR.2d. Avoidability is a limitation (damages not allowed where injured party did not avoid losses where they could w/o undue, risk, burden or humiliation—not quite the same as mitigation, but there is a sense that there is something injured party could do to stop the bleeding)* Employee taking another job to cover lost wages from previous, breached employment contract
* BUT… only need to take a similar job—area of dispute around whether two jobs are simliar. (Stars/celebrities treated differently by the courts—widest scope to turn down a cover for artistic reasons.)
* Cases: Shirley MacLaine v. 20th C Fox; Jordan v. MCI

R.2d. Uncertainty is a limitation (damages not recoverable beyond an amount that the evidence permits to be established with reasonable certainty)* New Business Rule (not a binding rule, but a strong guiding principal). With a new business, it’s hard to know what lost profits would be—use data from the previous year (not projections or even next year’s performance)

Limits on consequential damages: * Avoid binding the performing party w/o their understanding of projected damages
* Adjust their pricing structure
* Get extra insurance/ precautions to complete performance
* R.2d may limit damages to foreseeable loss (not profits) when “in the circs, justice so requires”
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| Loss due to Emotional Disturbance | R.2d. Recovery will be excluded unless the breach also caused bodily harm or the contract or breach is of such a kind that serious emotional harm is a particularly likely result.Questions/Thoughts:* Is there a real loss?
* Can any loss by adequately measured?
* Would emotional distress damages open D to punishment or loss disproportionate to the consideration?
* Emotional distress damages are only recoverable in rare cases. (Funerals gone awry or failure to deliver death messages—Newell’s view is that the very high cost (which might be read to suggest self-insurance) of those services (playing on your care for the deceased) is a driver of why damages are allowed; my thought is that the commodity is really emotional comfort, so when that goes off, the contract is broken.)
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| Misc | Punitive damages only likely with bad faith insurers, fraud, fiduciary contracts, where there is overlap with tortAttorney’s fees are not part of K damages (unless K term says otherwise)Most cases, no pre-judgment interest |

Parallel Remedies Matrix

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|  | Paying Party is Injured Party (Buyer) | Performing Party is Injured Party (Seller)§2-703 (Seller’s Remedies in General) |
| Substitute Transaction is Available | §2-712 Actual Cover§2-713 Hypothetical Market Price / “Cover” | §2-704 Completion (for resale) or Salvage§2-706 Actual Resale§2-708(1) Hypothetical Market Price/”Resale” |
| No Substitute Transaction is Available | §2-714 Accept Defective Goods§2-716 Specific Performance§2-717 Deduct Damages from Pending Bill | §2-708(2) Lost Volume Seller§2-709 Action for the Price§2-718 Liquidated Damages / Deposit |
| Other Damages | §2-715 Reasonable Incidental DamagesAND Consequential Damages (Hadley’s Rule) | §2-710 Reasonable Incidental Damages |

DEFENSES (Boundaries where promises are not enforced—beyond freedom of contract and private autonomy)

| Defenses | Duress | Undue Influence | Fraud | Public Policy | Unconscionability |
| --- | --- | --- | --- | --- | --- |
| Short label | Overpowering:Difficult to analyze because bargaining itself often involves pressure (what’s duress vs. hard bargaining?) | Overpersuading:Comes up in Wills and Trusts a lotTypically personal relationships involving trust and confidence | Misleading:Tort, and also a defense to KInvolves misleading people—material factual misrepresentations as to material being soldSequence of events matters | Bad contract or clauseWe don’t like the deal | The garbage can of the lawProcedural (the first 3)ORSubstantive (4th one)This is a legal matter for the judge |
| Restatement/ UCC | R Assent to K was * induced by
* improper threat
* that leaves victim no alternative

EXAMPLES:* Threat of crime
* Abusing public process
	+ Turn you into IRS
	+ Selective approach to prosecution (Pay back money you stole or we go to DA)
* Civil Process Abuse
	+ Bad Faith: putting liens on property of public officials one doesn’t like
	+ Fight child custody unless you agree (may or may not be bad faith)
 |  | R Contract is voidable…1. If a party’s manifestation of assent is induced by EITHER a) a fraudulent misrepresentation—knowingly false or recklessly made, OR

b) a material misrepresentation—likely to induce assent of a reasonable person or maker knows likely to induce assent of recipient1. Misrepresentation by either party
2. Upon which the recipient is justified in relying
3. Contract is voidable by recipient

DISCUSSION POINT: some tension betw the reliance and the materiality—after all the more material it is, the more party should be investigating or confirming, rather than relying. | Examples:Adhesion Contracts; Covenants not to Compete; Exculpatory Clauses(SEE PUBLIC POLICY CHART) | UCC §2-302 Com 1Prevent oppression and unfair surprise but do not disturb allocation of risks b/c of superior bargaining power. |
| Newell’s short version | * Necessitious circumstances;
* Nasty conduct;
* Crummy resulting deal
 |  | Direct MisrepresentationsHalf-TruthsActive ConcealmentsDuty to DiscloseThese apply to facts, not opinions | Thinking about public policy changes over time | Policy dispute:PRO: avoid hard-cases-make-bad-law problemAvoid setting precise standards which can be evaded by sneaky sortsCON: too much discretion to judge; too uncertain to allow for planning; masks real problems & muddies analysis |
| Discussion | Pre-existing duty rule is a tool to avoid a particular type of duress (namely a midstream attempt to re-negotiate a higher $ but no change in duties) (Performance of a Legal Duty)Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration but a similar performance is consideration if it differs from what was required in a way that reflects more than a pretense of bargaining.UCC §2-209(1) essentially rejected the pre-existing duty rule |  |  |  |  |

PUBLIC POLICY (EXAMPLES)

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| Adhesion ContractsGeneral Qs to ask yourself1. Will clarity and conspicuousness fix these problems?
2. How important is the substance of the particular provision(s) being challenged?
3. What is (should be) the effect of the “duty to read”?
4. How important is it that the adhering party had some real choice?
5. How important is relative bargaining power?
6. How important is the adequacy of consideration? (i.e., what was paid versus what was received?)
7. Whose reasonable expectations matter?
	1. Some courts say the reasonable expectations of the contract signer matter most
	2. Restatement focuses on expectations of the seller/contract drafter (did they believe signer would not have signed if they had known the term was there?)
 | Policy issues:Classical model has a hard time with these because it is based on assumption of two negotiating parties of approximately equal power—but courts use this model because nothing else is readily available in our legal systemSome courts take the approach of construing against the drafter whenever something is unclear (even if they have to twist it to make it unclear)Now adhesion is primarily consent to the transactions, not the detailed terms.Per Newell, often neither side really understands the language fully (just the lawyers on one side) |
| Covenants Not To CompeteR.2d. §186-1881. Those covenants that unreasonably restrain trade are unenforceable
2. They restrain trade if EITHER
	1. Performance of promise would limit competition, OR
	2. Performance of promise restricts promisor in exercise of a gainful occupation
3. Such restraint is unreasonable if EITHER
	1. It is not ancillary to an otherwise valid transaction or relationship. Ancillary where promise has interest worthy of protection to balance hardship to promisor and injury to public (e.g., sale of business and protection of goodwill; employment and protection of trade secrets or customer lists), OR
	2. It is ancillary but EITHER
		1. Restraint is greater than necessary (time, scope of activity, geography), OR
		2. Promisee’s need is outweighed by hardship to promisor or injury to public
 |  |
| Exculpatory ClausesUCC §2-316 deals with disclaimers. Cannot “unreasonably” disclaim.* Trend now is moving away from these clauses being enforceable
* Caselaw is all over the place on these as they apply to negligence, and there are statutory limitations in different states
* (Almost completely unenforceable for reckless or intentional conduct)
 | Policy: * More likely to be enforceable if: Commercial deal; Negotiated contract; Optional activity (sports, recreation); Adults
* Less likely to be enforceable if: Consumer deal; Form contract; Necessity (housing, health service); Children
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Orientation questions:

What was purpose of the contract?

How big in terms of $, time, scope?

What was the expectation of both parties?

* Contract (mutual agreement)
* Promise/gift (perspective of 1 side)
* How formal was this?

What changed hands?

* Partial performance? None?
* Consideration?

How long from “deal” to “breach”?

* Reliance

Did both parties act reasonably?

How much did each party know/understand?

What looks “fair”?

What makes sense economically?

Can we go forward or do we have to go back?