

# American Journal of Health, Medicine and Nursing Practice (AJHMPN)



**The Implementation Science of Financial  
Intelligence in Evidence-Based Medicine Using  
Select Criteria Mechanism as Treatment Process  
towards Healthcare Corporate Governance**

*Zharama M. Llarena*



## The Implementation Science of Financial Intelligence in Evidence-Based Medicine Using Select Criteria Mechanism as Treatment Process towards Healthcare Corporate Governance

 **Zharama M. Llarena<sup>1\*</sup>**

Doctor of Jurisprudence Student, School of Law and Justice  
University of Southern Queensland, Toowoomba, Australia  
Scopus Author ID: 42661679700



### Article history

*Submitted 22.09.2023 Revised Version Received 05.10.2023 Accepted 22.10.2023*

### Abstract

**Purpose:** Implementation science is the broader aspect of corporate social responsibility (CSR) translating healthcare education to clinical research and practice for public health and patient safety encompassing the hierarchy of evidence-based medicine (EBM), hence, serving as an integrative method of combing CSR towards healthcare corporate governance. This paper aims to model EBM under principles of valid contract formation as compliance to CSR theories of promoting positive health outcomes of patient safety leading to financial success and lessening the risks of mortality cases.

**Methodology:** The elements of valid contract formation and sources of errors are the systematic plan for behavioral guidance of EBM practice. These determinants are crucial in refining the clinical judgment of medical experts together with other healthcare professionals in support with high-ranking databases of research publication, resulting to a greater impact of positive health outcomes of patient safety under “judicious” application of CSR. These principles of contract law are integrated for “measuring” the EBM’s financial success towards healthcare corporate governance.

**Findings:** EBM is a scientific approach to handle medical cases and reports towards patient safety under clinical judgment of medical expert and healthcare team in corroboration with reliable

sources of databases for medical research and review for reducing death rates in healthcare setting. SELECT Criteria Mechanism elucidated EBM as implementation science integrating CSR for behavioral compliance to healthcare corporate governance. First, the modeling of CSR as method to comply with EBM delineates the elements formed for valid contract formation in producing an “ethical” standard as responsibility for optimal patient safety as bargained promise under acceptance of the clinical team. Second, the illustration of the healthcare corporate governance in EBM practice as theory “measures” the reduction of healthcare expenditures from the exhibited means of diminishing mortality cases. Therefore, implementation science serves as an initiation for remediation process of reducing risks of death cases.

**Recommendation:** Implementation science is very important in EBM practice in treating ways of lessening the probability of mortality cases under “ethical” or “judicious” patient safety guidelines as corporate social responsibility. Hence, it is recommended to develop systems for behavioral guidance in a more organized plan of targeting death reduction cases towards financial intelligence as fulfillment in implementation science.

**Keywords:** *Implementation Science, Evidence-Based Medicine, Corporate Social Responsibility, Healthcare Governance, Pharmaceutical Care*

## 1.0 INTRODUCTION

Recently, there has been a rapid growth in the implementation science field as it broadens its disciplinary range encompassing corporate social responsibility (CSR) education, health care, and public health. It has been developing due to its novel way of citing the know-do gap and application of its own theories, methods, and principles as frameworks. It mainly concentrates on affecting, planning, and evaluating the system adoption of evidence-based practices as theories and it was brought to modeling for existence of desire to answer the problems encountered during research towards fulfillment of goals for a more evidence-based practice as non-obviousness in translation. There are several theories, models, and framework, but those who have gained attention are implementation theories, classic theories, process models, determinants frameworks, and evaluation frameworks. Furthermore, there are several tools and guidelines in aiming the facilitation of breaching the knowledge gap of implementation science into either development of start of remediation process.<sup>1</sup>

Expert opinion alone is inadequate to corroborate healthcare decision. The profession of pharmacy has integrated cognitive services to their conventional role of dispensing medicines. The evidence-based practice establishment is crucial for pharmaceutical care services to be updated, effective, and relevant to patients. Pharmacists must accept their social responsibility and actively participate in healthcare research to establish the needed evidence-based pharmaceutical care. Based on the study of Hepler & Strand, pharmaceutical care is “the CSR provision of drug treatment is intended to aim definite outcomes that would improve patient’s quality life through responsibility acceptance in providing care to patients as basis of relationship together with other healthcare providers in reaching drug treatment decisions.”<sup>2</sup>

The evidence-based medicine (EBM) concept is apparently defined as medicine practiced on evidence basis. Eventually, EBM was enhanced through evidence on which medicine is practiced using a new identified paradigm with brilliant rhetorical devices that successfully gained the attention of the medical media. Moreover, as to support healthcare decision based on evidence, a hierarchy was continuously being updated for valuing the reliability of published research, especially clinical trials, with trial data outdoing other ranks of evidence. Particularly, clinical judgment is ranked to a lower position since authoritative opinion serves as an expertise decision basis of fictional clinical presentations, ranking lower, and seeking for more reliable up-to-date published research as evidence for medicine.<sup>3</sup> Furthermore, EBM was established as a guidance method of healthcare providers in rendering an optimal drug treatment including clinical pharmacists throughout the process of patient safety. It pertains to the suitable procedure of utilizing medical databases as source of information for evaluation to make reasonable decisions in their practice area.<sup>4</sup>

This paper has two developed problem statements: (1) There is an ethical standard issue involved in applying EBM as “judicious” use, and (2) there are mortality cases and risks to “measure” the financial intelligence of healthcare corporate governance. Thus, this study aims to diagnose the ethical problems encountered in valid contract formation using SELECT Criteria Mechanism Framework to model evidence-based medicine as implementation science. Contract law is the observance of valid

---

<sup>1</sup> Jovin Rushagala Tibenderana, ‘The art of putting research into practice: The emergence of implementation science as a transformative research approach’ (2023) 21 *Clinical Epidemiology and Global Health* 1.

<sup>2</sup> Osama Mohammad Al-Quteimat and Amer Mostafa Amer, ‘Evidence-based pharmaceutical care: The next chapter in pharmacy practice’ (2014) 24 *Saudi Pharmaceutical Journal* 448.

<sup>3</sup> Desmond J. Sheridan and Desmond G. Julian, ‘Achievements and Limitations of Evidence-Based Medicine’ (2016) 68(2) *Journal of the American College of Cardiology* 204-205.

<sup>4</sup> Eman Abu-Gharbieh, Doaa Al Khalidi, Mirza R. Baig, and Saeed A. Khan, ‘Redefining knowledge, attitude, and practice of evidence-based medicine (EBM) among pharmacy students for professional challenges’ (2015) 23 *Saudi Pharmaceutical Journal* 162-163.

agreement between parties in mutual assent of the terms and conditions for the performance of bargained promise in exchange of money. It is crucial to observe compliance of evidence-based medicine as a positivistic approach to pharmacoeconomics as their legal means of providing patient safety as part of the bill of rights of their respective citizens for public health promotion and healthcare translation. Evidence-based medicine must be illustrated in a way of knowing the corporate social responsibility of the healthcare team towards fulfillment of the goals of healthcare corporate governance. Modeling is crucial in implementation science to resolve issues in valid contract formation. Pharmaceutical care is a responsibility upon acceptance, as well as performance of other health care professionals under review of evidence-based medicine (EBM).

## 2.0 METHODOLOGY

### A. BARGAIN PROMISES

#### 1. General Rule—Bargain Constitutes Consideration [§6]

- a negotiation is an exchange in which group of individuals perceives his promise or performance as the other's promise or performance price.
- as a general rule, negotiation comprises consideration.

#### a. Equal value not required [§7]

- the law does not assess whether a bargained-for promise or performance is in proportion in terms of value with the counter-promise or performance, as long as the agreement is reasonable [Batsakis v. Demotsis, 226 S.W.2d 673 (Tex. 1949); Restatement Second ("Rest. 2d") §§71, 72, 79]
- the theory is that the offeror and the offeree are the best judges to assess the desirability of a negotiation
- the conventional means of this approach is formulated that "consideration sufficiency will not be judged," and that "a negotiation will be implemented in reference to its terms."

#### (1) Gross disparity as evidence [§8]

- gross difference between the value of what is performed or to be performed by each group of individuals may be utilized as evidence to corroborate particular defenses such as incapacity, fraud, duress, etc. (infra, §§495 et seq.).

#### (2) Unconscionability [§9]

- courts may directly evaluate a difference in value to ascertain whether there is a significant difference as to be unreasonable
- this doctrine is employed to ascertain whether the process that led to the negotiation was unreasonable
- in some cases, this doctrine was used by courts to upset agreements that seem to be unfair as to be harsh disregarding the defects in the negotiating process. (*See infra*, §§510-513.)

#### (3) Equitable remedies [§10]

- in ancient times, courts were branched into law courts and equity courts, each with varying rules and remedies
- while consideration sufficiency commonly is not assessed when a group of individuals sues at law for damages, consideration sufficiency may be evaluated by the courts when a group of individuals asks for an equitable restitution for certain performance
- equity usually needs an exhibition of fairness and essential equivalence in value as a state for provision relief

## 2. Exceptions—Bargains that Are Not Consideration [§11]

- even though negotiations usually comprise consideration and are legally implementable, there are numerous cases types in which negotiations or apparent negotiations do not comprise consideration and are, hence, unimplementable
- there are four major classifications to which several cases belong:
  - (i) Nominal consideration (deals that are negotiations in form but not in substance);
  - (ii) Promises to surrender or forbear from asserting a legal claim that is unconscionable (or, under some authorities, that is neither reasonable nor held in good faith);
  - (iii) Apparent negotiations engaging an illusory promise; and
  - (iv) Negotiations in which one party promises to do only what he is already legally obliged to do.

### a. Nominal consideration [§12]

- false casting of a promise in a negotiation form with the promise in an try to create the promise implementable, but the transaction lacks a negotiation substance since neither party perceives each agreed performance as the price of the other
- occurs when there is a recital of a negotiation, but no real negotiation

#### (1) Enforceability of promises given for nominal consideration

##### (a) Donative promises [§13]

- even though authorities are not in complete harmony, the prevailing perception is that nominal consideration usually will not create a donative promise implementable [Schnell v. Nell, *supra*, §6; Rest. 2d §71]

##### (b) Options and guaranties [§14]

- nominal consideration will create options and guaranties implementable is particular considerations are met

#### 1) Options [§15]

- a promise to hold an offer open for a fixed extent of time
- majority of courts hold that nominal consideration creates an option binding, at least if the option is in writing and proposes an exchange on fair terms. [Real Estate Co. of Pittsburgh v. Rudolph, 153 A. 438 (Pa. 1930); Rest. 2d §87; *and see infra*, §196]

##### a) Distinguish—U.C.C. “firm offers” [§16]

- facilitates agreements for the sale of goods
- a written “firm offer” by a merchant to buy or sell goods cannot be cancelled for the time period stated in the offer in the absence of any consideration necessity or even consideration recital. [U.C.C. §2-205; *and see infra*, §§239-244]

#### 2) Guaranties [§17]

- security promise for another party’s debt or for his performance of a contractual obligation
- most courts hold that nominal consideration will create a guaranty binding, at least if the promise is in writing. [Rest. 2d §88]

**3) Rationale—serve commercial purposes [§18]**

- options and guaranties commonly are not true donative promises, in the sense that they are not promises to provide a gift, rather, they are agreements intended to operate or further a proposed negotiation
- they cater essential commercial designs and similarly to be relied on
- if an option or a guaranty does not have both real and nominal consideration, it will usually be unimplementable unless either (i) it is relied upon, or (ii) a statute, such as U.C.C. section 2-205, gives for its implementation

**b. Promises to surrender or forbear from asserting a legal claim [§19]**

- comprises consideration
- problem emerges when the claim is (i) unconscionable, (ii) not held in good faith, or (iii) neither reasonable nor held in good faith.

**(1) Former rule—honest *and* reasonable belief required [§20]**

- would comprise consideration only if there was an honest and reasonable ground for believing there was a valid claim. [Springstead v. Nees, 125 App. Div. 230 (1908)]
- applied in Restatement First section 76, which has the provision that “the surrender of, or forbearance to assert, an invalid defense or claim by one who has not an honest and reasonable belief in its possible validity” is not regarded as consideration.

**(2) Modern rule—honest *or* reasonable belief suffices [§21]**

- the modern rule for claim assertion is consideration if the promisor’s belief in the claim validity is either reasonable or held in good faith. [Kossick v. United Fruit Co., 365 U.S. 731 (1961); Dyer v. National By-Products, Inc., 380 N.W.2d 732 (Iowa 1986)]

**(a) Restatement Second [§22]**

- applied in Restatement Second section 74 with modification of Restatement First section 76 in the provision that “forbearance to assert, or the surrender of, an invalid defense or claim is not consideration except (i) the claim or defense is in fact doubtful due to facts or law uncertainty, or (ii) the forbearing or surrendering party honestly believes that his defense or claim is just and may be ascertained to be valid.”

**(b) Minimum validity [§23]**

- under a pure good faith test, forbearance to seek for a claim held in good faith could be consideration even if the claim is entirely ill-founded
- a claim that does not have any validity at all might not be recognized as made in good faith under this rule

**(3) Actual surrender or forbearance [§24]**

- a negotiation for the actual surrender of or actual forbearance in asserting a claim will comprise consideration only where the claim is reasonable or held in good faith

**(4) Written release [§25]**

- may comprise consideration even if there is neither a reasonable ground for the claim released nor a good faith belief in its validity. [Mullen v. Hawkins, 40 N.E. 797 (Ind. 1895); Rest. 2d §74]

**(5) Forbearance where no specific period stated [§26]**

- the promise is understood as one to forbear for a reasonable time

**c. Illusory promises**

**(1) General rule—mutuality of obligation required in bilateral contract [§27]**

- the general rule is that for a bilateral contract to be implementable, it should have mutuality of obligation
- if both parties to a bilateral agreement are not obliged, neither will be bound
- the major mutuality rule impact is that an illusory promise is not recognized as consideration

**(a) “Illusory promise” defined [§28]**

- is a statement that has the promise form, but is not a real promise in substance
- a real promise is a commitment that restricts one’s future options in comparison to one’s options suddenly prior to the creation of promise
- an illusory promise does not restrict one’s future selections
- an illusory promise is an apparent commitment that actually indicates a “free way out”

**(2) Effect of illusory promise [§29]**

- under the mutuality rule, if one group of individuals do an illusory promise in return for another’s real promise, neither party is obliged
- the first party is not obliged basically since he has not created a real promise—nothing he has said restricts his future choices
- the second party is not obliged since all he claimed in return for his real promise was an illusory promise, which is not regarded as consideration, and a promise lacking consideration is unimplementable

**(a) Common types of illusory promises**

**1) Promise to do an act “if I want to” [§30]**

- the “promise” is illusory since subsequent to the making of a statement, the “promisor” has not restricted her choices
- he is just as free to do whatever he wants subsequent to making a statement as he was prior to doing a statement
- he has a free way out by basically deciding that he does not desire to perform the act

**2) Right to terminate at will without notice [§31]**

- a real promise that is combined with a power to end the obligation under the promise at will and in the absence of notice
- such a power provides a free way out and thus, makes the promise illusory. [Miami Coca-Cola Bottling Co. v. Orange Crush Co., 296 F. 693 (5th Cir. 1924); Bernstein v. W.B. Manufacturing Co., 131 N.E. 200 (Mass. 1921)]

**a) U.C.C. section 2-309 [§32]**

- U.C.C. section 2-309(3) has the provision that “end of a contract by one party unless on the occurrence of a mutual event needs that reasonable notification be claimed by the other party, and a contract dispensing with notification is invalid if its facilitation would be unreasonable.”
- a contractual provision that provides one party to a sale-of-goods agreement the right to revoke or end may be held subject to an implied reasonable notification requirement

- an agreement might not be illusory, since the promise would be obliging during the event between the time when notice was provided and the reasonable time after that period until the effectivity of notice
- a contract dispensing with the notice requirement for cessation may be held invalid under section 2-209(3) and thus, might not make the promise illusory
- if a right to repeal at any time is in fact restricted under section 2-209(3), and the promise that is directed to the right to revoke, thus, it is not illusory, the contract would have consideration and could be implemented by either group of individuals

**(b) Exceptions to mutuality rule**

**1) Unilateral contracts [§33]**

- the mutuality doctrine is not employable to unilateral agreements
- in the unilateral agreement case, the promisee does get something in exchange of the act he negotiated for

**2) Limited promises [§34]**

- if a real promise has been created, absence of mutuality is not a defense, no matter how restricted the promise may be. [Lindner v. Mid-Continent Oil Corp., 252 S.W.2d 631 (Ark. 1952); Gurfein v. Werbelovsky, 118 A. 32 (Conn. 1922)]

**3) Voidable promises [§35]**

- a real promise is not considered illusory only due to voidable agreement by one group of individuals as a matter of law. [Atwell v. Jenkins, 40 N.E. 178 (Mass. 1895); Rest. 2d §78]

**a) Distinguish—void promises [§36]**

- sometimes unimplementable by justification of law *is* illusory if the promise is not only voidable, but void. [See Rest. 2d §75]
- void and voidable promises have questionable distinction, both in terms of the doctrine and the cases, and in any situation very few assessments are completely void. (*see infra*, §§580, 586)

**4) Conditional promises [§37]**

- is a promise that the promisor requires to merely perform if a particular event happens
- such a promise is a real commitment when the promisor has restricted his future choices because if the event does happen, the promisor must act
- a conditional promise is not illusory and comprises valid consideration even if the event is within the promisor's regulation. [Scott v. Moragues Lumber Co., 80 So. 394 (Ala. 1918)]

**5) Alternative promises [§38]**

- is one in which the promisor can discharge his duty by selecting between two or more alternatives

**a) General rule—each alternative must constitute consideration [§39]**

- engaging alternative promises will be implementable only if each of the performances would have been consideration if negotiated for alone



**b) Distinguish—contracts giving *promise* the right to choose between alternatives [§40]**

- the promise has the right to require one of numerous alternative performances from the promisor, a promise to make alternative performances is consideration if any one of the alternative performances would be consideration

**6) Agreements allowing one party to supply or determine a material term [§41]**

- a contract may leave open a particular term and give that one of the group of individuals has the unilateral right to distribute or ascertain the term in the future

**a) Common law rule—promise illusory [§42]**

- the general rule is that if the omission of the term is material, the promise is illusory

**b) Exceptions**

**1/ Power to alter or modify terms [§43]**

- if there is a fixed term in the agreement, but one group of individuals is provided by the power to alter or modify the term, the power does not create that party's promise illusory
- these cases have been interpreted such a power as ordered to the obligation to perform in good faith
- the group of individuals with the power to modify or alter the term does not have a free way out, since his power to modify or alter the term is not absolutely free, but must be performed in good faith [Automatic Vending Co. v. Wisdom, 182 Cal. App. 2d 354 (1960)]

**2/ Objective standard for establishing terms [§44]**

- the term should be set in association to an objective measure

**3/ Material term omitted and neither party given power to supply or determine the term [§45]**

- the law states a reasonable term except the agreement is too indefinite to be implemented. (See *infra*, §§415-471.)
- since the implied term is cited by law, not by the determination of one of the parties, the parties' promises are not illusory and the agreement will not explain a consideration problem even though, to further expound, it may indicate indefiniteness problem

**c) U.C.C. provisions [§46]**

- the U.C.C. potentially makes an impact on the common law rule in numerous means

**1/ General obligation of good faith [§47]**

- U.C.C. section 1-203 has an imposition of an obligation of good faith on every group of individuals in regard to their performance of contractual duties
- a party who has the right to put a term in an agreement for the sale of goods is restricted by the obligation to perform in good faith in setting the term
- even though section 1-203 does not particularly give that a contract allowing a party to put a agreement term satiates the consideration need, this outcome could be attained on the following theory: Due to the good faith need, a group of individuals with the right to put a term does not have unlimited judgment, and thus, the party's promise is not illusory

**2/ Setting price [§48]**

- under U.C.C. section 2-305(2), the party setting the price has an obligation to perform the power in good faith, whether or not the agreement has an explicit provision of it

**7) Implied promises [§49]**

- delivered as a consideration just as if it were a distinct and clear promise as satisfaction for the mutuality principle

**a) Implied promise to use reasonable or best efforts [§50]**

- agreement is unimplementable since it lacks consideration, and no promise has been made

**1/ Landmark case [§51]**

- in the landmark case of *Wood v. Lucy, Lady Duff-Gordon*, N.Y. 88 (1917), Judge Cardozo decided that Retailer could implement an agreement of this sort, on the basis that Retailer had created an implied agreement to utilize reasonable efforts to trade Designer's products and services

**2/ U.C.C. section 2-306(2) [§52]**

- U.C.C. section 2-306(2) codifies the rule in *Wood* by the provision that except the parties concede, in a different way, a lawful contract for exclusive transaction in goods has an obligation imposition of "the seller to utilize best efforts to provide the goods and by the buyer to utilize best efforts for sale promotion."

**a/ Note**

- Since the U.C.C. rule employs to merely sale of goods, *Wood* remains an essential case law in situations engaging other kinds of agreements, like services or real estate contracts

**8) Requirements and output contracts [§53]**

- in a requirements agreement, the buyer concedes to buy all of his needs of a provided commodity from the seller, and the seller concedes to sell that price to the buyer
- in an output agreement, the seller concedes to sell all of his commodity output to the buyer, and the buyer concedes to buy that price from the seller

**a) Former rule—agreement illusory [§54]**

- some courts handled needs and output agreements as illusory, on the basis that the buyer in a requirements agreement was not accountable to have any needs and the seller in an output agreement was not obliged to generate any output
- such agreements were implementable if the promisor had an established transaction at the event the agreement was made. [*Pessin v. Fox Head Waukesha Corp.*, 282 N.W. 582 (Wis. 1938)]

**b) Modern rule [§55]**

- the courts usually implement needs and output agreements, regardless of whether the promisor had an established transaction at the event the contract was created, since the parties really have restricted their selections
- if the buyer in a requirements agreement wants to buy any of the commodity during the contract term, he should buy it all from the seller
- if the seller in an output agreement wants to generate any of the commodity during the contract term, he should sell it all to the buyer. [*McMichael v. Price*, 57 P.2d 549 (Okla. 1936)]

**c) U.C.C. rule [§56]**

- requirements or output agreement that engages the sale of goods is facilitated by U.C.C. section 2-306(1), assuming the contract implementation, and goes on with rule provisions facilitating the performance of such agreements

**1/ Obligation of good faith [§57]**

- has the provision that “a term which gauges the quantity by the seller’s output or the buyer’s requirements denoting of such actual output or requirements as may happen in good faith.”
- the party who ascertains the quantity of needs or output under such an agreement should perform business in good faith and in accordance to commercial norms of just transaction in the trade, so that yield or requirements will estimate a reasonably predictable figure
- if the party has a real obligation, the promise is not illusory. [U.C.C. §2-306(1), comment 2]

**2/ Limitations on quantity [§58]**

- the quantity paid under an output agreement or required under contract needs cannot be “unconscionably disproportionate to any stated approximate, or in the lack of a stated approximate to any normal or otherwise comparable before yield or requirement.”
- the Official Comment supplements that if an approximate of needs or yield is added in the contract, it will be handled as “a center around which the parties design any disparity to happen.” [U.C.C. §2-306(1), comment 3]

**3/ Implied promise to remain in business [§59]**

- it might be perceived that a seller could shun the duty of a output agreement, and a buyer could impede the duty of a requirements agreement, by going out of transaction, in which point the seller would have no yield and the buyer would have no needs. However, going out of transaction is itself harmful. [Brightwater Paper Co. v. Monadnock Paper Mills, 161 F.2d 869 (1st Cir. 1947); McMichael v. Price, *supra*]
- the liberation to go out of transaction may be restricted by the duty to perform in good faith
- as a general rule, if a party to a yield or requirements agreement goes out of business for reasons other than the contract profitability in issue, there is no duty breach to act in good faith
- a shutdown in motivation of the contract unprofitability in issue may offend the obligation
- a shutdown by a needs of a buyer for absence of orders might be allowable, whereas a shutdown only to reduce losses under the agreement in issue might not be. [See U.C.C. §2-306(1), comment 2]

**d. Legal duty rule—promise to perform act promisor already obliged to perform**

**(1) General rule [§60]**

- another principle exception is that a promise to conduct an action that the promisor has a preexisting legal obligation to act does not comprise consideration, even if negotiated for
- same rule employs to the actual performance of such an obligation. [Rest. 2d §73]

**(a) Party asserting the rule [§61]**

- commonly, the legal obligation rule is done assertion as a defense, not by the individual who has created the promise to act the preexisting legal obligation, but rather by the group of individuals to whom the promise was created

**(2) Types of preexisting legal duties [§62]**

- there are two principal kinds of preexisting legal obligations, namely, public duties and contractual duties
- legal duty rule application varies somewhat between the two types

**(a) Public duties**

**1) Official duties [§63]**

- is not consideration and neither is the actual performance of such an action. [Gray v. Martino, 103 A. 24 (N.J. 1918)]

**a) Scope test [§64]**

- is employable to a promise by an official whenever the performance is within the scope of the official's obligations, although actions of the specific performance is not legally needed

**b) Action not within scope of official duties [§65]**

- legal duty rule is not employable [Harris v. More, 70 Cal. 502 (1886); Rest. 2d §73]

**c) Pretense of bargain not sufficient [§66]**

- legal duty rule cannot be impeded
- variation between the official duty and the promised action should be real and material, not a slight variation designed to create the agreement implementable. [Rest. 2d §73]

**2) Other public duties [§67]**

- is handled in the same means as is action of an official obligation. [Van Boskerck v. Aronson, 197 N.Y.S. 809 (1923); Rest. 2d §73, comment b]

**(b) Contractual duties [§68]**

- is not consideration
- the cases handled by this division of the legal duty rule incline to belong into two designs: (i) those in which one party is under a contractual obligation to provide some action to another, who concedes to pay the party more for the very similar act, and (ii) those in which a debtor owes some money to a creditor, and the creditor concedes to accept less than that price in full discharge of the debtor's duty to the creditor

**1) Performance of preexisting contractual duty for increased payment—no consideration [§69]**

- under legal duty rule, new promise is not consideration [Lingenfelder v. Wainwright Brewery Co., 15 S.W. 844 (Mo. 1891)]
- same rule would also be employed to actual performance, that is, neither promise to act a preexisting contractual obligation, nor actual performance of this obligation, is consideration for promise to pay more for the same performance

**a) Exceptions [§70]**

- not in harmony with commonly accepted commercial practice, at least when the preexisting legal obligation is a contractual obligation rather than a public obligation
- the courts have considered several exceptions to the rule as it employs to a contract alteration

**1/ Promise of different performance [§71]**

- there is consideration

- since the courts do not support the legal duty rule as it employs to preexisting contractual obligations, even a relatively small disparity between the performance needed under the alteration and the performance needed under the preexisting agreement may satisfy to comprise consideration

**2/ Preexisting duty owed to third party [§72]**

- usually unemployable to trigger performance of the obligation. [Joseph Lande & Sons, Inc. v. Wellsco Realty, Inc., 34 A.2d 418 (N.J. 1943); Rest. 2d §74]

**a/ Minority position**

- considers an exception to the legal duty rule
- has a legal right to mutually repeal their preexisting agreement

**3/ Availability of a defense under original contract [§73]**

- legal duty rule is also unemployable
- the party was not lawfully obliged to provide any performance due to defense
- the promise is implementable since it is not basically a promise to perform a preexisting legal obligation

**4/ Fair and equitable modification in light of unanticipated circumstances [§74]**

- the legal duty rule is unemployable in view of the occurrences
- this exception is employable even if the unanticipated occurrences would not give an “impossibility” defense or “modified occurrences” under the preexisting agreement. [Angel v. Murray, 322 A.2d 630 (R.I. 1974); Rest. 2d §89]

**5/ Modification of contract for the sale of goods [§75]**

- under the U.C.C., the legal duty rule is unemployable to agreements for the sale of goods

**a/ Fairness not explicitly required [§76]**

- alteration that is unfair and equitable would most likely be unbinding. [U.C.C. §2-209, comment]

**b/ Distinguish—waivers [§77]**

- even though a contract modification is implementable in the lack of consideration under U.C.C. section 2-209, a waiver of a right under a contract is implementable in the absence of consideration only if the waiver is not validly withdrawn.

**6/ Writing as substitute for consideration [§78]**

- an agreement may be implemented and altered by a writing even if no new consideration is provided. [See Cal. Civ. Code §1697]

**7/ “Mutual rescission” [§79]**

- finding is usually fictional
- courts that employ this reasoning basically undercut the legal duty rule

**8/ Effect of performance [§80]**

- the legal duty rule has no employment, and the promisor cannot refund the extra money paid unless he paid under duress

**a/ Preexisting legal duty coupled with economic duress [§81]**

- the party who was under duress commonly can refund any payment in excess of that promised in the original agreement
- 2) Payment of lesser amount as discharge of debtor’s full obligation—no consideration [§82]**
  - is not consideration under the legal duty rule
  - the creditor’s promise to claim the lesser price as full payment is not implementable [Foakes v. Beer, 9 App. Cas. 605 (1884)]
- a) Exceptions**
- 1/ Different performance [§83]**
  - the common rule is unemployable [Jaffray v. Davis, 124 N.Y. 164 (1891)]
- 2/ Honest dispute [§84]**
  - there is consideration for a promise to discharge in full. [Rest. 2d §73; *and see supra*, §§21-23]
- 3/ Unliquidated obligations [§85]**
  - there is consideration for a debt discharge in full. [Rest. 2d §74]
- a/ Payment of amount admittedly due [§86]**
  - there is consideration for full debt discharge. [Flambeau Products Corp. v. Honeywell Information Systems, Inc., 341 N.W.2d 655 (1984)]
- b/ Separate obligations [§87]**
  - will not serve as consideration for the creditor’s contract to discharge the unliquidated duty. [Rest. 2d §74]
- c/ Comment**
  - the total debt emerging out of the associated negotiations may be recognized as one debt, rather than as separate debts, for applying purposes concerning the settlement rule of unliquidated duties
- 4/ Composition of creditors [§88]**
  - consideration may be found in the creditors’ mutual contract to accept lesser prices than those actually due
  - although the debtor is not a party to the composition contract, he may be able to implement the agreement as a third-party beneficiary. [Massey v. Del-Valley Corp., 134 A.2d 602 (N.J. 1957); *and see infra*, §§595-601]
- 5/ Agreement not to file a bankruptcy petition [§89]**
  - the debtor has forgone the legal right exercise such as the right to declare bankruptcy. [Melroy v. Kemmerer, 67 A. 699 (Pa. 1907)]
- 6/ Written release [§90]**
  - will operate to cancel the original debt. [*See, e.g.*, Cal. Civ. Code §§1524, 1541]
- 7/ Executory contracts [§91]**
  - a contract to accept lesser payments in full satisfaction of the payments already due is implementable to the degree that it is executed

- other authorities keep that due to preexisting legal duty performance, there is no more consideration than a promise to act, the shortfalls in payments already created can be refunded. [See, e.g., *Levine v. Blumenthal*, 186 A. 457 (N.J. 1936)]

#### **8/ Full-payment checks [§92]**

- can sue to refund the claim balance

#### **a/ Common law [§93]**

- cashing a full payment check comprised an accord and satisfaction (see *infra*, §§97-109)

#### **b/ U.C.C. rule [§94]**

- distinctly and clearly negotiates with full-payment checks
- common rule of section 3-311 is that if a creditor cashes a full-payment check, his absolute claim is discharged, in the provision that (i) the check is tendered in good faith as full claim satisfaction; (ii) the check or an accompanying writing has a conspicuous statement to the effect that the check is so tendered; and (iii) the claim amount that the check concerns is unliquidated or the subject of a bona fide dispute

#### **1] Exception—check not sent to prescribed person, office, or address [§95]**

- the common rule does not employ if (i) the creditor is an organization; (ii) within a reasonable time prior to the check was tendered, the creditor sent a conspicuous statement to the debtor that checks tendered in full satisfaction of debts are to be sent to a assigned person, office, or address; (iii) the check was not sent to that person, office, or address; and (iv) the creditor did not know, within a reasonable time prior to initiation collection of the check, that the check was tendered in full satisfaction of the creditor’s claim

#### **a] Rationale**

- this rule permits the company to make a special department for transacting with full-payment checks, create its customers aware of that department, and have accountability to merely those customers informing the special department that the check is a full payment of their debt

#### **2] Exception—repayment tendered [§96]**

- the common rule also does not employ if (i) the creditor tenders a repayment of the amount of the check within 90 days subsequent to the check that has been paid; (ii) the creditor did not send to the debtor, within a reasonable time prior to the debtor tendered her own check, a conspicuous statement that full-payment checks were to be sent to an assigned person, office, or address; and (iii) the creditor had no knowledge, within a reasonable time prior to initiation collection of the check, that the check was tendered in full satisfaction of the creditor’s claim

### **A. MUTUAL ASSENT**

#### **1. Existence of Mutual Assent Determined Under Objective Theory of Contracts [§154]**

- for contract formation, there should be mutual assent
- an expression is not interpreted in accordance to what the individual making the expression subjectively meant the statement to deliver or what the individual to whom the expression was addressed subjectively comprehended the expression to denote

#### **a. Rationale—protection of parties’ reasonable expectations**

- contract theory has a requirement of an actual “meeting of the minds” to form an agreement

- modern contract law has denied the idea that an actual, subjective meeting of the minds is essential to form an agreement
- the essence of protecting the parties' reasonable expectations in reliance of a promise, and the requirement for security and particularity in business negotiations, make it imperative that each contracting party be able to rely on the other party's manifested purposes, lacking concern to his thoughts or mental reservations. [Rest. 2d §18; Brant v. California Dairies, Inc., 4 Cal. 2d 128 (1935)]

### **(1) Note**

- courts usually continue to utter of a “meeting of the minds.”
- in modern courts, it is basically a shorthand phrase for contract formation, and does not need an actual subjective meeting of the minds

### **b. Application**

- there is utilization as an expression that he has knowledge, or has reason to know, the other party would reasonably interpret as an offer or acceptance, and the other party does so explain it. [Rest. 2d §19]

## **2. Express and Implied Contracts**

### **a. Express contracts [§155]**

- is explicitly exhibited in oral or written words of contract

### **b. Implied contracts**

#### **(1) Implied-in-fact contracts [§156]**

- inferred from their conduct or acts, or from words that are not explicitly words of contract
- such agreements are true contracts
- mutual assent is inferred, but it is real, not fictional. [Rest. 2d §4]

#### **(2) Implied-in-law contracts [§157]**

- one party is needed to pay another for a benefit conferred in order to impede unjust enrichment, rather than because there has been an actual or implied-in-fact promise to compensate for the advantage
- are not real contracts
- the basis is not assent

## **B. OFFER**

### **1. Introduction [§158]**

- majority of agreements are formed by offer and acceptance
- first step is to analyze and ascertain whether an offer has been created

### **2. Legal Significance of an Offer [§159]**

- offer makes a power of acceptance in the individual to whom the expression was addressed
- has the power to conclude a bargain by only providing assent in the suitable means

### **3. What Constitutes an Offer? [§160]**

- willingness to engage into a negotiation, created in such a way that a reasonable individual to whom the statement is addressed would believe that he could conclude a negotiation only by providing assent in the means needed by the expression. [Rest. 2d §24]



**a. Two essential elements [§161]**

- an expression should meet two criteria, such as: (i) intent to engage into a negotiation; and (ii) definiteness of terms

**(1) Intent to enter into a bargain**

**(a) Offer vs. invitation to deal [§162]**

- the expression reflects only an intent to start a bargain
- such expressions are known as “preliminary negotiations” or “invitations to negotiate” or “invitations to deal,” rather than offers

**1) Words suggesting negotiations [§163]**

- commonly, phrases such as “Are you interested ...?,” “Would you give ...?,” “I quote ...,” or “I would consider ...” indicate merely preliminary transactions or invitations to deal. [Elkhorn-Hazard Coal Co. v. Kentucky River Corp., 20 F.2d 67 (6th Cir. 1927)]

**2) Words suggesting an offer [§164]**

- phrases such as “I will sell (or buy)” or “I offer” indicate that an offer is designed

**3) Words not conclusive [§165]**

- a statement utilizing the word “offer” may be interpreted as an invitation to deal, and an expression utilizing the word “quote” may be considered an offer. (*See infra*, §172.)

**(2) Definiteness of terms [§166]**

- differs considerably with the occurrences
- even though an offer requires not encompass all possible contingencies, commonly speaking a statement will not be considered an offer except it explicitly makes: (i) the subject matter of the proposed negotiation; (ii) the price; and (iii) the quantity engaged

**(a) Intent determinative [§167]**

- does not importantly prevent an expression from being an offer if: (i) the expression, otherwise, evidences an intent to conclude a negotiation, (ii) the omission does not suggest absence of such intent, and (iii) the court can answer the omitted term by implication

**b. Special rules [§168]**

- some kinds of expressions are facilitated by special rules

**(1) Advertisements [§169]**

- normally regarded to be invitations to deal rather than offers. [Craft v. Elder & Johnston Co., 38 N.E.2d 416 (Ohio 1941)]

**(a) Rationale**

- the common rule is grounded on one or more of the following three grounds:
  - 1) Advertisements are commonly indefinite as to quantity and other terms;
  - 2) Sellers ought to be able to select with whom they will transact; and
  - 3) Advertisements are commonly addressed to the general public, so that if an advertisement was considered to be an offer, a seller might regard the offer to be “over-accepted”

**(b) Exceptions [§170]**

- usually regarded only invitations to deal

- such a construction is definite in its terms, and either (i) the occurrences explicitly suggest an intention to create a negotiation, (ii) the advertisement invites those to whom it is addressed to take a particular performance in the absence of further communication, or (iii) over-acceptance is unlikely. [Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W.2d 689 (Minn. 1957)]

### 1) Rewards [§171]

- payment is usually interpreted as an offer
- act is specified
- there is a clear purpose that those who see the advertisement will rely on it
- there is no significant over-acceptance problem

### (2) Offering circulars [§172]

- are common mailings sent out by merchants to a several potential customers, setting forth the terms on which a merchant is ready to transact
- treated like advertisements
- common test is whether a reasonable individual representing the addressee would think the communication had been addressed to him individually, or only as one of a number of recipients
- use of the word “offer” commonly, but not always, indicates an offer
- use of the word “quote” most likely, but not always, implies an invitation to transact

### (3) Auctions

#### (a) Auction with reserve [§173]

- sometimes termed as an auction “with reserve” is guided to the following rules:

#### 1) Putting an item on the block [§174]

- is not an offer [U.C.C. §2-328(3)]

#### 2) Bids [§175]

- is an offer, which is accepted if the auctioneer “hammers it down.”
- a) Because an offer is normally cancellable (*see infra*, §§225 *et seq.*), until a bid is accepted by being hammered down, the bid may be withdrawn (repealed).
- b) Each new bid (offer) automatically discharges all earlier bids. [U.C.C. §2-328(2), (3); Payne v. Cave, 3 Term R. (I.B.) 148 (1789)] Thus, if a bid is cancelled prior it is hammered down, the auctioneer is not free for earlier bid acceptance

#### (b) Auction without reserve [§176]

- *bids* in an auction “lacking reserve” are handled the same means as bids in a normal auction

#### (c) Determining whether auction is “with” or “without” reserve [§177]

- the common auction is with reserve, and the auctioneer may deny any and all bids, and withdraw any item from sale, at any time prior the hammer has fallen. [U.C.C. §2-328]

### (4) Putting contracts out for bid [§178]

- government agency or a private firm may set an agreement “out for bid”

#### (a) Legal status [§179]

- is not considered to be an offer
- bids submitted in response commonly are deemed offers

**(b) Interpretation [§180]**

- putting a contract out for bid might be explained as an offer [see, e.g., Jenkins Towel Service, Inc. v. Fidelity-Philadelphia Trust Co., 161 A.2d 334 (Pa. 1960)], while a bid might be interpreted as only an invitation to deal [see Leo F. Piazza Paving Co. v. Bebek & Brkich, 141 Cal. App. 2d 226 (1956)].

**4. Termination of Power of Acceptance—In General [§181]**

- Termination of the offeree’s acceptance power may generate from any of the following causes:
  - (i) Expiration or lapse of the offer;
  - (ii) A repudiation by the offeree;
  - (iii) A counteroffer by the offeree;
  - (iv) A conditional or qualified acceptance by the offeree;
  - (v) A valid offer revocation by the offeror; or
  - (vi) By law operation.

**a. Termination of power of acceptance by expiration or lapse of the offer [§182]**

- most common means is through expiration or lapse
- the rules facilitating this termination method rely in part on whether a time period is fixed in the offer itself

**(1) Where time for acceptance is fixed in the offer [§183]**

- stated phrases such as it will be “held open,” or “is good,” or the like, for a particular time period, the offeree’s acceptance power lapses or expires at the termination of that period in the absence of any further performance by the offeror. [Rest. 2d §41]

**(a) Interpretation of stated time period [§184]**

- suggests that except the offer otherwise gives, the time runs from the receipt day, at least if the offer was not apparently deferred in transmission. [Caldwell v. Cline, 156 S.E. 55 (W. Va. 1930)]

**1) Delay in transmission [§185]**

- had no reason to know of the deferment, the same rule employs
- if the offeree knew or should have known of the deferment, the time period starts to run from the day on which the offeree would have received the offer if the delay had not happened

**(2) Where no time for acceptance is fixed in offer [§186]**

- the offeree’s acceptance power lapses or expires subsequent to the expiration of a reasonable time. [Loring v. City of Boston, 48 Mass. (7 Metc.) 409 (1844)]

**(a) What constitutes a reasonable time? [§187]**

- depends on the occurrences: *e.g.*, the subject matter nature of the offer, the price fluctuation rapidity for that subject matter, the medium through which the offer is created, and business custom. [Rest. 2d §41]

**1) Face-to-face and telephonic bargaining [§188]**

- the time for acceptance commonly does not extend outside the conversation end, except a contrary intention is suggested [Rest. 2d §41]

**2) Offer sent by mail [§189]**

- an acceptance mailed by midnight on the receipt day is timely, except the occurrences suggest otherwise. [Rest. 2d §41]
- an acceptance may be timely even if it is sent later, given that it is sent within a reasonable time under the occurrences and the offer does not limit the time, such as by needing an answer by return mail
- a special rule might employ where the offer is deferred in transmission and the offeree knows or should know of the deferment. (*See supra*, §185.)

**b. Termination of offer through rejection by offeree [§190]**

- does not intend to accept the offer, although the acceptance power would not otherwise have lapsed. [Goodwin v. Hidalgo County Water Control & Improvement District No. 1, 58 S.W.2d 1092 (Tex. 1933)]

**(1) Rationale—protection of offeror**

- no longer interested

**(2) Exception for options [§191]**

- a rejection in the event of option period does not terminate the offeree's acceptance power. [Ryder v. Wescoat, 535 S.W.2d 269 (Mo. 1976)]
- the offeree has a contractual right to have the offer held open in the event of its term (see *infra*, §232)

**c. Termination of power of acceptance by counteroffer [§192]**

- a counteroffer is an offer created by an offeree to an offeror that regards the same subject matter as the original offer, but varies in its terms
- terminates the offeree's acceptance power, on the same rationale that employs to repudiations. [Livingston v. Evans, [1925] 4 D.L.R. 769 (Can.); Rest. 2d §39]

**(1) Status as offer [§193]**

- one legal effect is that it terminates the offeree's acceptance power
- has a second legal effect: Since a counteroffer is an offer, it makes a new acceptance power in the original offeror

**(2) Inquiries and requests [§194]**

- is not terminated by an inquiry regarding the offer or by a request for varying terms. [Stevenson, Jaques & Co. v. McLean, 5 Q.B.D. 346 (1880)]

**(a) Test [§195]**

- to distinguish between a counteroffer and an inquiry

**(3) Exception for options [§196]**

- In the case of an option, a counteroffer created in the event of option period does not terminate the offeree's acceptance power [Humble Oil & Refining Co. v. Westside Investment Corp., 428 S.W.2d 92 (Tex. 1968)]

**(a) Rationale**

- the offeree has a contractual right to have the offer held open in the event of its term (see *infra*, §232).

**d. Termination of power of acceptance by conditional or qualified acceptance [§197]**

- a purported acceptance that supplements to or alters the offer terms is known as a conditional or qualified acceptance

**(1) Legal effect—general rule [§198]**

- commonly terminates the offeree’s acceptance power, on the same rationale as that employable to counteroffers. [Minneapolis & St. Louis Railway v. Columbus Rolling-Mill, 119 U.S. 149 (1886)]

**(2) Status as offer [§199]**

- can be accepted by the original offeror

**(3) Exceptions to general rule**

**(a) Acceptance coupled with request [§200]**

- an unconditional acceptance combined with a request is a valid acceptance and forms an agreement. [Culton v. Gilchrist, 61 N.W. 384 (Iowa 1894)]

**(b) “Grumbling” acceptances [§201]**

- is an acceptance in accompaniment of a dissatisfaction expression
- is a valid acceptance and forms an agreement as long as the dissatisfaction expression terminates short of actual dissent. [Johnson v. Federal Union Surety Co., 153 N.W. 788 (Mich. 1915)]

**(c) Implied terms [§202]**

- is not terminated by an acceptance that is conditional or qualified in form, but in substance only spells out an implied offer term. [Rest. 2d §59]

**(d) U.C.C. provision [§203]**

- U.C.C. section 2-207(1) modifies the common law rule in the provision that “a definite and reasonable acceptance expression facilitates as an acceptance although it states terms supplemental to or varied from those offered or agreed upon, except acceptance is expressly made conditional on assent to the supplemental or varied terms.”

**(4) The mirror image rule [§204]**

- in common law, an acceptance had to be an offer “mirror image”
- a purported acceptance in deviation from the offer in any means, even in an immaterial way, was considered to be a qualified or conditional acceptance and did not form an agreement; instead, it had the legal effect of a counteroffer. [Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310 (1915); *see supra*, §197]

**(a) Form contracts and the last shot rule**

**1) The problem [§205]**

- other terms, such as warranties or disclaimers of warranties, will commonly be preprinted on each form in fine print

**2) Common law last shot rule [§206]**

- there is no agreement at the time the goods are shipped since the two forms vary
- the last shot rule is an approach where the contract terms are those set out in the last form sent, which could be either the seller’s form or the buyer’s form

**(5) U.C.C. rule [§207]**

- the U.C.C. has modified the mirror image rule concerning agreements for the sale of goods, so that for such agreements “a definite and seasonable acceptance expression facilitating as an acceptance although it states terms supplemental to or varied from those offered or agreed upon, except acceptance is expressly created conditional on assent to the supplemental or varied terms.” [U.C.C. §2-207(1)]

**(a) Sale of goods [§208]**

- U.C.C. section 2-207 is employable merely to agreements for the sale of goods [See *In re Doughboy Industries, Inc.*, 17 App. Div. 2d 216 (1962)]

**(b) Form contracts [§209]**

- U.C.C. section 2-207 is employable to all agreements for the sale of goods

**(c) “Definite expression of acceptance” [§210]**

- the very design of section 2-207 is to change the mirror image rule, just because a reply to an offer deviates from the offer in some means and even a material way, does not imply the reply is not a definite acceptance expression within the definition of section 2-207
- if an offeree’s reply deviates from the offer in its individualized terms, such as the definition of the subject matter, price, or quantity, the reply most likely will not be recognized a definite acceptance expression within the definition of section 2-207

**1) “Written confirmation” [§211]**

- under U.C.C. section 2-207(1), the rules employable to a definite acceptance expression are also employable to a written confirmation of a before contract

**(d) Acceptance “expressly made conditional” [§212]**

- U.C.C. section 2-207(1) is unemployable by its terms if an acceptance

**1) Initial effect on contract formation [§213]**

- no contract generates from the offeree’s transmitting the form to the offeror

**2) Effect if performance occurs [§214]**

- under U.C.C. section 2-207(3), conduct by both parties which considers the contract occurrence is adequate to establish an agreement for sale even though the writings of the parties do not otherwise establish an agreement

**a) Contract terms [§215]**

- comprises of the written terms to which the parties agreed, plus any additional terms included under other Code provisions
- when the parties basically fill in printed forms, merely the individualized provisions of each form will concede. As a result, the pre-printed provisions of both forms will drop out

**b) Interpretation [§216]**

- tracks the language of the conditional assent exception in U.C.C. section 2-207(1)
- acceptance should be made expressly conditional on the offeror’s assent to those terms. [*Dorton v. Colins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972)]

**1/ Note**

- principle exact tracking is not required

- court has uttered that whether an acceptance is expressly conditional on the offeror's assent is dependent on the commercial transaction context [Gardner Zemke Co. v. Dunham Bush, Inc., 850 P.2d 319 (N.M. 1993)]

**(e) Contract formed by conduct of the parties [§217]**

- adequate to establish a contract for sale although the writings of the parties do not otherwise establish an agreement
- no agreement is formed by the writings due to the offeree's response is not "definite and seasonable acceptance expression" within the definition of U.C.C. section 2-207(1)

**(f) Effect of additional or different terms [§218]**

- is not expressly conditional on the offeror's assent
- under U.C.C. section 2-207(1), an agreement is formed in spite of the presence of the supplemental or varied terms in the acceptance

**1) Additional terms [§219]**

- are to be interpreted as proposals for supplements to the contract under U.C.C. section 2-207(2)
- if the parties are both merchants, these proposed supplemental terms become part of the contract, except:
  - (i) The offer expressly restricts acceptance to the terms of the offer;
  - (ii) The supplemental terms would materially modify the contract; or
  - (iii) The offeror either notifies the offeree within a reasonable time that he objects to the supplemental terms or has already notified the offeree of his objection.

**a) Merchant [§220]**

- an individual who deals in the type of goods engaged in the negotiation or who otherwise holds himself out as having knowledge or skill particular to the practices or goods engaged in the negotiation. [U.C.C. §2-104(1)]

**2) Different terms [§221]**

- U.C.C. section 2-207(2) does not give any guidance about the effect of varied terms
- in light of the fact that section 2-207(2) pertains to additional terms, but not to different terms, three broad views have been raised:

**a) Knockout rule [§222]**

- varied terms do not become part of the contract, but they negate like knock out as those terms in the offer from which they vary
- this rule has some modest corroboration in Comment 6 to U.C.C. section 2-207, which states,

Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with the one on the confirmation sent by himself. As a result the requirement that there be a notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act.

- knockout rule by Comment 6 is restricted since it pertains merely to "confirming forms"
- the knockout rule is corroborated very powerful by the purpose of section 2-207 since under this rule, neither party gets the unfair benefit of having its preprinted terms prevail
- the agreement is on fair terms: those terms that the parties have both concede to, and those terms that the U.C.C. distributes in the lack of contract

**b) Different terms treated like additional terms [§223]**

- treated like additional terms. [See *Steiner v. Mobil Oil Corp.*, 20 Cal. 3d 90 (1997)]
- under U.C.C. section 2-207, whether or not additional or different terms will become part of the contract depends upon the subsection (2) provisions
- under this principle, varying terms might in some cases become part of the contract under section 2-207(2) if (i) the offer has not expressly restricted acceptance to the offer terms, (ii) the varied terms do not materially modify the offer, and (iii) the offeror has not provided objection notice to the varied terms or does not object within a reasonable time
- varied terms will usually drop out under this principle, because commonly they will materially modify the offer terms

**c) Different terms always drop out [§224]**

- under rule of section 2-207(2), which gives that under described occurrences additional terms become contract part, but does not give that different terms become agreement part
- the agreement will contain any supplemental terms in the acceptance that meet the section 2-207(2) test, but not any varied terms in the acceptance
- the outcome under this principle is in conflict with the design of section 2-207, which is to get away from giving one party an unfair benefit by having her preprinted terms automatically regulate

**e. Termination of power of acceptance by revocation [§225]**

- a revocation is a retraction of an offer by the offeror
- terminates the offeree's acceptance power, given the course that the offer has not already been accepted

**(1) When revocation is effective [§226]**

- only when received by the offeree. [Rest. 2d §42]

**(a) Minority view [§227]**

- by statute, California and a few other states comply a minority view under which a cancellation is effective on dispatch

**(2) Communication of revocation [§228]**

- to be effective, should usually be communicated by the offeror to the offeree

**(a) Exception—offer to the public [§229]**

- reward can usually be cancelled by publishing the repeal in the same medium as that in which the offer was done
- such publication ends the acceptance power even of those people who saw the offer but did not notice the cancellation. [*Shuey v. United States*, 92 U.S. 73 (1875)]

**(b) Exception—indirect revocation [§230]**

- revoked in spite the lack of direct communication between the offeror and the offeree, if the offeree acquires reliable information that the offeror has taken action exhibiting that he has changed his mind, known as “indirect revocation,” or “the rule of *Dickinson v. Dodds*.” [*Dickinson v. Dodds*, 2 Ch. D. 463 (1876)]

**(3) Revocability of “firm offers” [§231]**

- a firm offer is an offer that by its implied or express terms is to stay open for a particular time period



- common rule is that a cancellation of a firm offer, before the period expiration in the event which it was to stay open, has the same effect as the cancellation of a common offer [*See, e.g., Dickinson v. Dodds, supra*]
- this rule is subject to some crucial exceptions:

**(a) Rationale—no consideration**

- the offer term that explains that the offer will be kept open for a particular period is, in effect, a promise by the offeror to remain the offer open for the designated time period
- a promise lacking consideration is not binding. (*See supra*, §1.)
- the promise to stay the offer open for a fixed time period is not binding, and the offer is just as cancellable as it would have been if the offeror had not promised to remain it open for a particular time period

**(b) Exceptions**

**1) Options [§232]**

- if the offeree provides consideration for the promise, the offer is irrevocable for the discussed period. [*Humble Oil & Refining Co. v. Westside Investment Corp.*, 428 S.W.2d 92 (Tex. 1968)]
- a firm offer in which consideration has been provided for the promise to remain the offer open for a particular time period is called an “option.”

**2) Nominal consideration [§233]**

- cancellable if it recites an interpreted or nominal consideration—at least if the offer is in writing and proposes an exchange on fair terms within a reasonable time. [Rest. 2d §87(1)(a)]

**3) Reliance [§234]**

- a firm offer is also irrevocable [*Drennan v. Star Paving Co.*, *supra*, §179]

**a) Implied promise to hold offer open [§235]**

- a promise to hold an offer open may be implied rather than express

**b) One-sided effect of rule [§236]**

- has been criticized as “commercial imbalance.” [*See* 19 U. Chi. L. Rev. 237 (1952)]

**1/ Note**

- can be applied to certain restricted cases (*See infra*, §§288-289.)

**c) Older view [§237]**

- older cases are probably would not be followed today. [*See, e.g., James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933)]

**d) Restatement view [§238]**

- firm offer creates the offer cancellable, at least to the extent essential to impede injustice
- under Restatement Second section 87, “an offer which the offeror must be reasonably expect to trigger forbearance or action of a substantial attribute on the part of the offeree prior acceptance and which does trigger such forbearance or action is binding as an option contract to the extent important to shun injustice.” [Rest. 2d §87]

**4) Contracts for the sale of goods—U.C.C. section 2-205 [§239]**

- under U.C.C. section 2-205, a signed, written offer by a merchant to buy or sell goods, which provides assurance that it will be kept open, is not cancellable in the absence of consideration during the time discussed
- this irrevocability period cannot exceed three months.

**a) Operation of U.C.C. section 2-205 [§240]**

- for U.C.C. section 2-205 to be employable, the following occurrences must be satisfied:

**1/ Written and signed [§241]**

- if the offer is on a form prepared by the offeree, the provision to remain the offer open should be separately signed by the offeror

**2/ Irrevocability [§242]**

- the offer need not state the time in the event which it is irrevocable

**3/ Sale of goods [§243]**

- section 2-205 associates merely to agreements for the sale of goods

**4/ Merchant offeror [§244]**

- section 2-205 is restricted to offers by merchants.

**(4) Revocability of offers for unilateral contracts [§245]**

- an offer that is to be accepted by performance of an act is explained as an offer for a unilateral agreement
- special problems emerge when unilateral agreement tries to cancel the offer subsequent to the performance has begun but prior performance has been finished

**(a) Old rule—offer revocable until performance is complete [§246]**

- considered to be cancellable even though the offeree had started performance of the act in reliance on the offer, as long as performance had not yet been finished. [Petterson v. Pattberg, 248 N.Y. 86 (1928)]

**1) Rationale**

- can be accepted only by performance of an act, and since an offer is cancellable until accepted, until the act was finished there was no acceptance and thus, the offer was cancellable

**2) Note**

- once performance had started, the offeror was not permitted to cancel his promise [*See, e.g.,* Brackenbury v. Hodgkin, 102 A. 106 (Me. 1917)]

**(b) Modern rule—offer for unilateral contract not revocable after performance has begun [§247]**

- modern courts deny the old rule
- unless the performance is not finished within a reasonable time

**1) Rationale**

- offer for a unilateral agreement has the inclusion of an implied promise to remain the offer open for a reasonable time if the offeree creates a substantial start of performance before cancellation
- the start of performance in reliance on this implied promise gives the offer cancellable

**(c) Restatement Second section 45 [§248]**

- the modern rule is represented in Restatement Second section 45, which states that: (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it. (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.
- section 45 is broadly complied by the courts. The following three aspects of the rule represented in section 45 are noteworthy:

**1) Offer open for reasonable time [§249]**

- the offeror can repeal prior the offeree starts performance
- the offeror can repeal even after the offeree starts performance if the offeree does not finish performance within the time provided or a reasonable time

**2) Preparation vs. performance [§250]**

- a problem may emerge when the offeror cancels subsequent to the offeree has started preparing to perform, but prior the offeree has actually started performing

**a) Restatement First [§251]**

- explained that preparation, in opposition to the start of performance, was not adequate to create an offer for a unilateral agreement irrevocable

**1/ Comment**

- the preparation/performance distinction is usually more basic to state than it is to employ

**b) Restatement Second [§252]**

- also considers that the offeree's preparation may comprise reliance of a kind that contract law must protect
- such reliance may impede cancellation under the mechanism reflected in Restatement Second section 87 (see supra, §238), although section 45 is unemployable since performance has not started

**1/ Significance**

- distinction between preparation and performance has a difference in the measure for damages
- if the offeree in a unilateral agreement has started performance, so that the rule represented in section 45 is employable, the offeree must usually be entitled to expectation damages if the offeror cancels
- if the offeree has basically started preparation, so that the case belongs under the mechanism of Restatement Second section 87, the offeree may be entitled merely to reliance damages

**f. Termination of power of acceptance by operation of law [§253]**

- via the incapacity or death of the offeror or as an outcome of altered occurrences

**(1) Death or incapacity of offeror [§254]**

- ended by the offeror's death or incapacity, whether or not the offeree knows of the death or incapacity. [Rest. 2d §48]

**(a) Options [§255]**

- does not end the offeree's acceptance power under an option [Rest. 2d §37]

**1) Unilateral contracts [§256]**

- not ended by the offeror's death or incapacity once the offeree has started performance as defined in Restatement 92 Second section 45

**a) Rationale**

- not ended by the offeror's death or incapacity, and under Restatement Second section 45, once performance has started an offer for a unilateral contract is handled like an option

**(2) Changed circumstances [§257]**

- may also be ended by operation of law as an outcome of particular very restricted kinds of altered occurrences, such as interrupting illegality of the proposed agreement or destruction of its topic matter. (*See* the discussion of changed circumstances *infra*, §§845-862.)

**C. ACCEPTANCE**

**1. Introduction [§258]**

- there are three major issues emerged in relation with the power of acceptance:
  - (i) What kind of acceptance is needed (promise or act);
  - (ii) When can silence handle as an acceptance; and
  - (iii) What is the effect of an interpreted acceptance that deviates from the offer terms?

**2. Is Offer for Unilateral or Bilateral Contract? [§259]**

- an offer may demand acceptance by either a promise or an act

**a. Acceptance of offer for bilateral contract [§260]**

- an offer that needs acceptance by a promise is termed an offer for a bilateral contract

**(1) General rule—promissory acceptance required [§261]**

- can be accepted only by a promise, not by an act. [See *White v. Corlies*, 46 N.Y. 467 (1871)]
- the needed promise may be either express or implied, and in some cases a promise can be implied from a performance (see *infra*, §266)

**(a) Possible exception—tender of full performance [§262]**

- bilateral agreement can be accepted only by a promise
- it is sometimes uttered that such an offer can be accepted, in the absence of a promise, by full performance before cessation of the offeree's acceptance power

**1) Two views**

**a) Restatement First [§263]**

- the major corroboration for this exception was Restatement First section 63, which had the provision that an agreement was formed where an offer known for acceptance by a promise and the offeree (i) fully performed, or tendered full performance, prior to his acceptance power had ended; and (ii) notified the offeror of that fact within the time permitted for accepting by promise

**1/ Rationale**

- the offeror is not bigoted by acquiring the "wrong" type of acceptance

**b) Restatement Second [§264]**

- status is ambiguous and has dropped Restatement First section 63 on the theory that the rule in section 63 engaged a departure from the fundamental mechanism that the offeror is master of his offer. [Rest. 2d §62]

**(2) Modes of promissory acceptance [§265]**

- the promise requires not essentially be verbal

**(a) Promise implied from offeree's conduct [§266]**

- in some cases, a promise may be implied in fact from the offeree's conduct (*see supra*, §156)

**(b) Act designated by offer to signify a promise [§267]**

- performance of the act comprises a promissory acceptance

**1) Note**

- not considered bargained-for consideration
- only signifies the return promise

**2) Limitation**

- the offer cannot assign as a performance signifying acceptance of an act that the offeree might very well perform anyway

**(c) Silence as acceptance [§268]**

- in some occurrences, a promissory acceptance may even be inferred from the offeree's silence (*see infra*, §§300-313)

**(3) Communication of acceptance of offer for bilateral contract [§269]**

- an offer can be accepted merely by a communicated promise
- there are numerous instances in which this is not true:

**(a) Mailbox rule [§270]**

- usage of the mail, telegrams, or the like is a reasonable means of communicating an acceptance, the acceptance usually is effective when dispatched
- true although the acceptance does not actually reach the offeror since it is lost in the mail. [Rest. 2d §56]

**(b) Waiver of communication [§271]**

- a contract is formed when the offeree accepts or approves, even prior he communicates the acceptance. [International Filter Co. v. Conroe Gin, Ice & Light Co., 277 S.W. 631 (Tex. 1925); Rest. 2d §56]

**1) Implied condition of notice [§272]**

- effective that the offeror knows that the contract is on
- agreement would be formed when the offeree approves the offer, so that the offer would no longer be cancellable
- the agreement would not be enforceable except the offeree provided acceptance notice within a reasonable time thereafter

**2) Implied waiver [§273]**

- acceptance communication may be impliedly waived in cases where silence may comprise acceptance (see *infra*, §§300-313)

**b. Acceptance of offer for unilateral contract [§274]**

- can be accepted merely by performance, not by a promise

**(1) Notice of acceptance [§275]**

- a problem of notice to the offeror may emerge in unilateral contract cases

**(a) Notice of completed performance required [§276]**

- the offeror's obligation under the agreement is subject to the implied state that he claims notice of the offeree's performance within a reasonable time period
- if an offeree under a unilateral agreement performs in full, but is unsuccessful to notify the offeror within a reasonable time subsequent to completion that he has finished performance, an agreement will be formed by the performance, but the offeror's duty under the agreement will be dismissed by the failure to provide notice. [Bishop v. Eaton, 37 N.E. 665 (Mass. 1894)]

**1) Diligence in giving notice [§277]**

- the offeror will be bound although for some fortunate reason, the notice does not actually meet the offeror. [Bishop v. Eaton, *supra*]

**2) Exceptions [§278]**

- not needed to provide notice of that fact to the offeror if either:
  - (i) The offeror expressly or impliedly waives attention;
  - (ii) The performance would come to the offeror's notice within a reasonable time in the usual course of things and the offeror has not explicitly demanded notice; or
  - (iii) The performance actually comes to the offeror's notice within a reasonable time. [Midland National Bank v. Security Elevator Co., 200 N.W. 851 (Minn. 1924); Rest. 2d §54]

**(b) Contracts for the sale of goods [§279]**

- the offeree under a unilateral agreement requires merely to notify the offeror that performance has been completed, not that performance has started
- in the case of a contract for the sale of goods, U.C.C. section 2-206(2) has the provision that "where the start of a requested performance is a reasonable approach of acceptance, an offeror who is not informed of such start of performance within a reasonable time may handle the offer as having lapsed prior acceptance."

**(2) Subjective intent of offeree [§280]**

- an offer for a unilateral contract contemplates acceptance by act performance
- the act known for by an offer is performed by either (i) an individual who has no knowledge of the offer or (ii) an individual who knows of the offer but who is principally motivated to perform by some reason other than the offer
- two conditions are handled differently

**(a) Performance without knowledge of offer**

**1) General rule [§281]**

- the act does not form a contract. [Broadnax v. Ledbetter, 99 S.W. 1111 (Tex. 1907)]

**2) Minority rule [§282]**

- a contract is formed although the offeree had no offer knowledge, on the theory that individuals must be encouraged to take virtuous action in pursuit of claiming a reward. [Dawkins v. Sappington, 26 Ind. 199 (1866)]

**a) Statutory rewards [§283]**

- knowledge is not needed in the reward case that is offered by statute, on the basis that liability in such a case is statutory rather than contractual. [Choice v. Dallas, 210 S.W. 753 (Tex. 1919)]

**(b) Offer not the principal motive for performance**

**1) General rule [§284]**

- an agreement is formed although the offer was not the principal motive for doing the act. [Klockner v. Green, 254 A.2d 782 (N.J. 1969)]

**2) Exception—involuntary acceptance [§285]**

- might not form a contract if the act is done involuntarily. [Vitty v. Eley, 51 App. Div. 44 (1900)]

**(3) Obligation of offeree [§286]**

- an offeree's acceptance of an offer for a bilateral agreement binds the offeree as well as the offeror
- if the offer is for a unilateral agreement, the offeree's start of performance obliges the offeror to remain the offer open (see supra, §247), but does not commonly oblige the offeree to finish performance, since the offeree has never done any promise

**(a) Exception [§287]**

- if the offeror relies on such an implied promise by the offeree, the reliance might create the implied promise implementable under the reliance mechanism. [Rest. 2d §90]

**(4) Use of subcontractor's bid [§288]**

- the contemplated approach of accepting the sub-bid is assent by the general contractor, not the performance of utilizing the bid. [Southern California Acoustics Co. v. C.V. Holder, Inc., 71 Cal. 2d 719 (1969); Williams v. Favret, 161 F.2d 822 (5th Cir. 1947)]

**(a) Statutory approaches [§289]**

- in some states, statutes have the provision that a general contractor who bids on a government job should have the inclusion with his bid a list of all subcontractors whose sub-bids he has utilized, and that dispensed under assigned conditions, the general contractor may not replace any subcontractors for those he has listed
- if the general contractor creates an unallowable replacement, the subcontractor whose sub-bid was utilized can bring suit against the general contractor under the statute. [Southern California Acoustics Co. v. C.V. Holder, Inc., supra]

**c. Summary of consequences of unilateral vs. bilateral contract offer [§290]**

- there are two specifically essential outcomes of whether an offer is for a unilateral or a bilateral contract

**(1) Mode of acceptance [§291]**

- if an offer is for a bilateral agreement and the offeree performs an act in the absence of having created a promise, the offeror can reasonably take the position that no contract was formed, on the basis that the offer needed acceptance by promise, not by performance
- if an offer is for a unilateral agreement and the offeree creates a promise in the absence of having started to perform, the offeror can reasonably take the position that no contract was formed, on the basis that the offer needed acceptance by performance, not by promise

**(2) Revocability [§292]**

- if the offer was for a unilateral contract, such an offeree will be protected against revocation under the Restatement section 45 rule
- such an offeree may not be protected against cancellation if the offer was for a bilateral contract
- reasonable reliance on an offer might create the offer irrevocable even if the offer is for a bilateral contract, starting to perform prior to making a needed promissory acceptance might not comprise reasonable reliance

**(a) Note**

- in several cases, these problems do not emerge, either because acts can often be manifested as promises (see supra, §267), or because offers can usually be accepted by either an act or promise (see infra, §§293-298)

**d. Offers calling for acceptance by either a promise or an act [§293]**

- an offer is for either a bilateral or a unilateral agreement
- in many cases, the offer is unclear as to whether it needs acceptance by a promise or by an act

**(1) Restatement First rule [§294]**

- the offer invited the formation of a bilateral agreement by a promissory acceptance. [Davis v. Jacoby, 1 Cal. 2d 370 (1934)]

**(a) Criticism**

- although there was doubt about what type of acceptance was needed and the offeree understood the offer as calling for acceptance by an act and began performance, an offer was assumed to demand acceptance by a promise

**(2) Restatement Second rule [§295]**

- due to result unfairness, an offer is understood as inviting acceptance by either a promise or performance
- under this rule, if there is doubt about whether the offer needs acceptance by a promise or by performance, the offeree is protected no matter which explanation he sets upon the offer

**(a) U.C.C. in accord [§296]**

- U.C.C. section 2-206(1)(a) has the provision that “except otherwise unclearly noted by the language or occurrences an offer to create an agreement must be interpreted as inviting acceptance in any means reasonable in the situations.”

**1) Orders for prompt shipment [§297]**

- the common rule of U.C.C. section 2-206(1)(a) is employed in section 2-206(1)(b) to the particular case of “an order or other offer to buy goods for prompt or current shipment.”



- under section 2-206(1)(b), such an order is interpreted as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of the goods. [U.C.C. §2-206(1)(b); *see* Sale & Lease of Goods Summary]

**a) Shipment of nonconforming goods [§298]**

- will be considered as an acceptance even if the goods shipped are “nonconforming”
- if the shipper “seasonably informs the buyer that the shipment is offered merely as an accommodation to the buyer,” then there is no breach if the goods are nonconforming
- in such cases, the shipment of nonconforming goods is not interpreted as an acceptance, but rather as a counteroffer. [U.C.C. §2-206(1)(b); *see* Sale & Lease of Goods Summary]

**3. Silence as Acceptance**

**a. General rule [§299]**

- does not comprise acceptance. [McGlone v. Lacey, 288 F. Supp. 662 (D.S.D. 1968)]

**(1) Rationale**

- the purpose is to impede an offeror from placing an offeree involuntarily in a condition where the offeree should either take an affirmative action to deny the offer or else become liable on an agreement

**b. Exceptions [§300]**

- the offeree is not involuntarily set into a condition where he should either take an affirmative action to deny the offer or else become liable on an agreement

**(1) Offeree leads offeror to believe that silence will constitute acceptance [§301]**

- by his own prior words or conduct, provided the offeror reason to construe his silence as an acceptance. [Hobbs v. Massasoit Whip Co., 33 N.E. 495 (Mass. 1893); National Union Fire Insurance Co. v. Ehrlich, 122 Misc. 682 (1924); Rest. 2d §69]

**(2) Silence coupled with subjective intent to accept [§302]**

- will comprise acceptance [Rest. 2d §69; *see* International Filter Co. v. Conroe Gin, Ice & Light Co., *supra*, §271]

**(3) Exercise of dominion [§303]**

- is contractually bound to buy the goods at the proffered price, except that price is apparently unconscionable, even if the offeree does not have a subjective intent to accept. [Louisville Tin & Stove Co. v. Lay, 65 S.W.2d 1002 (Ky. 1933); Indiana Manufacturing Co. v. Hayes, 26 A. 6 (Pa. 1893); Rest. 2d §69]

**(a) Note**

- mere inspection does not comprise an improper dominion exercise

**(b) Statutory exceptions [§304]**

- federal statute now has the provision, “Unless for free samples clearly and conspicuously indicated as such, and merchandise mailed by a charitable institution obtaining contributions, the mailing of unordered merchandise comprises an unfair competition means and an unfair trade practice.”
- statutes in effect overturn the “dominion exercise” rule in the cases to which they employ

**(4) Solicitation of offer by offeree [§305]**

- silence may also yield in the contract formation where (i) the offeree has obtained the offer and drafted its terms; (ii) the offer, as drafted by the offeree, is so worded that a reasonable individual in the offeror's position would believe that the offer was to be deemed accepted except the offeree informs the offeror that the offer is denied; and (iii) the offeror relies or is likely to have relied on the reasonable belief that the absence of a prompt repudiation comprised an acceptance

**(a) Solicitation of orders for goods [§306]**

- in an instance, the seller may be under an obligation to fill the order except he particularly denies it within a reasonable time. [Cole-McIntyre-Norfleet Co. v. Holloway, 214 S.W. 817 (Tenn. 1919); Ammons v. Wilson & Co., 170 So. 227 (Miss. 1936)]

**(b) Applications for insurance [§307]**

- the insurer is liable if it fails to deny the application in a timely means [Kukuska v. Home Mutual Hail-Tornado Insurance Co., 235 N.W. 403 (Wis. 1931)]

**1) Rationale**

- the insurer must know that the applicant will rely on reasonably quick processing

**(5) Late acceptance [§308]**

- has the legal counteroffer effect [Phillips v. Moor, 71 Me. 78 (1880); Rest. 2d §70]
- a late acceptance does not conclude a negotiation, but is handled as an offer that can be accepted by the original offeror. (*See infra*, §322.)

**(6) Implied-in-fact contracts [§309]**

- the common rule does not employ to *communicated action*, even if the performance is nonverbal

**(a) Implied-in-fact offer and acceptance [§310]**

- in some cases, both the offer and the acceptance may be indicated in fact from nonverbal actions

**1) U.C.C. [§311]**

- conduct by both parties that considers the occurrence of an agreement for the sale of goods is adequate to establish an agreement, although the writings of the parties do not otherwise establish an agreement. [U.C.C. §2-207(3); *see supra*, §217]

**(7) Unjust enrichment or quasi-contract [§312]**

- can recover in restitution or quasi-contract if he can exhibit that:
  - (i) He has granted a benefit on the defendant;
  - (ii) He granted the advantage with the expectation that he would be paid its value;
  - (iii) The defendant knew or had reason to know of the plaintiff's expectation; and
  - (iv) The defendant would be unjustly enriched if he were permitted to retain the advantage in the absence of paying its value.

**(a) Failed express contract [§313]**

- 4 requirements above need not be proved where a quasi-contract remedy is searched since an express agreement has not been successful

- all should be proved is the express contract and unjust enrichment that would yield lacking the quasi-contractual remedy

## **D. DEFENSES**

### **E.1 INDEFINITENESS**

#### **1. General Rule [§415]**

- will not be implemented if it is observed to be too indefinite
- an apparent negotiation will be observed to be too indefinite if either: (i) its terms are so incomplete or ambiguous that they exhibit that the parties did not consider themselves as having finished an agreement, or (ii) even if it deems that the parties considered themselves as having finished an agreement, it is so indefinite that a court cannot ascertain its material terms with reasonable certainty or fashion a suitable remedy for breach

##### **a. Implication of terms [§416]**

- does not give it fatally indefinite

##### **b. Part performance [§417]**

- what comprises adequate definiteness is an issue of judgment
- a court might implement an agreement that has been partly performed although the court might have held the same agreement too indefinite if the agreement had not been partly done. (*See infra*, §439.)

#### **2. Examples of Recurring Types of Omissions**

##### **a. Price**

###### **(1) Omission of price [§418]**

- under old cases, courts could not infer what price the parties intended
- under several modern cases and the U.C.C. (see *infra*, §432), if the agreement is totally silent as to price, a reasonable price can be disseminated by the court if the court is satisfied that the parties intended to conclude an agreement and there is some objective standard for ascertaining a reasonable price. [Bendalin v. Delgado, 406 S.W.2d 897 (Tex. 1966); see *infra*, §§440 et seq.]

###### **(a) Intent to conclude a contract [§419]**

- a court will not implement the negotiation except the court ascertains that the parties intended to conclude an agreement
- the price omission may be considered as a proof that the parties were still in preliminary transaction. [Western Homes, Inc. v. Herbert Ketell, Inc., 236 Cal. App. 2d 142 (1965)]

###### **(2) Indefinite standard provided by parties [§420]**

- the conventional approach is to reject implementation on the basis that in such cases it cannot be inferred that the parties intended a “reasonable price.” [Walker v. Keith, 382 S.W.2d 198 (Ky. 1964)]

###### **(a) Modern trend [§421]**

- such a contract would probably be implemented utilizing the standard of “a reasonable price at the delivery time.” [U.C.C. §2-305(1); see *infra* §§432, 448]

**b. Time for performance**

**(1) General rule—reasonable time implied [§422]**

- the courts will commonly fill the gap by keeping that performance of the agreement within a reasonable time was implied. [Automatic Sprinkler Co. v. Sherman, 294 F. 533 (5th Cir. 1923)]

**(a) Test of reasonableness [§423]**

- will depend on the agreement nature, custom and usage in the community, and before dealings between the parties

**(2) Special cases**

**(a) Employment contracts [§424]**

- if duration is unspecified, the common rule is that the agreement is terminable at will by either party. [Atchison, Topeka & Santa Fe Railway v. Andrews, 211 F.2d 264 (10th Cir. 1954)]

**1) Rationale**

- includes personal relationships, and it would be objectionable to coerce either party to continue in such a relationship against his will, except for the provision of the parties

**2) Stated pay period not controlling [§425]**

- does not alter the usual rule
- statement is considered merely to set the employee's pay rate while the employment continues

**3) Agreement for “permanent” employment [§426]**

- are commonly construed to be terminable at the will of either party. [35 A.L.R. 1432; Ruinello v. Murray, 36 Cal. 2d 687 (1951)]

**a) Note**

- contracts will be interpreted literally in which either (i) the contract specifically limits the employer's power to fire the employee, or (ii) the circumstances clearly indicate that the parties really did have permanent employment in mind. [Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695 (1972)]

**b) Employee handbooks [§427]**

- material on employment security
- the majority rule is that statements of this type in employee handbooks are enforceable promises, and thus, overpower the assumption that employment is at will without a contract for a particular term. [See, e.g., Pine River State Bank v. Mettelle, 333 N.W.2d 622 (Minn. 1983)]
- courts in some states have held that employee handbooks will not be in harmony with the type of contractual status. [See, e.g., Heideck v. Kent General Hospital, Inc., 446 A.2d 1095 (Del. 1982)]

**c) Other factors [§428]**

- can be overcome by contrary intent proof
- this proof may take the form of an express oral promise by the employer
- may be overwhelmed by implication from other determinants, with the inclusion of personnel policies or practices of the employer, the employee's longevity of service, actions or

communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is involved. [Foley v. Interactive Data Corp., 47 Cal. 3d 654 (1988)]

#### **1/ Comment**

- since the at will doctrine is relatively ingrained, not all courts may be ready to observe that the doctrine is overpowered by an implied, in opposition to an express, promise
- conventionally, contracts that expressly gave that employment would be “permanent,” or “for life,” or the like, were usually construed to be terminable at will

#### **(b) Distributorship and franchise contracts [§429]**

- where the duration is left open, the law suggests that the agreement will last a “reasonable” time. [Allied Equipment Co. v. Weber Engineered Products, 237 F.2d 879 (4th Cir. 1956)]

#### **3. U.C.C. Provisions [§430]**

- comprises very liberal rules on indefiniteness in agreements for the sale of goods, and also contains several “gap filler” provisions
- U.C.C. section 2-204 has a provision that “although one or more terms are left open, an agreement for the sale of goods does not fail for indefiniteness if the parties have intended to create an agreement and there is a reasonably certain ground for providing a suitable remedy.”

#### **a. Gap fillers [§431]**

- by giving assigned terms that facilitate if there is a particular gap type, or by giving how a particular gap type must be filled
- U.C.C. does not comprise a gap filler on quantity

#### **(1) Price [§432]**

- under U.C.C. section 2-305(1), the price is a reasonable price at the time for delivery if: (i) nothing has been uttered as to price, (ii) the price is left to be conceded upon by the parties and they fail to concede, or (iii) the price is to be fixed in terms of some standard that is positioned by a third person or agency, and it is not so placed.

#### **(a) Note**

- if the parties intend not to be bound except the price is fixed or agreed upon, and the price is not fixed or agreed upon, then there is no contract
- in such cases: (i) the buyer must return any goods already received or, if unable to do so, should pay the reasonable value of the goods at the delivery time, and (ii) the seller should return any part of the price paid on account. [U.C.C. §2-305(4)]

#### **(2) Place of delivery [§433]**

- under U.C.C. section 2-308, if the delivery place for goods is unspecified, the delivery place is the seller’s place of business

#### **(3) Time for shipment or delivery [§434]**

- under U.C.C. section 2-309, if the time for shipment or delivery is unspecified, delivery is due in a reasonable time.

**(4) Time for payment [§435]**

- under U.C.C. section 2-310, if the time for payment is unspecified, payment is due at the place and time at which the buyer is to receive the goods.

**(5) Duration of contract [§436]**

- under U.C.C. section 2-309, if a contract has a provision for successive performances, but is indefinite in duration, the agreement is valid for a reasonable time, but either party may end the contract at any time unless otherwise conceded.

**(6) Effect of gap filler provisions [§437]**

- where too several terms are missing, the court may conclude that the parties did not intend to create an agreement, but rather they were only involved in preliminary transactions

**4. Modern Trend Toward Liberalization [§438]**

- under restatement Second, it has the provision that: “As a standard of reasonable certainty, it is adequate if the terms give a ground for ascertaining the breach existence and for providing a suitable remedy.” [Rest. 2d §33]

**5. Indefiniteness Cured by Part Performance [§439]**

- may be implemented if the parties have begun performance. [Bettancourt v. Gilroy Theatre Co., 120 Cal. App. 2d 364 (1953)]

**a. Rationale**

- implementation of indefinite contracts on the ground of part performance is commonly based on one or more of the following theories:
  - (1) Part performance pursuant to the contract exhibits that the parties believed they had finished an agreement and were not still in preliminary transactions;
  - (2) The greater the extent to which performance has already existed, the more unfair it is to let one of the parties no longer in difficulty, and thus, the more ready the court will be to distribute missing terms; and
  - (3) Performance may fill a gap left in the agreement by exhibiting what the parties believed the appropriate term was.

**6. Bargains Capable of Being Made Certain [§440]**

- in some cases, the parties do not fix a material term in the agreement, but do set a means for fixing the term
- such a negotiation is implementable if it creates a basis to an objective standard that is to be used to fix the missing term

**a. Standards for determining price [§441]**

- negotiations to sell at a price are implementable. [Kladivo v. Melberg, 227 N.W. 833 (Iowa 1930)]

**b. Output and requirements contracts [§442]**

- a negotiation to supply or to sell is adequately certain.
- both “requirements” and “output” may be objectively ascertained. [Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353 (1931)]

**(1) Caveat**

*See supra*, §§56-59, regarding the explanation of such an agreement

**c. Custom or usage [§443]**

- terms may also be made certain based on a local custom or usage
- the standard is the type of transfer that is common in the community. [Bondy v. Harvey, 62 F.2d 521 (2d Cir. 1933)]

**7. “Agreements to Agree” [§444]**

- if the term engaged is material, the conditional rule is that the agreement is unimplementable. [Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105 (1981)]

**a. Rationale—the courts will not make a contract for the parties [§445]**

- there is no room to distribute a “reasonable” term since the parties have not basically left a gap but have given a particular gap-filling principle, which has failed

**b. Complete omission vs. “agreement to agree” [§446]**

- if the parties render that the term is “to be agreed upon,” under the conventional rule the contract commonly will not be implemented

**c. Minor terms reserved [§447]**

- the agreement commonly will not be made unimplementable. [Rest. 2d §33]

**d. U.C.C. provision [§448]**

- under U.C.C. section 2-305, an agreement to concede on price does not make a negotiation unimplementable
- if the parties fail to meet a contract as to price, then the price is “a reasonable price at the delivery time.”

**e. Future trend [§449]**

- will probably be to leave from the conventional rule and implement an agreement that departs a material term to future contract, given the parties have exhibited an intent to conclude an agreement

**8. Bargains Subject to Power of One Party Concerning Performance [§450]**

- issues usually emerge as to whether a negotiation is adequately definite where one party has retained some power regarding performance

**a. Unrestricted option**

**(1) Common law [§451]**

- promise is regarded “illusory,” and hence, fails as sufficient consideration for a counter-promise. (*See supra*, §27.)

**(2) U.C.C. position [§452]**

- the other party can either revoke the agreement or set a reasonable price himself
- if the parties depart the price to be fixed otherwise than by their contract and no price is set as an outcome of one of the parties’ fault, the other party may either revoke the agreement or set a reasonable price himself

**(3) Future trend [§453]**

- will start to keep that an obvious unregulated power to set price is not illusory, because it is restricted by the common duty to perform agreements in good faith

**b. Alternative promises [§454]**

- reserves to a party the right to select which of two or more performances will be provided, given that each performance would comprise consideration when taken alone (*supra*, §§38-40).

**(1) Promisor's option [§455]**

- a negotiation that retains in the promisor the right to perform alternatives is not implementable unless each of the alternatives comprises consideration. (See *supra*, §§38-39.)

**(2) Promisee's option [§456]**

- the agreement is implementable since one selection is corroborated by consideration. (See *supra*, §40.)

**c. Promise dependent on ability to perform [§457]**

- is implementable since the party's ability is of great potential to do objective determination. [Van Buskirk v. Kuhns, 164 Cal. 472 (1913)]

**9. Agreement Contemplating Future Written Contract [§458]**

- a special problem that is associated to indefiniteness happens on the understanding that a formal written agreement will be executed, and that does not happen

**a. Writing as evidentiary memorial [§459]**

- the contract is implementable. [Saunders v. Pottlitzer Bros. Fruit Co., 144 N.Y. 209 (1894); Goad v. Rogers, 103 Cal. App. 2d 294 (1951)]

**b. Writing as consummation of agreement [§460]**

- the agreement is not implementable except and until the formal written agreement is executed. [Stanton v. Dennis, *supra*, §416; Rest. 2d §27; 165 A.L.R. 752]

**c. Determining intent [§461]**

- crucial determinants to recognize are: (i) whether the agreement is of a type commonly put in writing; (ii) whether there are few or several details; (iii) whether the amount engaged is large or small; and (iv) whether a formal writing is crucial for full expression of the kind of contract in question. [Mississippi & Dominion Steamship Co. v. Swift, 29 A. 1063 (Me. 1894); Rest. 2d §27]

**(1) Note**

- basically to memorialize the negotiation

**10. Preliminary Agreements [§462]**

- the question emerges whether the parties designed this preliminary contract to be binding, and if so, the degree to which the parties designed to be bound
- in a leading case, Teachers Insurance & Annuity Association of America v. Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1987), the court ascertained between two types of preliminary contracts:

**a. Agreement contemplating formalization [§463]**

- is binding as a contract at the time it is created
- is "preliminary" merely in the sense that it stays to be formalized in the manner the parties thought about. (See *supra*, §459.)

**b. Agreement contemplating further good faith negotiations [§464]**



- courts have started to consider that parties can bind themselves to an admittedly incomplete contract in the sense that they acknowledge a mutual commitment to negotiate together in good faith in an attempt to reach final contract within the scope of the terms that have been arbitrated in the preliminary, admittedly incomplete contract

**(1) Express preliminary agreement to negotiate in good faith [§465]**

- cannot bargain with anyone other than the subject of the proposed agreement [Channel Home Centers v. Grossman, 795 F.2d 291 (3d Cir. 1986)]

**(2) Implied agreement to negotiate in good faith [§466]**

- the parties are mutually committed to transact in good faith on those terms that have not been encompassed in the preliminary contract so that the final contract can be carried out

**(3) Content of obligation to negotiate in good faith [§467]**

- has been defined as impeding a party from: (i) renouncing the conceded upon terms of a transaction in the absence of trying to transact the unresolved terms, (ii) departing the transactions in the absence of having made a good faith attempt to consummate them, or (iii) insisting on terms that are either inconsistent with or do not execute the intent of those terms that have been conceded upon. [A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc., 873 F.2d 155 (7th Cir. 1989)]

**11. Reliance on Indefinite Contract [§468]**

- entitled to reliance damages since the conditions for promissory estoppel were adequate
- section 90 of Restatement First, the reliance principle “does not cite the need that the promise providing rise to the action cause should be so comprehensive in scope as to meet the needs of an offer that would ripen into an agreement if accepted by the promisee.”

**a. Part performance as alternative [§469]**

- may make an otherwise indefinite contract implementable
- may make it unnecessary to adopt to a reliance scrutiny

**(1) Note**

- may be able to bring suit for expectation damages, not solely reliance damages, to which he would usually be restricted under the Red Owl doctrine. (See supra, §128.)

**b. Duty of good faith negotiation as alternative [§470]**

- Red Owl was decided at a time when the duty to negotiate in good faith had not yet been fully developed. That duty may be a better fit for a given fact situation than the reliance approach of Red Owl.

**c. Application of Red Owl doctrine [§471]**

- the parties have not engaged into a preliminary written contract or begun performance, but one party has nevertheless started preparing to perform
- even though the Red Owl opinion did not clearly and distinctly turn on the defendant’s leading-on, conduct of this type explains the strongest case for employing the Red Owl doctrine

## **E.2 MISTAKE**

### **1. In General [§472]**

- belongs into five classifications, termed as “mutual mistake,” “unilateral mistake,” “mistake in transcription,” “misunderstanding,” and “mistake in transmission.”

### **2. Mutual Mistake [§473]**

- a shared mistake created by both of the parties to an agreement
- a mistaken presumption shared by both parties as to the situations beyond the world

#### **a. Older test [§474]**

- such distinctions were neither very illuminating nor easily workable, and few if any courts would now use types such as the “substance” or “identity” of the contract’s subject matter (case would be voidable), or only its “accidents” or “collateral attributes” (case would not be voidable) [See, e.g., *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887)]

#### **b. Modern rule [§475]**

- the agreement is voidable by the adversely affected party if the mistake has a material effect on the conceded exchange and the adversely affected party did not bear the risk that the presumption was mistaken. [Rest. 2d §152]

#### **c. Where a party assumes risk of mistake [§476]**

- in reference to Restatement First, “where the parties know that there is doubt in concern to a particular matter and agreement on that presumption, the agreement is not made voidable
- the peril of the doubtful fact is then presumed as one of the negotiating elements. [Rest. 1st §502, comment]

#### **d. Mistake in judgment no defense [§477]**

- is not voidable on the basis of mutual mistake if the mistake regards prediction or judgment

### **3. Unilateral Mistake [§478]**

- mistake made by one, rather than both, of the parties to an agreement
- a mechanical error of computation, perception, or the like regarding a fundamental presumption on which the agreement was created

#### **a. Non-mistaken party aware of error [§479]**

- the mistake is uttered to be a “palpable” unilateral mistake
- a palpable unilateral mistake creates the agreement voidable by the mistaken party
- “One cannot snap up an offer or bid knowing that it was created in mistake.” [*Tyra v. Cheney*, 152 N.W. 835 (Minn. 1915); and see *Peerless Glass Co. v. Pacific Crockery & Tinware Co.*, 121 Cal. 641 (1898)]

#### **(1) Actual knowledge not necessary [§480]**

- adequate that the non-mistaken party should have known of the mistake

#### **(2) Analysis [§481]**

- is usually uttered to be an exception to the objective theory of agreements, because the mistake is subjective
- the design of the objective theory is to protect the promisee’s reasonable expectations
-

**(3) Errors in judgment [§482]**

- the rule regarding palpable unilateral mistake does not employ to errors in judgment as to the quality or value of the work done or goods negotiated for

**b. Non-mistaken party unaware of error [§483]**

- the conventional rule is that there is a binding contract

**(1) Damages [§484]**

- the non-mistaken party is entitled to expectation damages (*see infra*, §876). [Crenshaw County Hospital Board v. St. Paul Fire & Marine Insurance Co., 411 F.2d 213 (5th Cir. 1969)]

**(2) Modern trend [§485]**

- if the mistaken party informs the other party of a unilateral mistake prior to the non-mistaken party has altered his position in reliance, the mistaken party can rescind the agreement. [St. Nicholas Church v. Kropp, 160 N.W. 500 (Minn. 1916)]
- if the non-mistaken party has modified his position, his recovery will be restricted to damages needed to pay him for his reliance

**4. Mistranscription [§486]**

- happens where the parties create an oral contract which they diminish to a signed writing, but through some clerical mistake the writing does not rightly embody the oral contract
- the aggrieved party is granted to the equitable remedy of reformation
- to acquire reformation the aggrieved party should prove his case not solely by the usual “preponderance of the proof” but by “clear and convincing” evidence. [Goode v. Riley, 28 N.E. 228 (Mass. 1891); and see Remedies Summary]

**5. Misunderstanding [§487]**

- emerges where an expression is vulnerable of two varying but equally reasonable explanations, and each party’s subjective intention regarding the expression varies from that of the other party and that no contract is formed. (See *supra*, §366.)
- this rule is unemployable where one party’s explanation is more reasonable than the other’s
- in such cases, the fact that the two parties subjectively design two varying definitions does not impede agreement formation

**6. Mistakes in Transmission by Intermediary [§488]**

- this kind of mistake engages a miscommunicated offer

**a. Offeree aware of mistake [§489]**

- an agreement will not be formed. [Germain Fruit Co. v. Western Union, 137 Cal. 598 (1902)]

**b. Offeree unaware of mistake [§490]**

- there is a authority split:

**(1) Majority view [§491]**

- a contract is formed on the terms transferred to the offeree by the intermediary
- some courts rationalize this outcome on the theory that the intermediary acts as the offeror’s agent, and the offeror is liable for the agent’s acts. [Des Arc Oil Mill v. Western Union Telegraph Co., 201 S.W. 273 (Ark. 1918)]

**(2) Minority view [§492]**

- no agreement yields where there is an transmission error, on the basis that the parties have neither objectively nor subjectively reached a contract. [Strong v. Western Union, 109 P. 910 (Idaho 1910)]

**(3) Intermediary's liability [§493]**

- the intermediary may be liable for negligence for any loss suffered by either party

**c. Practical significance [§494]**

- has been much diminished by changes in means of communication
- it is probably that each party will be liable for its own clerical mistakes and for mistakes caused by its own equipment

**E.3 CONTRACTS INDUCED BY MISREPRESENTATION, NONDISCLOSURE, DURESS, OR UNDUE INFLUENCE**

**1. Misrepresentation**

**a. Fraudulent misrepresentation [§495]**

- a misrepresentation is a statement that is not in harmony with the facts. [Rest. 2d §159]
- if the misrepresenting party intends her assertion to trigger another party to engage a contract and he either: (i) knows or believes the assertion is false, (ii) without confidence in the assertion truth but presents it as fact, or (iii) says or implies there is a ground for the assertion, such as personal knowledge or investigation, when in fact the ground does not occur. [Rest. 2d §162]
- the agreement is voidable by the innocent party. [Rest. 2d §164]

**b. Material misrepresentation [§496]**

- is also voidable by a party who reasonably relies on it and concedes to an agreement as an outcome of it. [Rest. 2d §164]
- is material if: (i) the assertion probably will trigger a reasonable individual to concede, or (ii) the misrepresenting party knows the assertion most likely will create a particular individual concede. [Rest. 2d §162]

**2. Nondisclosure [§497]**

- is needed if the prospective parties are in a fiduciary association or a association of trust or confidence
- may also be needed, even in the lack of such an association, where a material fact is known to one party by virtue of his special position and could not be readily ascertained by the other party in the carrying out of normal diligence

**3. Duress [§498]**

- is voidable on the basis of duress where consent was triggered by wrongful threats. [Rest. 1st §§492-495]

**a. Economic duress [§499]**

- is a valid defense to the contract implementation where:
  - (i) One party commits or threatens to commit a wrongful act, with the inclusion of agreement breach, that would position the other in a place that would gravely threaten his property or finances except the other party engages into an agreement; and

- (ii) No adequate means are available to avoid or prevent the threatened loss, other than engaging into the agreement.

#### **4. Undue Influence [§500]**

- is unjust persuasion of a party
- the agreement is voidable

### **E.4 UNCONSCIONABILITY**

#### **1. Introduction [§501]**

- is a very crucial doctrine whose precise scope is still somewhat ambiguous

#### **2. Development of Doctrine—U.C.C. [§502]**

- the doctrine in its modern form was incorporated into contract law by U.C.C. section 2-302.

##### **a. U.C.C. section 2-302 [§503]**

- U.C.C. section 2-302 has the provision that “if a court as a matter of law seeks an agreement or any clause of the agreement to have been unreasonable at the time it was created, the court may reject to implement the agreement, or it may implement the remainder of the agreement lacking the unreasonable clause, or it may so restrict the employment of any unreasonable clause as to impede any unreasonable outcome.”

##### **b. Extension [§504]**

- U.C.C. section 2-302 is applicable only to contracts for the sale of goods
- courts have commonly held that the unconscionability principle is employable to all agreements, and the mechanism is now also explained in Restatement Second section 208

#### **3. Meaning and Scope of Doctrine [§505]**

- are still ambiguous

##### **a. Comment**

- is employed to invalidate a contractual clause engaging procedural unconscionability

##### **b. Procedural unconscionability—unfair surprise [§506]**

- happens where the party who drafts the agreement involves a term in the agreement, having reason to know that the term does not harmonize with the other party’s impartial expectations and that the other party will not notify the term

##### **(1) Adhesion contracts [§507]**

- agreements in which the parties occupy remarkably unequal negotiating positions, and the party in the inferior negotiating position is coerced to “adhere” to the terms in the other’s printed form on a “take it or leave it” basis, rather than having terms bargained out. [Wheeler v. St. Joseph Hospital, 63 Cal. App. 3d 345 (1977); 16 Kans. L. Rev. 303 (1968)]

##### **(2) Party’s lack of knowledge of provisions in contract**

##### **(a) Traditional view [§508]**

- each party to an agreement was charged with knowledge of its provisions
- there was no doctrine of unfair surprise
- rule was termed as “the duty to read.”

**(b) Modern rule [§509]**

- a contracting party is bound only by those provisions that are fairly surprising. [California State Auto Association v. Barrett Garages, Inc., 257 Cal. App. 2d 71 (1967)]

**(c) Comment—protection of weaker party**

- the courts commonly are in need of that the weaker party had actual knowledge of the provisions

**c. Substantive unconscionability [§510]**

- unconscionability grounded on lopsided terms, lacking concern to defects in the negotiating process is still unresolved

**(1) U.C.C. [§511]**

- the Comment to U.C.C. section 2-302 explains that “the unconscionability principle is one of oppression, impediments and unfair surprise and not of allocation disturbance of perils due to superior negotiating power.”

**(2) Restatement Second [§512]**

- it is possible for an agreement to be oppressive taken as absolute, in spite of the fact that there is no weakness in the negotiating process, but supplements that unconscionability commonly engages other determinants as well as overall imbalance. [Rest. 2d §208, comment]

**(3) Cases [§513]**

- have engaged an unfair negotiating process [American Home Improvement, Inc. v. MacIver, 201 A.2d 886 (N.H. 1964)]

**4. Types of Unconscionable Provisions [§514]**

- have been bombarded as unconscionable in several settings:

**a. Exculpatory clauses [§515]**

- is a clause liberating a party from liability for injury caused by his performances
- such clauses often raise unconscionability problems

**(1) Intentional wrongs [§516]**

- is usually held violative of public policy and thus, illegal. [See, e.g., Cal. Civ. Code §1688]

**(2) Negligence [§517]**

- raises greater difficulty

**(a) Injuries to the person [§518]**

- in theory, a liability disclaimer for detriment to the individual caused by negligence is implementable unless it is unconscionable
- in practice, such disclaimers are generally, even though not invariably, held to be unreasonable, either because the disclaimer is contained in a form adhesion contract and is unconscionably surprising, or because the contract that contains the disclaimer affects the public interest and the injured party is a member of a protected class. [See, e.g., Tunkl v. Regents of the University of California, 60 Cal. 2d 92 (1963)]
- some cases do implement liability disclaimers for detriment to the individuals caused by negligence, especially where the agreement regards activities that are known to be detrimental [Garretson v. United States, 456 F.2d 1017 (9th Cir. 1972)]

**(b) Injuries to property [§519]**

- provisions that relieve a party from liability for lost profits or injury to property caused by the party's negligence are usually upheld, given the injured party had some selection and no unfair surprise was engaged (*see infra*, §§522-524). [Mayfair Fabrics v. Henley, 222 A.2d 602 (N.J. 1967); Sweeney Gasoline & Oil Co. v. Toledo, Peoria & Western Railroad, 247 N.E.2d 603 (Ill. 1969)]

**b. Disclaimers and limitations of warranty liability [§520]**

- there is in every agreement for the sale of goods a warranty that the seller has good title to the goods. [U.C.C. §2-312]
- a merchant seller impliedly warrants that goods sold are merchantable [U.C.C. §2-314]
- any seller who has reason to know that the buyer designs to utilize the goods bought for a specific intent and that the buyer is relying on the seller's skill or judgment in selection of suitable goods impliedly warrants that the goods are fit for the particular purpose. [U.C.C. §2-315]
- seller may attempt to restrict implied warranty liability in two varying means, and such restrictions are not essentially unreasonable

**(1) Disclaimers [§521]**

- the language must mention merchantability and, in the case of a writing, the disclaimer should be conspicuous
- for exclusion of the implied warranty of fitness, the language must be in writing and conspicuous

**(2) Limitation of remedies [§522]**

- instead of disclaiming a particular warranty, the seller may restrict liability for warranty breach
- U.C.C. section 2-719(1)(a) is subject to two major exceptions:

**(a) Where exclusive remedy fails of its purpose [§523]**

- U.C.C. section 2-719(2) has the provision that "where occurrences cause an exclusive or restricted remedy to fail of its crucial intent, remedy may be had as provided in this Act."
- this provision is most commonly invoked where the contract restricts remedy to repair and substitute, and the seller neither repairs nor substitutes within a reasonable time period of time

**(b) Where there is personal injury [§524]**

- U.C.C. section 2-719(3) has the provision that consequential damages may be restricted or excluded except the restriction or exclusion is unreasonable, but that "restriction of consequential damages for injury to the person yielding from consumer goods is prima facie unreasonable."
- U.C.C. section 2-719(3) supplements that restriction of damages where the loss is commercial is not prima facie unreasonable

**1) Application**

- such a restriction is almost invariably perceived as unreasonable by the courts. [*See, e.g., Collins v. Uniroyal, Inc., 315 A.2d 15 (N.J. 1974)*]

**E.5 STATUTE OF FRAUDS**

**1. In General [§525]**

- oral contracts are implementable

- needs particular types of agreements to be memorialized in a writing signed by “the party to be charged”
- if an oral agreement belongs within one of the contract categories that should be memorialized in a writing under the Statute of Frauds, the agreement is said to be “within the Statute”
- if an agreement is “within the Statute” it is unimplementable against a party who has not signed a written memorandum containing the agreement’s material terms, unless some exception takes the agreement “out of the Statute,” in which case the agreement is implementable

## **2. Purpose [§526]**

- to impede fraud and perjury by individuals who might falsely claim that an agreement was created, when it was not

## **3. Types of Contracts that Must Be Memorialized in Writing [§527]**

- commonly needs at least five categories of agreements to be memorialized in a writing: (i) agreements for the sale of an interest in land; (ii) agreements for the sale of goods; (iii) agreements in marriage consideration; (iv) agreements not to be performed within one year from the creating thereof; and (v) agreements of suretyship

### **a. Contracts for sale of interest in land [§528]**

- should be memorialized in a writing

#### **(1) Leases [§529]**

- covered by the sale-of-an-interest-in-land Statute provision
- several Statutes of Frauds render that leases for one year or less do not have to be memorialized in a writing. [See, e.g., Cal. Civ. Proc. Code §1971]

#### **(2) What constitutes “interest in land”? [§530]**

- what comprises an interest in land is ascertained by property law

##### **(a) Note**

- a contract to share the profits or proceeds from the purchase or land sale is not within the Statute, since it is not an agreement for sale and does not promise to transfer an interest in land

#### **(3) Part performance doctrine [§531]**

- facilitates somewhat variedly on sellers and purchasers

##### **(a) Sellers [§532]**

- can recover the purchase price although the agreement is not in writing

##### **(b) Purchasers [§533]**

- may take an agreement out of the Statute for intents of an action in equity
- the conventional part performance exception to the Statute of Frauds does not employ to an action against the seller at law

#### **1) Requirements under traditional rule**

- is employable only if the purchaser, with the seller’s consent, either: (i) created a valuable improvement on the land, or (ii) took or retained possession and paid a part of the purchase price.

##### **a) Note**

- under some cases, taking possession is sufficient



**2) Reliance doctrine**

- may be adequate to estop the other party from pleading the Statute of Frauds
- on this theory, part performance may be appropriate even where the action is at law

**b. Contracts for the sale of goods—U.C.C. section 2-201 [§534]**

- employable to sales of goods is set forth in U.C.C. section 2-201
- an agreement for the sale of any goods should be corroborated by a writing

**(1) “Goods” defined [§535]**

- involves all tangible movable property
- does not comprise intangible securities or services

**(2) Exceptions [§536]**

- an oral agreement for the sale of goods will be implemented under the following occurrences:

**(a) Receipt and acceptance of goods [§537]**

- the buyer claims and accepts all or part of the goods [U.C.C. §2-201(3)(c)]

**(b) Part payment [§538]**

- the buyer creates part payment for the goods [U.C.C. §2-201(3)(c)]

**(c) Special manufacture [§539]**

- not appropriate for sale to others in the common course of the seller’s negotiation, and the seller creates either a “substantial beginning” in the manufacture of the goods or commitments for their procurement [U.C.C. §2-201(3)(a)]

**(d) No objection to confirmation [§540]**

- within a reasonable time a written confirmation, which is sufficient to the Statute of Frauds as to the sender, is sent; and the party receiving the confirmation does not dispatch a written objection thereto within 10 days [U.C.C. §2-201(2)]

**(e) Admission [§541]**

- the agreement is accepted by the party against whom implementation is sought “in his pleadings or testimony in court” [U.C.C. §2-201(3)(b)—not in effect in California].

**(3) Modifications [§542]**

- if the new agreement that yields from putting together the original agreement and the alteration is within the Statute

**(4) Other U.C.C. provisions [§543]**

- is restricted merely to agreements for the sale of goods
- other U.C.C. provisions render that a writing is required for other types of negotiations

**(a) Assignments—“authentication” required [§544]**

- are unimplementable except the assignor either has property possession or has signed or otherwise authenticated a security contract defining the assigned debt. (*See infra*, §670.)

**(b) Securities—no writing required [§545]**

- do not have to be in writing to be implementable. [U.C.C. §8-113]

**(c) Certain general intangibles—writing required [§546]**

- under section 1-206, lacking a sufficient writing, an agreement for the sale of such property is not implementable beyond \$5,000 (in amount or value of remedy).

**(5) Sale of goods vs. contract for services [§547]**

- an agreement does not come within the sale-of goods provision of the Statute only because it engages an incidental supply of goods
- an agreement does not belong outside the sale-of-goods provision only because it needs an incidental furnishing of services

**c. Contracts in consideration of marriage [§548]**

- should be memorialized in a writing
- comprises financial provisions
- the provision is *not* construed to employ to basic mutual promises
- recognized to be “contracts to marry” rather than “contracts in marriage consideration.”

**d. Contracts that cannot be performed within one year of making [§549]**

- agreements that by their terms cannot be performed within one year from the creating thereof should be memorialized in a writing
- the one-year period starts at the contract date is made, not when performance is promised. [2 Corbin §444]

**(1) Statute not applicable if performance within one year is possible although unlikely [§550]**

- such an agreement is not within the Statute, and thus, is implementable even though oral

**(2) Exception for performance [§551]**

- the great burden of authority holds that once the agreement has been fully performed on one side, it will be implementable although oral

**(a) Rationale**

- even if the agreement was not implementable, the party who performed could sue in restitution for the advantage conferred. (*See infra*, §572.)

**e. Suretyship contracts [§552]**

- the debtor’s obligation should be memorialized in a writing
- pay the decedent’s debts out of her own funds should be memorialized in a writing
- the suretyship provision is subject to some important exceptions:

**(1) Promise to debtor [§553]**

- such a promise is therefore implementable although oral, presuming there is consideration. [Rest. 2d §123]

**(2) Promisor is primary obligor [§554]**

- employs solely to agreements in which the promisor promises to be secondarily liable

**(3) Main purpose rule [§555]**

- a suretyship promise is implementable, although oral, if it seems that the promisor’s main purpose in assuring the obligation of another was to secure an advantage or pecuniary advantage for himself. [Rest. 2d §116]

**4. Type of Writing Required [§556]**

- the Statute of Frauds can be sufficed by any type of writing signed by the party to be charged

- a formal agreement is not needed
  - the writing should comprise a “memorandum” of the essential terms of the contract and should be signed by the “party to be charged.”
- a. Essential terms [§557]**
- to suffice the Statute, a memorandum usually should involve:
    - (i) The identity of the contracting parties;
    - (ii) A definition of the subject matter of the agreement; and
    - (iii) The terms and conditions of the contract.
- b. Recital of consideration [§558]**
- a writing will not suffice the Statute of Frauds except it states “the consideration.”
  - major requirement application is to suretyship contracts, where the writing usually states the surety’s promise in the absence of stating the consideration for that promise
- c. U.C.C. provisions [§559]**
- in agreements for the sale of goods, a writing can suffice the Statute of Frauds although it is less complete than is usually demanded
  - under U.C.C., there require merely be “some writing adequate to suggest that an agreement for sale has been created” and specifying the quantity term
  - the contract will not be implementable beyond the quantity of goods specified in the writing. [U.C.C. §2-201; and see Sale & Lease of Goods Summary]
- (1) Written confirmations [§560]**
- the recipient is bound except he objects within 10 days following receipt even though the recipient merchant never signed anything. [U.C.C. §2-201(2); *see supra*, §§509 *et seq.*]
- d. Signature [§561]**
- requires not be handwritten to suffice the Statute of Frauds; it can be typed or printed
  - a party’s initials may also be a adequate signature if so designed
- (1) Agents’ signature [§562]**
- adequate if signed by an authorized agent of the party to be charged
- (a) Equal dignity statutes [§563]**
- under such statutes, if an agreement is needed by law to be in writing under the Statute of Frauds, a principal is bound to an agreement signed by the agent only if the agent’s authority is also in writing. [See, e.g., Cal. Civ. Code §2309]
- (2) Party to be charged must sign [§564]**
- the fact that the party seeking to implement the agreement has not signed a writing is immaterial
- (3) Location of signature [§565]**
- can be observed anywhere on the relevant instrument
  - some courts have needed a signature at the bottom of the writing
- e. Integration of several documents [§566]**
- each document pertains to or incorporates the others, or the documents are otherwise combined
- f. Sales at auction [§567]**
- are commonly oral

- the auctioneer's written memorandum of the terms of a sale is held to be a adequate writing against both the buyer and the seller

## **5. Effect of Noncompliance with the Statute of Frauds**

### **a. Majority view—contract unenforceable but not void [§568]**

- in most states, failure to follow with the Statute of Frauds provides a contract voidable [U.C.C. §2-201; Rest. 2d §138; Walter H. Leimert Co. v. Woodson, 125 Cal. App. 2d 186 (1954)]

#### **(1) Effect [§569]**

- the contract is valid for all other intents
- the agreement becomes implementable against a party who signed the later memorandum although no new consideration is provided (*supra*, §94)
- once an agreement that belongs within the Statute of Frauds has been performed on both sides, neither party is granted to recover back what he has provided. [Rest. 2d §145]

#### **(2) Third party cannot raise defense of Statute of Frauds [§570]**

- cannot reject to pay on the basis that Buyer's agreement was oral

### **b. Minority view—contract void [§571]**

- the Statute renders that failure to follow with the Statute gives an agreement void
- the Statute of Frauds might be a defense to the formation, not only the implementation, of an agreement. [Ward v. Ward, 30 P.2d 853 (Colo. 1934)]

## **6. Recovery in Restitution [§572]**

- can recover in restitution for the value of the advantage, even if he cannot implement the agreement

### **a. Rationale**

- Statute says that no action shall lie to implement agreements that belong within it
- not an action to implement the agreement, but an action in restitution or quasi-contract
- it would be unfair to allow a party to retain advantages claimed under the agreement without paying for them

### **b. Distinguish part performance exceptions [§573]**

- creates an agreement implementable, either in full, as in sale-of-land cases (see *supra*, §531) or in part, as in sale-of-goods cases (see *supra*, §536)
- it permits the performing party to sue on the contract for expectation damages, rather than only in restitution or quasi-contract for the value of the advantage granted

#### **(1) Caveat**

- only particular types of part performance result in the contract implementation that belongs within the Statute (*see supra*, §§531, 537)
- if part performance does not make a agreement implementable, the remedy remains a suit in restitution for the value of the advantage granted

## **7. Reliance on Contracts Within the Statute of Frauds**

### **a. Reliance on the contract [§574]**

- does not make an exception to the Statute

- modern cases hold that reliance by one party may estop (preclude) the other from asserting the Statute of Frauds as a defense, even if the reliance does not comprise of part performance of a type that suffices the Statute

**b. Restatement in accord [§575]**

- may estop the other group of individuals from pleading the Statute as a defense
- if the promisor has triggered forbearance or action by the promise so that “injustice can be impeded only by implementation of the promise,” the promise is implementable. [Rest. 2d §139]

**E.6 LACK OF CONTRACTUAL CAPACITY**

**1. Minors [§576]**

- is voidable at the minor’s selection, even though the minor may implement the agreement against the adult

**a. Restitution [§577]**

- a minor is liable in restitution for the reasonable value of necessities provided to him

**(1) “Necessaries”**

- includes food, clothing, shelter, and whatever else is required for the minor’s subsistence, health, comfort, or education, taking into consideration the minor’s age, status, and life’s condition

**(a) Note**

- only if he is liberated from his parents, or if his parents are unable to give the necessities. [See, e.g., Cal. Civ. Code §36]

**2. Mental Incapacity**

**a. Traditional rule [§578]**

- person without the mental capacity to transact only if his mental processes are so deficient that he lacks comprehension of the nature, purpose, and effect of the negotiation. [95 A.L.R. 1442]
- under the “cognitive test,” which is the majority rule, psychological or emotional problems that affect a party’s judgment or reason do not in themselves comprise mental incapacity for contract law intents [Smalley v. Baker, 262 Cal. App. 2d 824 (1968)—manic depressive person held competent]

**b. Restatement rule [§579]**

- adopts a more liberal rule
- a party without capacity if he is “unable to act in a reasonable manner, and the other party has reason to know of his state.” [Rest. 2d §15] known as the “affective test.”

**c. Effect of incapacity [§580]**

- engaged into by an individual without mental capacity is voidable by him, but not by the other contracting party

**(1) Note**

- in several states, if the individual has been adjudicated insane or mentally incompetent his agreements are void, rather than only voidable. [See, e.g., Cal. Civ. Code §40]

**d. Restitutional liability for necessities [§581]**

- a person who lacks mental capacity is liable in restitution for the value of any necessities provided to him

### **3. Drunken or Drugged Persons [§582]**

- raise problems of temporary incapacity
- whether the person was so intoxicated or drugged as to be unable to comprehend the nature, purpose, and effect of what he was doing. [Rest. 2d §16; Backus v. Sessions, 17 Cal. 2d 380 (1941)]

## **E.7 ILLEGAL CONTRACTS**

### **1. In General [§583]**

- the intervening illegality ends the offer as a matter of law
- if a contract is created, and is legal when made, but becomes illegal thereafter, the agreement is dismissed (*see infra*, §847)

### **2. What Constitutes Illegality? [§584]**

- if either the consideration or the object of the agreement is unlawful
- they are expressly forbidden by statute
- they offend public policy

#### **a. Indirect aid in accomplishment of an illegal act [§585]**

- valid contract is not illegal given the illegal act does not engage a grave crime or great moral turpitude

### **3. Effects of Illegality [§586]**

- an illegal contract is void, and the common rule is that if an agreement is illegal the courts will not intercede to assist either party
- if the agreement is executory, neither party can implement it
- if the agreement is partly performed, neither party can recover in restitution for advantages granted
- public importance of discouraging such negotiations outweighs considerations of probable injustice between the private parties. [Rest. 1st §598]
- there are some essential exceptions to this rule:

#### **a. Severable portion may be enforced [§587]**

- and the illegal portion does not go to the “essence of the bargain,” the legal portion may be implemented. [Rest. 1st §606]
- is rescinded for these intents merely where it expressly demands performance in distinct installments or portions and a divisible consideration is given for each such portion (*see infra*, §§812 *et seq.*)

#### **b. “Locus penitentiae” doctrine [§588]**

- the party may acquire restitutionary recovery for the value of what he gave in performance before repenting and repudiating. [Rest. 1st §605; Wasserman v. Sloss, 117 Cal. 425 (1897)]

#### **c. Not “in pari delicto” [§589]**

- this exception is inapplicable if the agreement is *malum in se* (against good morals). [Smith v. Bach, 183 Cal. 259 (1920)]

**(1) Where one party is member of protected class [§590]**

- the party is commonly not considered in *pari delicto* [Randal v. Beber, 107 Cal. App. 2d 692 (1951)]

**d. Contract only *malum prohibitum* [§591]**

- restitutionary recovery may also be accessible
- courts will not implement the illegal agreement, but they may allow a party to acquire restitution for advantages granted. [Rest. 1st §604]

**e. Licensing requirements [§592]**

- required in order to involve in a particular business or occupation
- if an unlicensed individual contracts to perform services, whether the agreement is implementable depends upon the design of the licensing statute

**(1) License for protection of public [§593]**

- agreement transacted by an unlicensed individual associating to the business is commonly held illegal, and the unlicensed individual will be rejected recovery in restitution for the value of the services

**(a) Note**

- if a party has substantially complied with the licensing laws, that compliance will commonly be held adequate
- will not permit the other party to the agreement to impede obligations under the agreement only because of technical offenses as long as the public has claimed significantly the protection contemplated by the licensing law. [Latipac v. Superior Court, 64 Cal. 2d 278 (1966)]

**(2) License for fiscal regulation or taxation [§594]**

- agreements engaged into by the unlicensed individual are commonly held implementable notwithstanding the absence of a license.<sup>5</sup>

**Discussion**

Based on Contract Law principles, valid agreements are made to make security of the bargained transactions between parties in exchange of money or settled payments via third party agreements. The hierarchy of EBM is relevant in refining the quality of patient care for positive health results that would benefit the financial intelligence of healthcare corporate governance serving as the support and extension of the medical research done for drug quality products and further clinical trials in healthcare setting as strict compliance for patient safety.

Based on the study of Djulbegovic, the healthcare decision-making devoted for positive health outcomes remain to be poor, hence, suboptimal, as there are cases of leading cause of mortality resulting to a healthcare expenditure responsibility of more than 80%. A decade ago, the USA spent \$3.2 trillion as healthcare expenses although 30% of it was found inappropriate. The clinicians with expert opinion are expected to make judgments that would ensure the best possible outcomes to several stakeholders, such as patients, families, employers, and community. Hence, EBM organizes the clinical decision-making performances upon acceptance of transactions by producing the implementation science of patient safety using high ranking databases of research publication as evidence in medicine, for presentation together with clinical judgment. Hence, medical experts became obliged under conditions of making reasonable scientific knowledge that would assure the best patient

---

<sup>5</sup> Melvin A. Eisenberg, 'Contracts' (Thomson/West, 2002).

safety at its greatest extent. Furthermore, EBM is known as the fundamental basis in translating health education into clinical practice and research as modern healthcare standard. Hence, it is a normative rationality approach for measurement determination of the optimal patient safety a clinician can best possibly give and provide to his patients as corporate social responsibility under conditions of required medical services. Hence, the clinical judgment is based on the calibrated benefits and harms of the medicines and services applied as treatment to evidence.<sup>6</sup>

There are two most commonly quoted EBM definitions as Dr. David Sackett explained: (1) the conscientious, explicit and judicious utilization of current best evidence in making clinical judgments about the safety of the individual patients, and subsequently refined to (2) EBM is a systematic approach to clinical problem solving permitting the integration of the best appropriate research evidence with clinical judgment and patient values. However, there are two questions being raised based on the cited definitions: (1) how to apply “judicious” in the definition, and (2) how to “measure” the cited definition?<sup>7</sup>

In making patient safety transactions, it is crucial to answer the following development of questions: (1) is there an ethical standard approach for application of EBM as “judicious” use, and (2) is there a way to “measure” healthcare corporate governance? Figure 1 illustrates the SELECT Criteria Mechanism to elucidate EBM as implementation science. In answering the issue of “judicious” use as evidence, corporate social responsibility (CSR) must be delineated in SELECT Criteria Mechanism of EBM. CSR is apparent in doing patient safety transactions encompassing the bargained promise of safety, terms and conditions of a valid contract formation. EBM is a scientific approach to do an optimal clinical decision of a medical expert using high ranking and up-to-date research publications, together with other healthcare providers, who accepted the responsibility for customer service towards patient safety, hence, in perfect harmony with CSR under valid contract formation emphasizing the duties and obligations of healthcare team under agreement of patient safety. EBM is handled scientifically as a legal system to evidence of drug therapeutic efficiencies, thus, it must be positively approached as a compliance to CSR as EBM must be perceived of achieving optimal health outcomes of drug treatment leading to patient safety. Otherwise, breach in valid contract formation can result to tort law violations. The importance of CSR delineation is for the study of their performance relative to encountered medical errors resulting to further refinement of EBM hierarchy. The elements in valid contract formation and their relevant errors are adequate tools in improving further the practice of evidence-based medicine for optimal patient safety. Moreover, healthcare corporate governance can be “measured” using its integrated problem solving skills in research laboratories towards financial success of patient safety. It is documented a decade ago that USA wasted \$3.2 trillion dollars for healthcare expenses deemed to have poor health outcomes due to several mortality cases with 30% of it observed to be inappropriate, hence, a waste of money leading to negative poor health outcomes. The importance of implementation science compliance is to bind the CSR under valid contract formation to produce a greater positive impact towards patient safety. Thus, healthcare corporate governance is important in refining further corporate ethics for maintaining the high quality integrity of patient safety towards financial success of business ethics.

---

<sup>6</sup> Ahmad A. Abujaber, Abdulqadir J. Nashwan, and Adam Fadlalla, ‘Harnessing machine learning to support evidence-based medicine: A pragmatic reconciliation framework’ (2022) 6 *Intelligence-Based Medicine* 1-2.

<sup>7</sup> George D. Chloros, Apostolos D. Prodromidis, and Peter V. Giannoudis, ‘Has anything changed in Evidence-Based Medicine?’ (2023) 54 *Injury* S20-S21.



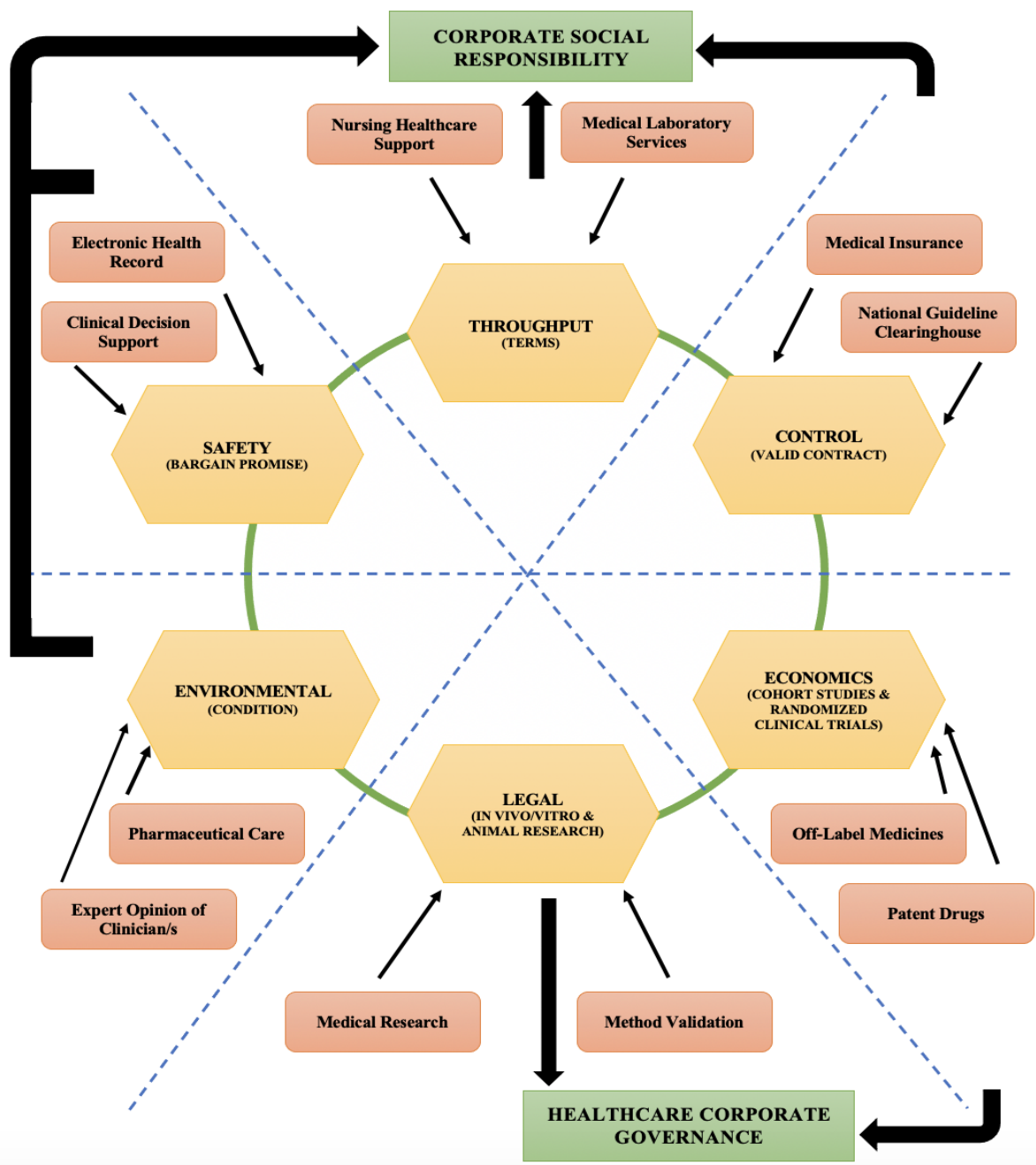


Figure 1: Evidence-Based Medicine (EBM) using SELECT Criteria Mechanism

### CONCLUSION AND RECOMMENDATION

Implementation science resolved the questions developed in evidence-based (EBM). First, there is corporate social responsibility as ethical standard incorporated in EBM practice and it is exhibited using the behavioral guidelines for optimal patient safety. Second, EBM practice is integrated to perform towards healthcare corporate governance since it is included in their hierarchy that clinical decisions must be based from medical experts and healthcare team using high quality research databases as support to their medical judgment of positive health outcomes for patient safety, hence, lessening the risks for cases of death, since patient safety would be tainted as failure to comply with EBM resulting to healthcare expenditures, therefore, it measured means of promoting positive health outcomes. SELECT Criteria Mechanism shows the theory and method applied to implementation

science to start the treatment process of reducing death cases in EBM practice, thus, it would result to greater adherence of a strong and coherent clinical judgement under CSR towards financial intelligence of promoting patient safety in harmony with remediation to problems in mortality rates encountered under EBM practice of behavioral guidance of valid contract formation. Implementation science emphasizes the translation of EBM practice as corporate social responsibility of achieving optimal patient safety as economic success to healthcare corporate governance. However, this study is limited to theories, methods, and framework of implementation science. It is suggested to develop systems for utilization of treatment process as initiation to apply implementation science in EBM practice.

## REFERENCES

- Ahmad A. Abujaber, Abdulqadir J. Nashwan, and Adam Fadlalla, ‘Harnessing machine learning to support evidence-based medicine: A pragmatic reconciliation framework’ (2022) 6 *Intelligence-Based Medicine* 1-7.
- Desmond J. Sheridan and Desmond G. Julian, ‘Achievements and Limitations of Evidence-Based Medicine’ (2016) 68(2) *Journal of the American College of Cardiology* 204-213.
- Eman Abu-Gharbieh, Doaa Al Khalidi, Mirza R. Baig, and Saeed A. Khan, ‘Redefining knowledge, attitude and practice of evidence-based medicine (EBM) among pharmacy students for professional challenges’ (2015) 23 *Saudi Pharmaceutical Journal* 162-166.
- George D. Chloros, Apostolos D. Prodromidis, and Peter V. Giannoudis, ‘Has anything changed in Evidence-Based Medicine?’ (2023) 54 *Injury* S20-S25.
- Jovin Rushagala Tibenderana, ‘The art of putting research into practice: The emergence of implementation science as a transformative research approach’ (2023) 21 *Clinical Epidemiology and Global Health* 1.
- Melvin A. Eisenberg, ‘*Contracts*’ (Thomson/West, 2002).
- Osama Mohammad Al-Quteimat and Amer Mostafa Amer, ‘Evidence-based pharmaceutical care: The next chapter in pharmacy practice’ (2014) 24 *Saudi Pharmaceutical Journal* 447-451.

*@2023 by the Authors. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<http://creativecommons.org/licenses/by/4.0/>)*