References are to sections.

A

Abandonment

Anticipatory breach or repudiation, ground for, 12.35 Damages, 12.35, 14.3 Distinguished from rescission, 14.3 Material breach, ground for, 12.37 Mutual, 12.66

Acceptance of Goods, U.C.C. Sale of Goods

Generally, 12.9 Statute of frauds, 4.5, 4.16, 4.57

Acceptance of Offer

Generally, 2.3, 2.29 Accord and satisfaction, settlement of dispute by, 12.75–12.77 Acknowledgment distinguished,

2 31

After rejection

- —by mail, 2.21, 2.46
- —by telegraph, 2.49

Conduct, effect of, 2.39

Continuing offers

- -generally, 2.25
- —time for acceptance, 2.27

Counteroffer, qualified acceptance as, 2.33

Death of party affecting acceptance by mail, 2.47

Email, acceptance by, 2.50

Inaction, effect of, 2.39

Incapacity of party after acceptance by mail, 2.47

Mail, acceptance by

-authorization, 2.45

- —death or incapacity of party, effect of, 2.47
- -deposited acceptance rule, 2.46

Manner of acceptance

- —when not prescribed, 2.37
- —when prescribed, 2.36

Meeting of the minds, 2.29

Oral acceptance, 2.37

Partial performance

- -effect of, 2.37, 2.40-2.42
- —notice to offeror, generally, 2.37
- —notice to offeror, U.C.C. sale of goods, 2.42

-unilateral contract, 2.41

Qualified acceptance

- —counteroffer, qualified acceptance as, 2.33
- -effectiveness under U.C.C., 2.34

Reading, acceptance of written contract without, 3.10, 5.23

Reply, acceptance by failure to, 2.39

Rewards, 2.11

Silence, effect of, 2.39

Telegraph

- —acceptance by, 2.49
- —mailing of acceptance of telegraphic offer, 2.49

Telephone

- —acceptance by, 2.48
- —telephoning of acceptance of offer requesting telegram, 2.48

Time for acceptance, 2.14, 2.20

Accord and Satisfaction, Settlement of Dispute by

Acceptance of offer

—implied by conduct, 12.76

—with attempted reservation of rights, 12.77 Checklist, app. 12C Consideration -generally, 12.79 —disputed claim, 12.80 -unliquidated claim, 12.81 Definition and scope, 12.72 Offer, 12.74 Pleading, affirmative defense, 12.72 U.C.C., reservation of rights, 12.77

Act of God, Impossibility, 12.60

Adequacy of Consideration

Generally, 2.72 Contract modification, 7.7

Advertisement

As offer, 2.10 Creation of express warranty, 6.30

Affection as Consideration, 2.65

Agreement to Agree as Offer, 2.7

Alteration. See Modification

Ambiguities. See Construction and Interpretation

Anticipatory Breach or Repudiation

Generally, 12.17 Damages, ground for, 12.41, 12.48 Damages, measure, 13.17 Delay in performance as, 12.17 Innocent party required to be ready, willing, and able to perform, 12.17, 12.48

Modification, demand for as, 12.17 Notice of unwillingness to perform, clearest indication of, 12.17

Prevention or hindrance of performance as, 12.18 Rescission, ground for, 12.17, 12.35, 14.11 Restitution, ground for, 14.38, 14.49 Specific performance, ground for, 12.41 Untenable construction of contract as, 12.17 Waiver, nonrepudiating party's continuing performance as, 12.41

Arbitration

Battle of the forms, 5.68 Boilerplate clause, drafting, 15.70 Enforceability of waivers to pursue class and collective actions, 4.67 Specific performance, 13.71 Statute of frauds, 4.67 Third-party beneficiary contract, 8.22, 8.29, 8.44, 8.49, 8.64, 8.66

Assignment, ch.9

Assignment of causes of action, 9.19 Assignment of expectancies, 9.17 Assignment of wages, 9.18 Contractual provision barring assignment, effect of, 9.24 Defenses and counterclaims of promisor against assignee, 9.30 Defined as conveyance of right, 9.2 Delegation. See Delegation Distinguished from subrogation, 9.2 English Rule, priorities among assignees, 9.25 Formalities and drafting considerations -generally, 9.27

—U.C.C., secured transactions, 9.28

—writing requirement for assignments within statutes of frauds, 9.29

Gratuitous assignments

- -irrevocable, 9.14
- -revocable, 9.13

Historical perspective and terminology, 9.2

Limitations on assignment

- -generally, 9.21
- —assignment having specified consequences for promisor, 9.2
- —contract to be assigned is personal, 9.23
- —contractual provision, U.C.C. contracts for sale of goods, 9.24
- —U.C.C., sale of goods and commercial paper transactions, 9.22

New York Rule, priorities among assignees, 9.25

Personal services, limitations on assignment, 9.23

Priorities among assignees, 9.25

Requirements for assignment

- —basic rule, stated, 9.5
- -consideration, 9.10-9.14
- -intent of assignor, 9.7
- -notice, 9.9
- —present transfer having immediate effect, 9.8
- —writing, 9.6

Subsequent contract modification by assignor and promisor, effect of, 9.30

Third party's debt, promisee's order to promisor to pay, 9.8

Assignment of Wages

Generally, 9.18 Statute of frauds, 4.61–4.63

Associations, Voluntary, Contracts with, 10.17

Attorney Fees

Construction of provision for, 5.27 Counterclaims, affecting recovery of stipulated attorney fees, 5.27 Damages, measure of, 13.19–13.22 Drafting, boilerplate clause, 13.21, 15.70

Reasonable terms, construction in favor of, 5.27

Authentication, 15.81

Electronic contracts, 16.10, 16.25, 16.30

В

Bad-Faith Breach. *See* Performance and Breach

Bargain. See Hard Bargain

Battle of the Forms. *See*Construction and Interpretation

Beneficiaries. *See* Third-Party Beneficiary Contract

Benefit to or from Third Person as Consideration. 2.62

Best-Efforts Clause

Generally, 12.8
Distinguished from fiduciary
relationship, 12.8
Implied in exclusive distributorship
contract, 5.73, 12.8

Bid as Offer, 2.8

Bilateral Contract

Defined, 1.22 Promises construed as mutually dependent, 11.5

Breach. *See* Performance and Breach

\mathbf{C}

Cancellation

Anticipatory breach, ground for, 12.35

Damages

- -generally, 12.35, 14.3
- —U.C.C., sale of goods, 12.9, 13.11, 14.17

Distinguished from rescission, 14.3 Material breach, ground for, 12.37 Mutual, 12.66

Partial performance, ground for, 12.38

U.C.C., sale of goods

- —generally, 12.9, 14.17
- —distinguishing cancellation and termination, 14.3

Capacity to Contract. *See* Incapacity of Parties

Charitable Subscriptions

Third-party beneficiary contract, consideration for, 8.16

Choice of Law

Absence of statute or contractual clause, 1.32, 5.9–5.11
Choice imposed by statute, 1.30
Choice-of-law analysis necessary if outcome determinative, 5.3
Clause in contract, 1.29, 5.5–5.7
Conflicting choice-of-law provisions, 1.31, 5.8
Public policy, effect of, 5.6
Third-party beneficiary contract, 8.39
U.C.C., 5.7

Circumstances, Surrounding, as Aid in Construction, 5.36, 5.61

Classification of Contracts

Divisible and indivisible, 1.27 Enforceable and unenforceable, 1.23 Exculpatory, 1.26, 3.28–3.34 Express and implied, 1.25 Formal and informal, 1.21 Unilateral and bilateral, 1.22 Void and voidable, 1.24, 3.2

Collective Bargaining Agreements

Arbitration clauses and statute of frauds, 4.67 Modification, 7.27 Third-party beneficiaries, 8.64

Computers. *See also* Electronic Transactions
Computer as agent, 16.11, 16.32–

16.33
Requirements of UETA regarding transferable records, 16.23
Retention of records, 16.27
Uniform Computer Information Transactions Act (UCITA), 16.1, 16.37

Conditions, ch.11

Acceptance of performance as excuse for nonoccurrence, 11.22 "After" indicating condition, 11.4 "As soon as" indicating condition, 11.4

Assignment of right conditioned on performance of return promise, 9.30

Benefits, restoration of as condition precedent to rescission, 14.21

Bilateral contracts, promises construed as mutually dependent, 11.5

Classification by manner

- -express and implied-in-fact, 11.9
- —implied-by-law, 11.10

Classification by time

- —concurrent conditions, 11.15
- —conditions precedent, 11.12
- —conditions subsequent, 11.13

Index-4

Common contractual conditions, 11.36

Concurrent conditions, 11.15

Consideration

- —conditional promise as, 2.57
- -restoration of as condition precedent to rescission, 14.21

Construction and interpretation

- —conditions precedent, 11.5
- —dependent and independent promises, 11.5

Construction contract, satisfactory performance as condition precedent, 11.18

Creation, manner of, 11.4

Defined, 11.3

Distinctions

- -condition and conditional offer, 11.3
- —condition and promise or duty, 11.5
- -condition precedent and condition subsequent, 11.14
- -condition subsequent and special limitations in real estate context, 11.14

Drafting, 11.34, 15.54

Express conditions, 11.9

"If" indicating condition, 11.4, 11.10

Implied-by-law conditions, 11.10 Implied waiver of conditions, 11.23

Insurance contracts, 11.14, 11.36 Intention of parties, 11.4

Nonoccurrence of conditions, effect

- when nonoccurrence excused, 11.32
- —when nonoccurrence unexcused, 11.20

Nonoccurrence of conditions, excuses for

- —acceptance of performance, 11.22
- -breach of good faith, 11.26
- -disproportionate forfeiture, 11.31

- —impracticability, 11.30
- -manifested inability to perform conditional duty, 11.22, 11.28
- -passive noncooperation, 11.27
- -repudiation of conditional duty, 11.22, 11.28
- —subsequent promise, 11.22
- -waiver, 11.23
- -wrongful prevention or substantial hindrance, 11.26

Payment

- —progress payments as conditions precedent, 11.23
- -rendition of work presumed condition precedent, 11.10

Performance of condition

- —express condition, requires literal, 11.9
- -implied-by-law condition, requires substantial, 11.10

Pleading and proof, 11.14

- -affirmative defense of condition subsequent, 11.14
- -breach of duty subject to condition precedent, 11.14

Precedent, 11.5, 11.12, 11.14

Promises

- —dependent and independent, 11.5
- —distinguished from conditions, 11.5

"Provided that" indicating condition, 11.4, 11.10

Proviso, as creating condition, 11.4

Real estate contracts, 11.36

Reasons to include in contract, 11.35

Release, taking effect on occurrence of condition, 12.84

Rescission, failure of condition as ground for

- —generally, 11.20, 14.8
- —warranty, 6.11

Satisfaction

- —effort to satisfy, 11.17
- -nature of satisfaction, 11.18

Satisfactory performance as condition precedent, 11.18, 12.8 "Should" as not indicating condition, 11.4

Specific performance, conditions

with, 13.74 "Subject to" indicating condition, 11.4, 11.10

Subsequent, 11.13, 11.14

Tender of performance, constructively conditioned, 11.15

Third-party beneficiary's right as subject to conditions, 8.26, 8.31

Third person's satisfaction as condition precedent, 11.18, 12.8 Waiver, 11.23

"When" indicating condition, 11.4

Conduct of Parties

Acceptance of offer implied from, 2.37, 2.38–2.42 Implied-in-fact contracts, 14.40 Modification implied from, 7.14 Rescission implied from, 14.7

Conflict of Laws. *See* Choice of Law

Consideration

Accord and satisfaction,
consideration for, 12.78–12.81
Adequacy, 2.72
Affection and love as
consideration, 2.65
Assignment, 9.10–9.14
Benefit to or from third person,
2.62
Benefit to promisor, 2.53
Charitable subscriptions, third-

party beneficiary contract, 8.16 Conditional promise as

Conditional promise as consideration, 2.57

Continued employment as consideration, 2.70

Detriment to promisee, 2.53

Extension of payment time as consideration, 2.60

Forbearance from exercising right as consideration, 2.59

Forms of

—benefit to or from third person, 2.62

—continued employment, 2.70

-extension of payment time, 2.60

—forbearance, 2.58–2.61

—impossible acts, 2.66

—legal or contractual obligation, 2.69

—love and affection, 2.65

—moral obligation, 2.64

—past consideration, 2.68

—promise, 2.55–2.57

—unenforceable promises, 2.67

—withholding from competition, 2.61

Impossible acts as consideration, 2.66

Lack or failure of consideration

—generally, 2.52

—burden of proof, 2.52

—extrinsic evidence, 5.63

—rescission and restitution, ground for, 14.8

Legal or contractual obligations as consideration, 2.69

Love and affection as consideration, 2.65

Modification

—adequacy of consideration, 7.7

—effect of illegal consideration, 7.8

-executory contract, 7.4

—performed contract, 7.5

—U.C.C., sale of goods, 7.6

Moral obligation as consideration, 2.64

Mutual promises as consideration, 2.56

Novation, 12.67

Past consideration as consideration, 2.68

Index-6

Promissory estoppel as substitute for consideration

- generally, 2.74
- -inducement of action or forbearance, 2.78
- —injustice avoided only by enforcement, 2.79
- -promise, 2.77

Restoration of as condition precedent to rescission, 14.21

Seal, effect of, 2.71, 15.76

Services

- -by family members or relatives, 2.64
- —past services, 2.68

Statutes of frauds, 2.67

Third-person beneficiary contracts, 8.14 - 8.16

Third persons, consideration moving to or from, 2.62

Unenforceable promises as consideration, 2.67

Waiver of right as consideration, 2.59

Warranty, consideration for

- —generally, 6.3
- —oral statement subsequent to contract, 6.29

Withholding from competition as consideration, 2.61

Construction and Interpretation, ch. 5,

- Checklist of Rules, app. 5A Ambiguities
- —generally, 5.34
- -course of dealing as aid in construction, 5.42
- —custom and usage as aid in construction, 5.39-5.41
- —drafter of contract, construction against, 5.30, 15.18
- -extrinsic evidence, explanation by reference to, 5.32-5.34, 5.62

- -other contracts between same parties as aid to construction, 5.38
- -parol evidence, 5.62
- –parties, construction by, 5.37
- -recitals as aid in construction, 5.21, 12.14
- -surrounding circumstances as aid in construction, 5.36, 5.61

Attorney fees, 5.27

Battle of the forms

- —generally, 5.67
- -contracts subject to U.C.C., 5.68
- -warranties subject to U.C.C., 6.34
- Circumstances, surrounding, as aid in construction, 5.36, 5.61
- Collateral agreements as aid to construction, 5.58

Condition and promise, 11.5

Conflicting provisions, 5.34, 15.34

Contemporaneous instruments construed as single contract, 5.38, 5.53

Contradiction of integrated contract by extrinsic oral agreements, 5.57

Course of dealing

- -as excluding implied warranty of merchantability, 6.47
- —consideration in construction, 5.39-5.41
- —implication of warranties, 6.34
- -U.C.C., sale of goods, 5.42

Court's power to make or change contract for parties, 5.20

Custom and usage

- -as excluding U.C.C. implied warranty of merchantability, 6.47
- —consideration in construction, 5.40
- —implication of warranties, 6.35
- -U.C.C., sales contract, 5.41

Dependent and independent promises, 11.5

Dictionary definitions, use of, 5.22 Distinction between govern, interpret, and construe, lack of, 5.6

Drafter of contract, construction against, 5.30

Duration of contract, 5.72 Employment contracts, 5.34 Essential time provisions, 5.73, 12.15

Exclusive distributorship contracts, 5.73, 12.8

Extrinsic evidence, 5.31–5.42 Foreign language, 5.23

Form contracts, counseling clients on use, 5.7

Good faith and fair dealing

—construction of broad or draconian cancellation or modification clause, 12.45

—implication of duty of, 12.12–12.14

Government contracts, canons of construction, 5.44

Handwritten and typewritten or preprinted matter, inconsistencies between, 5.29

Harmonizing parts, construction in favor of, 5.25

Implied conditions, 11.10 Implied warranties, 6.31–6.36 Incidental beneficiary, 8.21 Inconsistent provisions, 5.34,

15.37, 15.48

Incorporation of other writings by reference, 5.38

Insurance contracts

—canons of construction, 5.37, 5.43

—correspondence, 5.58

—de novo standard of review on appeal, 5.18

—interpretation a question of law, 5.14

Integrated written contracts, 5.52–5.55

Integration of preliminary negotiations and oral agreements into written contract, 5.59

Intended beneficiary, 8.19-8.21 Intention of parties

—contract as best evidence of, 5.21

—determination and enforcement of as purpose of interpretation, 5.20

Issues decided as matter of fact, 5.15–5.17

Issues decided as matter of law, 5.14

Joint and several contracts

—joint, several, and joint and several duties, 10.5–10.7

—joint, several, and joint and several rights, 10.21

—negotiable instruments, U.C.C., presumption of joint and several duties, 10.27

—presumption of joint rights, 10.23

Knowledge of parties

—generally, 5.23

-guaranty agreement, 5.65

—reading contract, acceptance of contract without, 3.10, 5.23

—specific performance, 13.61

Law governing interpretation

—absence of choice-of-law clauses, 1.31, 5.9–5.11

—choice-of-law analysis necessary if outcome-determinative, 5.3

—choice-of-law clauses in contract, 1.29, 5.5–5.7

—conflicting choice-of-law clauses, 1.31, 5.8

—public policy, effect of, 5.6

—U.C.C., 5.7

Lawful performance, construction in favor of, 5.28

Legal terms used in contracts, 15.30

Merger and integration clauses, 5.55, 15.70

Modifications, 5.50

Omissions. See Omissions

Oral agreements. See Oral Agreements

Ordinary meaning, 5.22

Other contracts by parties, as aid in construction, 5.38

Other writings referred to in contract, construction of, 5.38

Parol evidence rule. *See* Parol Evidence Rule

Partially integrated agreements

—generally, 5.54

—omissions supplied from oral agreements, 5.54

—U.C.C., 5.54

Parties, interpretation by, 5.59

Performance bonds construed together with contracts, 8.42

Plain meaning, 5.22

Prior dealings between parties as aid to construction, 5.45

Priority among conflicting provisions, 15.34

Reading contract, acceptance of contract without, 3.10, 5.23

Reasonable and conscionable terms, construction in favor of, 5.27

Reasonable certainty, 5.33

Reasonable time

- —acceptance of offer, 2.14, 2.20
- —duration of contract, 5.73
- —performance, 5.73

Recitals as aid in construction, 5.21, 12.14

Standards of review on appeal

- —clearly erroneous, 5.18
- —de novo, 5.18
- —insurance contracts, 5.18
- —separate findings of fact, 5.18

Statutory language used in contract, construction of, 15.29, 15.30

Strict construction. *See* Strict Construction

Subsequent conditions, 11.13

Subsequent oral agreements merged into written contract, 5.50

"Substantial performance," meaning of, 12.20–12.29

Surplusage or meaninglessness, construction in favor of avoiding, 5.26

Surrounding circumstances, as aid in construction, 5.36, 5.61

Technical words, use of, 15.29, 15.30

Third-party beneficiary contracts, intent to benefit, 8.19–8.21

Trade customs and usage. *See*Custom and usage *this heading*

Typewritten and handwritten or preprinted matter, inconsistencies between, 5.29

Untenable construction by party, as constituting breach, 12.17

Vagueness. See Ambiguities this heading

Warranties, 6.14–6.21, 6.26–6.36, 6.43

Whole, construction of contract as, 5.25

Construction Contracts

Approval or satisfaction as condition precedent, 11.18, 12.8

Damages, measure for substantial performance, 13.18

Delegation of personal obligation, 9.37

Easement, sample contract for construction of, 15.103, 15.104

Economic loss doctrine limiting damages, 6.73–6.88, 13.31

Impossibility of performance, as not created by cost increase, 12.56

Improvements by vendor, statutory warranty, 6.55

Indivisibility, 1.27

Restitution

- -implied-by-law contract, 14.41
- —implied-in-fact contract, 14.52

Specific performance, 13.69

Substantial performance, 12.25, 12.26, 12.27, 13.18

Third-party beneficiaries

- -generally, 8.42
- —construction debt, provider of limited guarantee, 8.65
- —construction loan agreements, no right to enforce, 8.44
- —identification of unnamed material suppliers, 8.22
- —payment and performance bonds, 8.42
- —real property, purchaser not third party to contract between builder and seller, 8.65
- —right subject to conditions on construction loan, 8.26
- —tort rule for accrual, 8.37

Waiver of defective performance by payment

- -generally, 12.70
- exception for latent or hidden defects, 12.70

Continued Employment, as Consideration, 2.70

Contracts for Performance Beyond One Year

General writing requirement, 4.49 Bilateral contract, 4.50

Transactions not within statute

- —employment and distribution contracts, 4.50
- —marital property agreements, 4.50

Contracts to Pay Third Party's Debt

Statute of frauds, 4.51–4.54 Third-party beneficiary doctrine, 8.56–8.60

Correction of Mistakes in

Contracts. See Reformation

Counteroffers, 2.22

Course of Conduct

As excluding U.C.C. implied warranty of merchantability, 6.47

Construction and interpretation, as aid in, 5.42

Implication of warranty, 6.34 Modification implied from, 7.14

U.C.C., sales contract, 5.37, 5.38, 6.34

Covenant

Distinguished from condition, 11.5 Drafting, 15.52

Implied covenant of good faith in performance, 12.13

Material, substantial breach of as material breach, 12.8

Not to sue, irrelevancy of performance, 12.85

Restrictive

- —in employment contract, 12.13
- -modification, 7.24

COVID-19

Effect on contract drafting considerations, 15.26

Creditor Beneficiary, Defined,

8.21

Custom and Usage

As excluding U.C.C. implied warranty of merchantability, 6.47

Construction and interpretation, as aid in, 5.40 Implication of warranty, 6.35 U.C.C., sales contract, 5.41, 6.35

D

Damages Abandonment, 12.35, 14.3 Anticipatory repudiation, 12.35, 12.41, 12.48, 13.17 Attorney fees, 13.19-13.22 Bad-faith breach (insurance), 13.47 Breach of warranty, 6.10 Cancellation —generally, 12.35, 14.3 —U.C.C. sale of goods, 12.9, 14.17 Compensatory defined, 13.6 Contractual provision barring damages for delay, 13.16 Costs, 13.19-13.22 Delay, 12.15, 13.16 Demand for performance as condition precedent, 12.47 Election of remedies, and rescission, 14.28 Excused nonoccurrence of conditions, effect of, 11.32 Expectation interest, 13.11

Interest, 13.19-13.22 Interests considered

Incidental, 13.11

-expectation, 13.11

-reliance, 13.12

-restitution, 13.13

Limitations on recovery of compensatory

-generally, 13.25

—causation, 13.27

—certainty, 13.29

-economic loss doctrine, 6.73-6.88, 13.31

-financial status, 13.34

—foreseeability, 13.28

—mental suffering, 13.33

-mitigation of damages, 13.30

—present-value concept, 13.32

-statute of limitation, 13.26

Liquidated damages

generally, 13.40

-defined, 13.36

—determination of reasonableness, 13.39-13.43

—difficulty of accurately estimating loss, 13.42

enforceability, 13.37–13.43

—not eliminating specific performance, 13.59

not reduced by effort to mitigate, 13.30

-proportionality of liquidated and actual damages, 13.43

—totality of circumstances, 13.41

Lost profits, 13.11

Material breach, 12.48, 12.49, 13.15-13.17, 14.38, 14.49

Measure of compensatory

-generally, 13.8

-interest, attorney fees, costs, 13.19-13.22

-interests, expectation, reliance, and restitution, 13.9–13.13

-limitations, common law and statutory, 13.2413.34

—type or severity of breach, 13.14-13.18

—unconscionability, 6.72, 13.23 Mitigation of damages, 13.30

Punitive damages, recoverability of

-generally, 13.46

-exceptions to general rule of unavailability, 13.47

-measure, 13.48–13.51

Reliance interest, 13.12

Rescission, affecting recovery of damages, 14.28

Restitution interest, 13.13, 14.38, 14.49

Specific performance in conjunction with, 13.77

Substantial performance, 13.18

Supplementing remedy of specific performance, 13.77

Tort for misrepresentation

- -generally, 3.4
- —election between tort claim and rescission, 14.30
- U.C.C., sale of goods, 12.9, 13.11, 14.15–14.17

Unavailability, 12.47

Waiver

- —by agreement of parties, 12.47
- —by rescission, 14.23

Death

Acceptance by mail affected by death of party, 2.47

Impossibility of performance, 12.61

Joint contracts, death of parties to, 10.15, 10.26

Legality of assigning benefits expected on death of beneficiary, 9.17

Option not revoked by, 2.27

Personal services, death of promisor affecting contracts for, 12.61

Revocation of offer by, 2.23

Default. See Damages;

Performance and Breach; Rescission; Restitution; Specific Performance

Defective Performance

Damages for

- -generally, 12.47, 13.3-13.51
- —anticipatory breach or repudiation, 12.41, 12.48, 13.17
- -delay, 13.16
- —material breach, 12.49, 13.15—13.17
- —partial breach, 12.49
- —substantial performance, 12.47, 13.18

—U.C.C., sale of goods, 12.9, 13.11, 14.17

Rejection, revocation, cancellation, U.C.C. sale of goods, 12.9, 13.11, 14.17

Remedies generally, 12.31

Specific performance for

- -generally, 13.52-13.57
- —anticipatory breach or repudiation, 12.41
- -material breach, 12.42

Unilateral rescission for

- -generally, 12.34
- —anticipatory breach or repudiation, 12.35, 14.11
- —delay in performance, 12.15, 14.12
- —material breach, 12.36–12.38, 14.9–14.12
- -partial performance, 12.38
- —U.C.C., sale of goods, 14.17
- —waiver of right to rescind, 12.34, 14.23

Delay. *See* Performance and Breach

Delegation, ch. 9

Assignment. See Assignment Defined as conveyance of performance, 9.2

General rules, 9.32

Limitations on

- —delegation prohibited generally or by U.C.C., 9.34–9.35
- —obligation is personal, 9.36

Performance by delegate, requirement that promisee accept, 9.32

Personal obligation, 9.36

Prohibitions

- -generally, 9.34
- —personal obligation, 9.36
- —public policy, 9.34
- —U.C.C., sale of goods, 9.35

Survival of liability of delegating promisor, 9.32

Destruction, Impossibility, 12.56

Disability of Party, Impossibility, 12.61

Disclaimers. *See* Warranties and Disclaimers

Divisible Contract

Generally, 1.27
Breach of contract, effect on remedies, 12.44
Construction contract, indivisibility, 1.27
Divisibility, partial illegality, 3.25
Statute of frauds, 4.40

Donee Beneficiary, Defined, 8.21

Drafter of Contract, Construction Against, 5.30, 15.18

Drafting, ch. 15

Acknowledgment, authentication, and witnesses, 15.81

Allocation of risk

- -generally, 15.61
- —indemnifications and releases, 15.62
- -insurance, 15.64
- —liability baskets and time limitations, 15.63
- provisions directed at impossibility of performance, 12.54

Attachments

- —generally, 15.82
- —numbering and captioning, 15.86

Authentication, 15.81

—electronic contracts, 16.10, 16.25, 16.30

Body of agreement

- -numbering and captioning, 15.85
- ---sections, 15.50-15.67

Boilerplate clauses

- -generally, 15.69
- -checklist, 15.70

Checklist for initial client meeting,

Clarity in language, methods of achieving

- —definitions, 15.2
- —gender-neutral language, 15.33
- —good grammar and avoidance of legalese, 15.33
- —language broad enough to avoid loopholes, 15.36
- —language that avoids conflicts, 15.34
- —language that sets parameters for performance, 15.35
- -- placement on page, 15.31
- —terms of art, 15.30

Conditions precedent, 15.54

Conflicts, language avoiding, 15.34

Covenants, reciprocal, 15.52

Customs dictating separate documentation, 15.15

Default and remedies

- -generally, 12.37, 15.56
- additional protection against other party's default, 15.59
- —contractual remedies and limitations on remedies, 15.58
- -definition of default, 15.57

Definitions, 15.2

Drafter, determination and consequences of, 15.16–15.18

Electronic contracts, ch. 16

Formal agreement, sections of

- -generally, 15.41
- —acknowledgment, authentication, and witnesses, 15.81
- -attachments, 15.82
- -body of agreement, 15.50-15.67
- -introduction, 15.49
- ---preamble, 15.42-15.47
- -recitals, 15.48
- -seal, 15.74-15.80
- ---signatures, 15.71-15.73
- -standard clauses, 15.68-15.70

Forms, use of existing, 15.23 Gender-neutral language, 15.33 Goals, 15.2 Good grammar, 15.32 Indemnifications, allocation of risk, 15.62

Insurance, allocation of risk, 15.64 Intended beneficiaries, drafting preamble, 15.46

Interacting with parties

-client, 15.88

—other parties, 15.89

Introduction, 15.49

Language

—ambiguity, advantages and disadvantages, 15.38

—clarity in, methods of achieving, 15.25–15.33

—gratuitous language, 15.38

Letter of intent, 15.19

Liability baskets and time limitations, allocation of risk, 15.63

Loopholes, language broad enough to avoid, 15.36

Modifications, 15.90

Multiparty transactions and separate documentation, 15.13

Numbering and captioning, mechanics of

-attachments, 15.86

-body of agreement, 15.85

-recitals, 15.84

Parameters for performance, language setting, 15.35

Preamble

-generally, 15.43

—identification of parties, 15.44—15.47

Predrafting considerations

—checklist for client meeting, 15.6

—circumstances in which separate documentation advantageous, 15.13–15.15

—drafter, determination of and consequences, 15.16–15.18

—existing documents, 15.7

—letter of intent, 15.19

—record notice or filing requirements, 15.9

-substantive law, 15.10

—tax effect of transaction, 15.21

Reciprocal covenants, 15.52

Recitals

—generally, 15.48

-numbering and captioning, 15.84

Record notice or filing

requirements, 15.9

Remedies and limitations on remedies. *See* Default and remedies *this heading*

Sample contract, 15.91–15.104

Seal

—affixing, 15.75

—evidence of consideration, 15.77

-requisite for recording, 15.79

-statute of limitation, 15.78

-U.C.C., 15.80

Signatures, 15.71-.15.73

—electronic contracts, 16.10, 16.24, 16.29

---electronic signatures, 4.8

---Electronic Signatures in Global and National Commerce Act, 4.8

—execution of contract, 15.72

-Fax copies of, 15.73

Standard clauses

-generally, 15.69

-checklist, 15.70

Tax effect of transaction, 15.21

Termination

-generally, 15.66

-effect of, 15.67

Terms of art, 15.30

"They" and "them" as singular pronouns, 15.33

Third parties desired for good will or resources, drafting preamble, 15.47 Third party, submission to, and use of separate documentation, 15.14

Warranties and representations, 15.52

Duration of Contract

Generally, 2.14 Reasonable time for, 5.72 Specific performance, certainty of terms, 13.58

Duress

Generally, 3.39

By improper threat

- -generally, 3.42
- —criminal prosecution threatened, 3.45
- —distinguished from hard bargain, 3.45
- -economic duress, 3.42, 3.45
- -elements, 3.43-3.46
- —good-faith duty, threat of breach as duress, 3.45
- —harm to reputation, 3.42
- -ratification, 3.42
- -standard of proof, 3.42
- -voidable by victim, 3.39

By physical force, 3.40

Rescission and restitution, ground for, 14.8

E

Economic Loss Doctrine

Adoption and development in Wisconsin, 6.74
Application to consumer claims, 6.75
Application to non-U.C.C. contracts, 6.78-6.82
Claims beyond scope of doctrine, 6.77
Dakota exception, 6.87
Damages, limitation on recovery,

Definition of economic loss, 6.76

De minimis injury to other
property, 6.84

Exceptions, 6.83–6.87

Intentional misrepresentation, 6.86

Public safety exception, 6.85

Real estate, 6.82

Services, 6.80

—mixed contracts, 6.81

Election of Remedies

Between rescission and claim for breach, 13.2, 14.28 Between rescission and tort claim for misrepresentation, 14.29

Electronic Commerce. *See* Electronic Transactions

Electronic Contracts. *See* Electronic Transactions

Electronic Transactions, ch. 16

Acknowledgment, 16.25 Agents, 16.11, 16.32 Attribution of electronic records and signatures, 16.29 Automated transactions, 16.33

Automated transactions, 16.33 Contracts, 2.50

Contracts, 2.30

Electronic agent, 16.11

Federal laws, 16.35-16.36

Freedom of contract, 16.14

Legal requirements

—form or manner of

communication, 16.26

—retention of records, 16.27 Legal status of records and

signatures, 16.21–16.25

Minimalism, 16.16

Modification, 16.31

National Conference of

Commissioners on Uniform

State Laws (NCCUSL), 16.4

Notarization, 16.25

Retention of records, 16.27

Security, 16.30

6.73-6.88, 13.31

Signatures, 16.10, 16.24, 16.29 Technology neutrality, 16.15 Time and place of sending and receipt, 16.28

Uniform Computer Information Transactions Act (UCITA), 16.1, 16.37

Uniform Electronic Transactions Act (UETA), ch. 16

- -adoption by NCCUSL, 16.1
- -approach of UETA, 16.12-16.16
- -background, 16.2-16.6
- —interplay with traditional contract principles, 16.7–16.11
- —operative provisions, 16.19–16.33
- -related laws, 16.34-16.37
- —transactions subject to UETA, 16.17
- —Wisconsin status, 16.5, 16.6 Writing, definition under U.C.C., 16.9
- -statute of frauds, 16.9

Embargo, Impossibility, 12.59

Enforceable Contract, 1.23

Estoppel

Equitable

- —real estate statute of frauds, enforcement, 4.19
- —statutes of frauds, common-law enforcement, 4.23

Promissory

- —as substitute for consideration, 2.73–2.79
- —precluded by merger and integration clause, 5.55
- —statutes of frauds, common-law enforcement, 4.23

Specific performance, 13.61

Exclusive Distributorship Contract

Best-efforts clause implied, 5.73, 12.8

Exculpatory Contracts

Generally, 3.29

Refusal to enforce, grounds for

- -generally, 3.31
- —intent of parties insufficiently expressed, 3.34
- -misrepresentation of fact, 3.33
- —public policy, 3.31
- —Restatement provisions, 3.32

Releases, 3.34

Strict construction, 3.29, 5.28

Excuses for Nonperformance.

See Performance and Breach

Express Contract, 1.25

Extension of Payment Time as Consideration, 2.60

Extrinsic Evidence. *See*Construction and Interpretation

F

Facts, Mistake as to. See Mistake

Fees. See Attorney Fees

Finance Lease, Warranty Provisions, 6.51

Fires, Impossibility, 12.56

Forbearance from Exercising Right, as Consideration, 2.58– 2.61

Formal Contract, 1.21

Freedom of Contract, 1.4, 3.1

G

Gift Proposal as Offer, 2.3

Good Faith and Fair Dealing

Breach of, as excuse for nonoccurrence of condition, 11.26

Distinguished from hard bargain, 3.45, 12.13–12.14

Duress, breach of good faith, 3.45 Failure by recipient, unjustified reliance on misrepresentation, 3.10

Implied contractual duty, 12.13–12.14

Modification of performed contract, 7.5, 7.6

Substantial performance, necessity of, 12.24

Government Action, Impossibility, 12.59

Government Contracts, Canons of Construction, 5.44

Guaranty

Acceptance without reading, 3.10 Construction debt, third-party beneficiary, 8.65

Drafting contract

- —ensuring financially strong party's support, 15.47
- —protection against default, 15.59 Knowledge of parties, factor in admitting parol evidence, 5.67

Modification, consent of guarantor, 7.25

Parol evidence rule, exception to show misrepresentation, 5.63

Statutes of frauds and oral termination, 4.12

Guardianship

Incapacity to contract, 3.53 Undue influence, 3.47

H

Hard Bargain

Distinguished from duress, 3.45 Distinguished from good faith and fair dealing, 3.45, 12.13–12.14 Specific performance, fairness of, 13.61

Homestead Property

Signature requirement of statute of frauds, 4.9, 4.39

I

Illegality. See also
Unconscionability
Generally, 3.23
Divisibility, partial illegality, 3.25
Exculpatory contracts. See
Exculpatory Contracts
Express statutory prohibitions on
contract formation, 1.16, 3.24
Extrinsic evidence to show legality
or illegality, 5.64
Illegal in performance, 3.25
In pari delicto doctrine, 3.23, 3.25,
3.27
Judicial power to determine public

Judicial power to determine public policy, 3.27

Modification

- —rendering contract illegal, 7.8
- —rendering illegal contract legal, 7.8

Partial illegality, 3.25

Public policy

- —generally, 3.27
- —agreements in violation of, 3.26—3.34
- -balancing of interests, 3.27
- —construction of contracts, public policy as aid in, 3.29
- —in pari delicto doctrine, 3.28 Relief when parties in pari delicto, 3.23, 3.25

Restoration of benefits, 3.23, 3.25, 3.27
Statutes, violation of, 3.22–3.25
Unconscionable contracts. *See*Unconscionability
Weighing public policy against contract enforcement, factors, 3.27

Implied by Law

Conditions, 11.10 Contracts
—generally, 1.25, 14.40
—restitution, 14.42, 14.53
Warranties, 6.36

Implied Contract

Generally, 1.25 Restitution, 14.41–14.45, 14.52–14.53

Implied in Fact

Conditions, 11.9 Contracts —generally, 1.25, 14.40 —restitution, 14.41, 14.52 Warranties, 6.33–6.35

Implied Warranties. *See* Warranties and Disclaimers

Impossibility of Performance

Excuse for nonperformance

- -generally, 12.54
- —affecting only part of performance, 12.57
- -due to act of God, 12.60
- —due to party's disability or death, 12.61
- —due to superior authority (war, government action, embargo, etc.), 12.59
- —due to supervening events (fires, shortage, destruction, etc.)12.56
- —in original contract, 12.55

—of temporary nature, 12.58

—U.C.C., sale of goods, 12.62

Relief

- —rescission and restitution, 14.8, 14.37, 14.48
- —restitution, when temporary, 12.51
- —specific performance, when temporary, 12.51

Impossible Acts, as Consideration, 2.66

In Pari Delicto Doctrine, 3.25, 3.27, 14.37

Incapacity of Parties Generally, 3.49 Acceptance of benefits as affirmation by previously incompetent, 3.49 Consideration, recovery of —mentally incompetent, 3.54 —minors, 3.51 Doctrine of necessaries, 3.49, 3.53 Drunkenness affecting capacity, 3.54 Guardianship, 3.53 Impossibility of performance, 12.61 Mentally incompetent persons, 3.54 Minors, 3.51–3.52 Offeror, effect on contract formation, 2.23, 2.47

Persons under guardianship, 3.53 Ratification

-generally, 3.49

—minor, on majority, 3.51

Rescission and restitution, ground for, 14.8

Voidability of contract, 3.49

Incidental Beneficiary Defined, 8.21

Index-18

Incompetent Persons. *See* Incapacity of Parties

Incorporation of Other Writings by Reference

Construction and interpretation, 5.38

Statutes of frauds, 4.11

Informal Contract, 1.21

Insurance Contracts

Ambiguity, 5.34

Assignment covering insurance renewal commissions, 9.18

Conditions

- -precedent, 11.36
- -subsequent, 11.13, 11.14, 11.36

Construction and interpretation

- —canons of construction, 5.37, 5.43
- —correspondence, 5.58
- —de novo standard of review on appeal, 5.18
- —interpretation a question of law, 5.14

Drafting, means of allocating risk, 15.60–15.64

Misrepresentation as to insurance, exculpatory contract, 3.33

Mutual mistake, 3.16, 3.19

Partially integrated contract, use of supplemental extrinsic agreements, 5.54

Plain-language doctrine, 15.28 Reformation for mistake, 3.16, 3.19, 13.83, 13.97

Rescission, statutory or public policy limitations

- —by federal bank deposit insurance program, 14.8
- —on insurer's right to rescind, 14.18

Statutory regulation, 1.17 Substantial performance, applicability, 12.22 Third-party beneficiary contracts

- —agreements to procure or maintain, 8.53
- automobile, recovery under policy for which facts misrepresented, 8.55
- —beneficiary's right subject to conditions, 8.26
- —fire, property, and casualty insurance, 8.51
- -intent to benefit, 8.19
- —liability and indemnity, 8.8, 8.49
- -life insurance, 8.52
- —public contracts, 8.46
- -reinsurance, 8.50

Bad-faith breach of contract

- -generally, 12.19
- -damages, 13.47
- —third-party beneficiary contract, 8.54

Integrated Written Contract

Construction and interpretation, 5.52–5.55

Statutes of frauds, 4.11

Intended Beneficiary Defined,

8.21

Intention of Parties

Conditions, 11.4 Construction and interpretation, 5.20, 5.21

Joint and several contracts, 10.5–10.7, 10.21, 10.23

Warranty

- -generally, 6.16
- -U.C.C., sale of goods, 6.17

Invitation to Negotiate as Offer,

2.9, 2.10

J

Joint and Several Contracts, ch.

Accord and satisfaction, effect of on multiple promisors, 10.13

Associations, voluntary, contracts with, 10.17

Contribution, 10.28

Covenant not to sue, release treated as, 12.85

Death

- —of joint promisee, effect of, 10.26
- —of joint promisor, effect of, 10.15 Discharge by one promisee, effect of, 10.25

Full performance, effect of, 10.14 Intention of parties

- —overcomes presumption of joint duties, 10.5, 10.6, 10.7
- —overcomes presumption of joint rights, 10.21, 10.23

Joint and several duties, defined, 10.7

Joint duties, defined, 10.5 Joint judgment, circumstances requiring, 10.11

Joint, several, and joint and several rights, defined, 10.21

Judgment against one multiple promisor, effect of, 10.12

Negotiable instruments, U.C.C., 10.27

Permissive joinder

- —of multiple promisees, 10.24
- —of multiple promisors, 10.10

Presumption

- —of joint and several duties by signers of U.C.C. negotiable instrument, 10.27
- -of joint duties, 10.5
- -of joint rights, 10.23

Release of one multiple promisor, effect of, 10.13

Rescission, effect of on multiple promisors, 10.13
Several duties defined, 10.6
Statute of limitation, special considerations, 10.16
Suretyship, release of one joint and several or one several promisor,

10.13 U.C.C., negotiable instruments, 10.27

Justifiable Reliance, Misrepresentation

Generally, 3.10

Tort claim

- —contract formed with minor lying about age, 3.52
- —distinguished from contract action for breach of warranty, 6.12

\mathbf{L}

Labor Agreements

Modification, 7.27 Third-party beneficiaries, 8.64

Law Governing Contracts

Generally, 1.5–1.18 Common law, 1.6 Statutes of frauds, 1.12–1.15, ch. 4 Statutory prohibitions on formation, 1.16, 3.24 U.C.C., 1.7 United Nations Convention on Contracts for International Sale of Goods, 1.18

Leases

Anticipatory repudiation, lessee's termination by written notice, 12.17

Coercion to sign lease, constituting duress, 3.45

Commission to real estate agent, statute of frauds, 4.46

Conditions, lessee's failure of as not eliminating lessor's right to benefit from promise, 11.17

Delegation, lease as making obligation personal, 9.37

Drafting

- —attachments, assigned leases, 15.86
- —broad language avoiding loopholes, 15.36
- —force majeure clause, 15.70
- -indemnification, allocation of risk, 15.62
- -numbering sections of lease, 15.85
- Fraud, admission of parol evidence, 5.63
- Illegality of contractual provision waiving termination right for untenantability, 3.24, 5.28
- Integration of written contract, defined, 5.53
- Mitigation of damages for breach, 13.30
- Motor vehicle, Wisconsin lemon law, 6.50
- Period of more than one year. See Statute of frauds, this heading

Reformation, 13.95

Specific performance

- —generally, 13.66 —breach by tenant, improper to award monthly payments, 13.66
- Statute of frauds, commission to pay real estate agent, 4.46
- Statute of frauds, lease for more than one year
- -generally, 4.42–4.44
- -assignment of lease, 4.43, 9.29
- —equitable estoppel, enforcement of noncomplying contract, 4.19
- -formal requirements, 4.43
- -modification of lease, 4.43
- -parol evidence, admissibility for fraud, 5.63

- -periodic-tenant status, consequence of noncompliance, 4.21, 4.44
- termination of lease, 4.43

Third-party beneficiary contract

- —generally, 8.65
- —contractual clause for payment of taxes by lessee, 8.19
- —lease involving public body, 8.46

U.C.C., lease of goods, warranty

- -generally, 6.51
- -advertising, creation of warranty, 6.30
- -finance lease, 6.51
- —limitation of remedies for breach, 6.67, 6.71–6.72
- part of basis of bargain, 6.17—

Legal or Contractual Obligation, as Consideration, 2.69

Letter of Intent

Generally, 2.7 Distinguished from offer, 2.7 Key issues, 15.20 Predrafting consideration, 15.19

Loans

Ambiguity, broad terms as providing flexibility, 5.34

Assignment, promisor's defenses and counterclaims against assignee, 9.30

Good-faith duty, meaning, 12.14 Lender generally the drafter, 15.17 Mental incapacity, 3.54

Mortgage loan sufficient to identify property, real estate statute of frauds, 4.11

Performance beyond one year, contracts calling for, 4.50

Restitution, measure for contract rescinded for violating administrative regulation, 14.48 Specific performance, generally not available, 13.70
Statutes of frauds, integration of multiple documents, 4.11
Statutorily regulated, 1.17
Third-party beneficiary contract

—generally, 8.44

—parol evidence rule, 8.36—third-party beneficiary's right subject to conditions, 8.26

Love, as Consideration, 2.65

\mathbf{M}

Marital Property Agreements

Statute of frauds

-generally, 4.64-4.66

—arbitration clauses, 4.67

Material Breach

Generally, 12.18 Burden of proof, 12.19 Damages, ground for, 12.48–12.49, 13.14-13.17 Defined as substantial breach of material covenant, 12.18 Defined by contract, 12.19, 15.57 Delay, essential time, 12.15 Determination, factors in, 12.18 Nominal damages, 12.18 Question of fact for jury, 12.18 Rescission and restitution, ground for, 12.34–12.38, 14.9–14.12, 14.38, 14.49 Specific performance, ground for, 12.42

Meeting of the Minds, 2.29

Mentally Incompetent. *See* Incapacity of Parties

Minors. See Incapacity of Parties

Misrepresentation

Contract avoidance distinguished from tort action, 3.4 Duty of disbelief, 3.10 Excuse for nonperformance, 3.4 Extrinsic evidence as to, 5.63 Failure to read contract, 3.10 Negligent reliance, 3.10 Oral representation contradicting written term, 3.10 Parol evidence as to, 5.63 Ratification of voidable contract, Rescission and restitution, ground for, 3.4, 14.8, Restoration of benefits by avoiding party, 3.4 Silence inducing reliance, 3.7 Voidability, grounds for —justifiable reliance, 3.10 —material or fraudulent fact, 3.8 -misrepresentation of fact, 3.7

—reliance upon representation, 3.9

Mistake Generally, 3.12 Fact, mistake as to, 3.15 Failure to read contract, 3.15 Impossibility of performance, 12.55 Insurance policies, 3.16, 3.19, 13.83, 13.96 Law, mistake as to, 3.16 Mutual mistake -generally, 3.18 —insurance policies, 3.19 Parol evidence to show mutual mistake, 3.18 Reformation of contract —insurance policies, 3.19, 13.83, -mutual mistake as ground for, 3.18, 13.83 -specific performance, in conjunction with, 3.18

—unilateral mistake coupled with fraud as ground for, 3.20, 13.84 Rescission

—mutual mistake as ground for, 3.18, 13.83, 14.8

—unilateral mistake as ground for, 3.20, 14.8

Restitution, ground for, 14.37, 14.38

Specific performance, in conjunction with reformation, 3.18

Unilateral mistake

-generally, 3.20

—coupled with fraud, ground for reformation, 3.20, 13.84

—rescission, ground for, 3.20, 14.8 Waiver of relief, 3.12

Mitigation of Damages

By party not in default, 12.41, 13.30

Duty of third-party beneficiary, 8.38

Modifications, ch. 7

Anticipatory breach by demand for modification, 12.17

Assent. See Consent of all parties this heading

Assignor and promisor, effect of subsequent contract modification by, 9.30

Bona fide dispute, settlement of as adequate consideration, 7.7

Collective bargaining agreements, 7.27

Consent of all parties

—contractual terms permitting modification by consent of fewer, 7.22

—exception for party not affected by modification, 7.22, 7.25, 7.26, 8.15

—generally required, 7.20

-modification by fewer, 7.21, 7.24

Consideration

-adequacy, 7.7

-executory contract, 7.4

—illegal consideration, 7.8

—modification creating third-party beneficiary contract, 8.15

—performed contract, 7.5

—U.C.C., sale of goods, 7.6

—usurious interest as consideration for extension of time for payment, 7.8

Contractual provision requiring modification in writing

—generally, 7.16

—U.C.C., sale of goods, 7.17

Course of conduct, implying modification, 7.14

Extension of time, usurious interest as consideration for, 7.8

Good-faith requirement

—generally, 7.5

—U.C.C. sale of goods, 7.6

Guarantees, 7.21, 7.25

Implied modification from course of conduct, 7.14

Invalid contract, effect of modification removing invalidity, 7.8

Invalid modification, effect of, 7.8

Mutual promises as adequate consideration, 7.7

Oral modification of written contract

-generally, 7.14-7.17

—contracts within statutes of frauds, 7.11, 7.12

—contractual provisions stipulating written modification, effect of, 7.16, 7.17

Restrictive covenants, 7.24

Statutes of frauds, oral

modification of contracts within

—generally, 7.11

—U.C.C., sale of goods, 7.12

Stipulations against oral modification, effect of

-generally, 7.16

—U.C.C., sale of goods, 7.17 Third-party beneficiary contracts, 7.26, 8.15

U.C.C., sale of goods

- -consideration, 7.6
- —contractual stipulations against oral modification, 7.17
- —oral modification of written contract generally, 7.17
- —oral modification of written contract within statute of frauds, 7.12

Unilateral waiver of condition creating invalidity, 7.11

Usurious interest as consideration for extension of time for payment, 7.8

Written contract, oral modification of

- -generally, 7.14-7.17
- —contracts within statutes of frauds, 7.11, 7.12
- —contractual stipulations against, 7.16, 7.17

Moral Obligation, as Consideration, 2.65

Mutual Promises as Consideration, 2.56

N

Novation

Generally, 12.67 Distinguished from third-party beneficiary contracts, 8.6

0

Offer

Generally, 2.3 Accord and satisfaction, settlement of dispute, 12.74, 12.76 Advertisement as, 2.10 Agreement to agree, 2.7

Bids, 2.8

Continuing offer, 2.24–2.27

Counteroffer, 2.22

Death of offeror, 2.23

Definiteness of terms, 2.3

Determination of offeree, 2.12

Duration of offer, 2.14

Gift proposal, 2.3

Incapacity of offeror, 2.23

Intention, mere statement of, 2.3

Invitation to negotiate, 2.9

Letter of intent, 2.7

Mail

- —rejection by, 2.21
- —revocation by, 2.17

Notice, 2.9

Option

- -generally, 2.24-2.27
- -consideration, 2.26
- —duration, 2.27

Price, 2.3

Price quotation or proposal, 2.9

Rejection

- -generally, 2.20
- —by mail, 2.21

Revocation

- —by indirect communication, 2.18
- —by mail or fax, 2.17

Rewards, 2.11

Statement of intent, opinion,

prophecy insufficient, 2.3 Termination of offer, 2.13–2.23

Offeree, Determination of, 2.12

Omissions

Generally, 5.71 Circumstances in which court prohibited from supplying, 5.20 Duration of contract, 5.72 Essential term distinguished, 5.20 Partially integrated contracts, omissions supplied from oral agreements, 5.54–5.55 Price, 5.74

Index-24

Time and other details of performance, 5.73

Option

Generally, 2.25
Consideration, 2.26
Duration, 2.27
Failure to state exact prices, effect, 5.74
Not revoked by death of offeror, 2.27
Omitted terms, supplying, 5.73
Specific performance of option to buy or sell land, 13.66

Oral Agreements

Integration into written contract, 5.54–5.59

Modification of written contract

- —generally, 7.14–7.17
- —contracts within statutes of frauds, 7.11, 7.12
- —contractual provisions stipulating written modification, effect of, 7.16, 7.17

Rescission by, 14.20 Subsequent oral agreements merged into written contract, 5.50

Supplying omissions in partially integrated contracts, 5.54–5.55

Other Contracts Between Parties, as Aid in Construction, 5.38

P

Parol Evidence Rule

Debilitation, 5.48
Effect on consistent agreements outside contract, 5.58
Effect on contradictory agreements outside contract, 5.57
Effect on negotiations, 5.59
Efficacy principle, 5.71
Elements, 5.49–5.55

Exception for contract subject to U.C.C., sale of goods, 5.64
Exception to establish integration and intent, 5.61
Exception to resolve ambiguity, 5.62
Exception to show contract invalid, 5.63
Purpose, 5.47
Tactical use, 5.65

Third-party beneficiary, determination of promisor's obligations to, 8.36 U.C.C., sale of goods, 5.54

Partial Breach, 12.18, 12.49

Partial Performance

Acceptance of, as waiver, 12.38
As acceptance of offer
—generally, 2.37, 2.40–2.42
—notice to offeror, generally, 2.37
—notice to offeror, U.C.C. sale of goods, 2.42
—unilateral contract, 2.41
By breaching party, restitution for, 12.38, 14.46, 14.54
Cancellation, ground for, 12.28
Damages, ground for, 12.27
Quantum meruit recovery, 12.29, 12.38
Rescission, ground for, 12.27, 12.38

Partially Integrated Contract

Specific performance, ground for,

Generally, 5.54 U.C.C., 5.54

12.27

Partnership

Real property conveyance and statute of frauds, 4.40

Past Consideration, as Consideration, 2.68

Index-25

Perfect Tender Rule, U.C.C. Sale of Goods, 12.9

Performance and Breach, ch. 12

Generally, 12.3, 12.5; flowchart, app. 12B

Abandonment, mutual, 12.66

Acceptance of goods, U.C.C. sale of goods, 12.9

Acceptance of performance, waiver by

- -generally, 12.69
- —latent or hidden defects, 12.70
- —U.C.C. sale of goods, 12.9, 12.69

Accord and satisfaction. See Accord and Satisfaction

Act of God, impossibility of performance, 12.60

Alteration of contractual terms, making performance irrelevant

- —accord and satisfaction, settlement of dispute by, 12.71– 12.77
- —covenant not to sue, 12.83, 12.85
- —mutual rescission, cancellation, and abandonment, 12.66
- -release, 12.83, 12.84
- —superseding contract (novation), 12.67
- —waiver of strict performance, 12.68–12.70
- Alternative performance, impossibility of performance, 12.54
- Anticipatory breach or repudiation.

 See Anticipatory Breach or
 Repudiation

Approval of performance as condition precedent, 11.18, 12.8

Assurance of performance, demand for adequate

- -generally, 12.45
- —U.C.C., sale of goods, expressly permitting, 12.45

Bad-faith breach (insurance contracts)

- —generally, 12.19
- —punitive damages, 13.47
- —third-party beneficiary contract, 8.54

Best-efforts clause

- —generally, 12.8
- —distinguished from fiduciary relationship, 12.8
- —implied in exclusive distributorship contract, 5.73, 12.8

Breach of contract, remedies. *See*Defective Performance

Breach of contract, types of

- —anticipatory breach or repudiation, 12.17
- -material breach, 12.18
- -technical breach, 12.18
- -tort of bad-faith breach, 12.19

Cancellation, mutual, 12.66

Care in performance, 12.8

Covenant not to sue, making performance irrelevant, 12.85

Death of party, impossibility of performance, 12.61

Defective performance. *See* Defective Performance

Delay in performance

- —generally, 12.15
- —anticipatory breach or repudiation, 12.17
- —damages for, 13.16
- —demand for performance, time nonessential, 12.15
- —essential time, determination,12.15
- —impossibility, temporary, excuse for, 12.58
- —material breach, 12.15
- —presumption of simultaneous performance, 12.15
- —rescission and restitution for, 14.10, 14.12, 14.21, 14.23, 14.28,
- —waiver and demand after waiver, essential time, 12.15

Discharge of performance by superseding contract, 12.67 Divisible contract, 12.44

Duty to comply with contractual terms

-generally, 12.7

—discharged by full performance, 12.8

-U.C.C. sale of goods, 12.9

Expedience, reasonable, in performance, 12.8

Faithfulness in performance, 12.8 Frustration of purpose, as excuse for nonperformance, 12.63

Good faith

—implied aspect of performance, 12.13

-meaning, 12.13-12.14

Implied aspects of performance

-generally, 12.11

—good faith, 12.12–12.14

—time; delay constituting breach, 12.15

Impossibility of performance. *See* Impossibility of Performance

Incapacity of party, impossibility of performance, 12.61

Insurance contracts, tort of badfaith breach, 12.19

Knowledge of parties, impossibility in original contract, 12.55

Material breach. *See* Material Breach

Mitigation of damages by party not in default, 12.41, 13.30

Modification, anticipatory repudiation by demand for, 12.17

Nonperformance, excuses for

—frustration of purpose, 12.63

--impossibility, 12.52-12.62

Offeree, partial performance by, qualifying as acceptance of offer, 2.40–2.42

Partial breach. See Partial Breach

Partial performance. *See* Partial Performance

Payment

—acceptance of payment, as waiver of performance, 12.70

-progress payments, 12.44

Perfect tender rule, U.C.C. sale of goods, 12.9

Release, 12.66

Rescission, mutual, 12.66, 14.7

Rescission, unilateral. See

Defective Performance

Satisfaction of third party as condition precedent, 11.18, 12.8

Skill in performance, 12.8

Specific performance. *See* Specific Performance

Substantial performance. *See*Substantial Performance

Superior authority, impossibility of performance, 12.59

Superseding contract, as

discharging performance, 12.67

Supervening events, impossibility of performance, 12.56

Suspension of performance, grounds for

-generally, 12.40

—anticipatory breach or repudiation, 12.41

-material breach, 12.42

Technical breach, 12.18

Time

-essential and nonessential, 12.15

—reasonable, 5.73

Tort of bad-faith breach (insurance contracts). *See* Bad-faith breach *this heading*

U.C.C., reservation of rights, accord and satisfaction, 12.77

U.C.C., sale of goods

-acceptance of goods, 12.9

—commercial impracticability, 12.62

—damages for breach, 12.9, 13.11, 14.17

- —flowchart, app. 12A
- —impossibility, 12.62
- -notice of breach, 12.9
- —perfect tender rule, 12.9
- -performance due generally, 12.9
- —rejection, revocation, cancellation of goods, 12.9, 13.11, 14.17
- —substantial impairment of goods, 12.9
- —waiver of rejection, 12.9

Variations in performance, discharging promisor from impossibility, 12.57

Waiver of strict performance

- —burden of proof, 12.69
- —by payment and acceptance, 12.70
- —contractual provision barring waiver, 12.70
- -express or implied, 12.69
- -hidden or latent defects, 12.70
- —intent, question of law or fact, 12.69
- —pleading, affirmative defense, 12.69
- —reservation of rights, U.C.C., 12.70

Warranty, breach of

- —economic loss doctrine, 6.73–6.88
- —limitation of remedies, 6.65–6.72
- -remedies, 6.7-6.12

Personal Property Contracts

Sale of, U.C.C. statute of frauds

- —acceptance of payment or property, enforcement, 4.16
- —judicial admission, enforcement, 4.16, 4.24

Specific performance

- —generally unavailable, 13.67
- -exceptions, 13.67

Warranty, Magnuson-Moss Act, 6.49

Prevention or Hindrance of Performance

Breach of contract, 12.17 Excuse for nonoccurrence of condition, 11.26

Price Quotation or Proposal as Offer, 2.9

Priorities

Among assignees, 9.25 Among conflicting provisions, 15.34

Privity

Beneficiaries of warranty, 6.24 Third-party beneficiary contract, 8.17

Problems in Formation. See

Duress; Illegality; Incapacity of Parties; Misrepresentation; Mistake; Unconscionability; Undue Influence

Progress Payments, Provision for

Divisible contracts, performance of, 12.44 Presumption of simultaneous performance, 12.15

Promises

Bilateral contract
—generally, 1.22
—construed as mutually dependent, 11.5
Conditions, 11.5
Consideration, 2.55–2.61
Dependent and independent, 11.5
Implied-in-fact contracts, 14.40, 14.41
Mutual promise, as consideration, 2.56
Unilateral contract, 1.22

Promissory Estoppel. See Estoppel

Index-28

Q

Quantum Meruit, 12.29, 12.38, 14.40, 14.41

Quasi-Contract

Implied by law, 14.40, 14.44 Restitution

- -ground for, 14.44
- -measure, 14.51, 14.53

Quotation of Price as Offer, 2.9

R

Real Estate Contracts

Anticipatory breach

- —demand for performance by specified date, 12.17
- —specific performance, waiver of tender, 13.60

Assignment, 9.16

Commissions

- -as damages, incidental, 13.11
- —standard of compliance absolute, 4.47, 14.41
- ---statute of frauds writing requirement,4.45-4.47

Conditions

- —listing contract and homepurchase contract, 11.36
- —special limitations distinguished, 11.14
- —subsequent, bequest of interests, 11.13
- —unilateral waiver of invalid condition, 7.8

Drafting

- —effect of vague financing contingency, 15.10
- -release, 15.62
- —seller usually the drafter, 15.17

Earnest money, forfeiture of, liquidated damages, 13.62

Essential time provisions, 12.15

Misrepresentation, quitclaim deed, 3.10

Mistake

- —mutual, 3.18
- —of fact, 3.15
- —of law, 3.20
- —unilateral, 3.20

Offer to purchase, nonessential time, 12.15

Reformation

- -generally, 13.95
- -ratification, 13.87
- —waiver, 13.88

Rescission

- —for failure to pay purchase price, delay as waiving rescission, 14.23
- —simultaneous with tort claim for damages, 14.30

Specific performance

- —generally, 13.66
- binding agreement, contract failing to meet requirement,13.57
- —damages, in addition to, 13.77
- —marketable title required, 13.61
- —relief in addition to, or in place of, 13.76
- —tender of performance, 13.60

Statute of frauds

- -generally, 4.33-4.41
- —damages as remedy, 4.29
- —divisible contracts, 4.40
- —enforcement of noncomplying contract, clear and satisfactory proof, 4.20
- extrinsic evidence for purposes of identification, 4.38
- —identification of real estate and interest conveyed, 4.38
- -modification, oral, 4.12
- -multiple documents, 4.37
- —parol evidence, admission, 5.63, 8.36
- —reformation as remedy, 4.19, 4.29

- —relief, statutory, 4.41
- —rescission, noncompliance as ground for, 14.8
- —rescission, transfer in writing, 14.21
- -restitution as remedy, 4.29, 4.41
- -signature, 4.39
- —specific performance as remedy, 4.29
- —third-party beneficiaries, 8.35
- —transactions subject to statute, 4.40

Statute of limitation, third-party beneficiary contract, 8.37

Substantial performance, applicability, 12.22

Third-party beneficiary contracts

- —generally, 8.65
- —agreements for support and maintenance, 8.61

Warranties

- -disclaimers, 6.59
- —drafting warranties and representations, 15.53
- —express warranties survive conveyance, 6.54
- —express warranties under common law, 6.53
- —new improvements by vendor, implied statutory warranty, 6.55
- —privity, beneficiaries of warranty as to title or environmental condition, 6.24
- -residential-seller disclosure, 6.56
- —time of breach, effect, 6.9
- —time of sale defined, 6.9
- —time-share ownership interest, 6.57
- —U.C.C., part of basis of bargain, applicability to real estate, 6.21
- —warranty deeds, 6.53

Recitals

As aid in construction, 5.21, 12.14 Drafting, 15.48, 15.84

Record Notice or Filing Requirements, 15.9

Reformation

Burden of proof, 13.89

Defenses

- -generally, 13.86
- —estoppel, 13.83
- —ratification, 13.87
- -waiver, 13.88

Delay, unreasonable, as waiver, 13.88

Estoppel as defense, 13.83 Grounds

- -generally, 13.81
- -antecedent agreement, 13.82
- -mutual mistake, 3.18, 13.83
- —unilateral mistake coupled with fraud, 3.20, 13.84

Insurance contracts, 13.96

Parties entitled to relief

- -generally, 13.91
- —third parties, effect on, 13.92 Ratification, as defense, 13.87

Real estate contracts

- -generally, 13.95
- —statute of frauds, equitable enforcement, 4.29

Releases, 13.97

Waiver, as defense, 13.88

Rejection

Offer. *See* Offer U.C.C., sale of goods, 12.9, 13.11, 14.17

Releases

Generally, as making performance irrelevant, 12.83, 12.84 Drafting, allocation of risk, 15.62 Exculpatory contracts, 3.34 Reformation, 13.97

Remedies

Breach of contract. *See* Damages; Performance and Breach;

Rescission; Restitution; Specific Performance

Breach of warranty

- —damages, 6.10
- —limitation of, 6.65–6.72
- -rescission and restitution, 6.11

Defective contracts. *See*Reformation; Rescission;
Restitution; Specific
Performance

Election of, 13.2, 14.28, 14.29

Repudiation. *See* Anticipatory Breach or Repudiation

Rescission

Abandonment distinguished, 14.3 Ambiguity in contract, ground for, 14.8

Anticipatory breach, ground for

- —generally, 12.35, 14.11
- —clean-hands requirement for nonrepudiating party, 12.35

Breach of residential-seller disclosure, ground for, 6.57

Cancellation distinguished

- —generally, 14.3
- —U.C.C. sale of goods, 14.17

Condition, unexcused nonoccurrence, ground for, 6.11, 11.20, 14.8

Consideration, lack of adequate, ground for, 14.8

Defined, 14.3

Delay in performance

- —essential time provisions, ground for, 12.15, 14.12
- —waiver of right to rescind and reinstatement by notice, 12.15, 14.12

Duress, ground for, 3.39, 14.8

Election of remedies

- -generally, 14.27
- —applicability to statutory claims, 14.31

- —between rescission and claim for breach, 14.28
- —between rescission and tort claim for misrepresentation, 14.29
- —claim for damages as precluding later claim for rescission, 14.29

Formalities, notice of intent, 14.20

Illegality, ground for, 14.8

Impossibility, ground for, 14.8

Inaction as waiver of right to, 14.23

Inadequacy of consideration,

ground for, 14.8

Incapacity of party, ground for, 14.8

Joint and several contracts, effect on, 10.13

Jury trial unavailable, 14.25

Material breach, ground for

- —generally, 12.36–12.38, 14.9–
- —anticipatory breach or repudiation, 12.35, 14.11
- —delay, 12.15, 14.12

Misrepresentation

- -ground for, 14.8
- —limitation on right to rescission, 14.8

Mistake, ground for, 3.18, 13.83, 14.8

Mutual rescission, 14.7

Notice of intent or demand for performance as prerequisite, 14.20

Oral rescission of written contract

- —generally, 14.20
- —statute of frauds, contract within, 14.20

Partial performance

- -ground for rescission, 12.38
- —recovery by breaching party, 12.38, 14.46, 14.54

Partial rescission

- -generally, 13.22
- —U.C.C., sale of goods, 13.22

Ratification, 14.23

Remedies, election of. *See*Election of remedies *this heading*

Restoration of benefits as prerequisite for, 14.21

Restorative damages, 14.28

Statute of frauds

—noncomplying contract, ground for rescission, 14.8

—oral rescission, 14.20

Statutory, generally, 14.14

Stipulations requiring rescission in writing, 14.20

Third-party beneficiary's assent, 8.29

Time, within reasonable, or waiver or right to rescind, 14.22

U.C.C., sale of goods

- —generally, 14.16
- —common-law right to rescission not abrogated, 14.17
- -damages, availability, 14.17
- -partial rescission, 14.22
- —preservation of common law remedies, 14.17
- —rejection, revocation, cancellation, 14.17

Undue influence, ground for, 14.8 Void, voidable, or unenforceable contracts, ground for, 14.8

Waiver, by passage of unreasonable time, 14.23

Restitution

- Administrative regulation, contract invalid for violation of
- —ground for restitution, 14.48
- —measure of restitution, 14.48

Defined, 14.33

Implied-by-law contract, ground for

- -generally, 14.40
- —contract, express or implied, nonexistent, 14.44

- —presumption of payment for benefit retention of which otherwise unequitable, 14.43
- —quasi-contract doctrine, 14.44
- —services, by whom provided, unmarried cohabitant vs. spouse, 14.45

Implied-by-law contract, measure, value of benefit conferred, 14.51, 14.53

Implied-in-fact contract, ground for

- —generally, 14.40
- —implied from conduct, 14.40
- —parameters and proof of right to recovery, 14.41
- -quantum meruit/valebant, 14.41
- —services, to whom provided, family versus stranger or commercial, 14.41

Implied-in-fact contract, measure, value of services or goods, 14.51, 14.52

Impossibility of performance, temporary, ground for, 12.51

Material breach

- —ground for, in rescission or damages action, 14.38
- —loss to nonbreaching party, contract resulting in, 14.49
- -measure of restitution, 14.49
- —parameters of right to recovery, 14.38
- —provocation of breach, consideration of in measure, 14.49
- —restitution interest, damages satisfying, 14.38, 14.49
- —restoration of pre-contract status quo, 14.38
- —restorative damages, availability, 14.38

Measure

—implied-by-law contracts, value of benefit conferred, 14.51, 14.53

- —implied-in-fact contracts, reasonable value of services or goods, 14.51, 14.52
- -material breach, 14.49
- —partial performance by breaching party, 14.54
- —rescission for void, voidable, or unenforceable contracts, 14.48
- -rescission, fraud basis for, 14.48
- —sufficient to restore pre-contract status quo, 14.35
- —unjust enrichment, 14.50–14.54 Partial performance by breaching party, ground for, 14.46

Quasi-contracts, ground for, 14.44 Rescission, ground for, 14.36– 14.38

Statute of frauds, noncomplying contract, remedy for, 14.37

Unjust enrichment, ground for

- —generally, 14.39–14.45
- -elements of claim, 14.40
- —implied-by-law contracts, 14.42–14.45
- —implied-in-fact contracts, 14.41
- —partial performance by breaching party, 14.46

Unjust enrichment, measure

- -generally, 14.40, 14.45, 14.51
- —implied-by-law contracts, value of benefit conferred, 14.53
- —implied-in-fact contracts, reasonable value of services or goods, 14.52
- —partial performance by breaching party, 14.53

Unmarried cohabitants, claims relating to, ground for, 14.45

Void, voidable, or unenforceable rescinded contracts

- —ground for, 14.37
- -measure, 14.48

Revocation. *See also* Offer U.C.C., sale of goods, 12.9, 13.11, 14.17

Reward as Offer, 2.10

 \mathbf{S}

Seal

Affixing, 15.75 Consideration, evidence of, 2.71, 15.77 Requisite for recording, 15.79 Statute of limitation, 15.78 U.C.C., 15.80

Shortage, Impossibility, 12.56

Specific Performance

Anticipatory breach, ground for, 12.41

Arbitration, 13.71

Binding agreement as prerequisite, 13.57

Certainty of contractual terms as prerequisite, 13.58

Conditions, specific performance with, 13.74

Construction contracts, 13.69

Damages, in addition to, 13.77

Estoppel, 13.63

Fairness as prerequisite, 13.61

Frustration of purpose, temporary, as ground for, 12.51

Impossibility, temporary, as ground for, 12.51

Inadequate legal remedy as prerequisite, 13.59

Incidental equitable relief, in conjunction with, 13.76

Liquidated damages, effect of provision for, 13.62

Loans, 13.70

Material breach, ground for, 12.42

Performance or tender of performance

- —prerequisite, 13.60
- —waived by repudiation of contract, 13.60

Personal property contracts, 13.67 Prerequisites to enforcement

—generally, 13.55

Index-33

- —binding agreement, 13.57
- —certainty of terms, 13.58
- -fairness, 13.61
- —inadequate legal remedy, 13.59
- —performance or tender of performance, 13.60

Real estate contracts

- —generally, 13.66
- —forfeiture of earnest money, liquidated damages, 13.62
- —marketable title, 13.66
- —statute of frauds, equitable enforcement, 4.29

Relief in addition to or in place of specific performance

- -damages, 13.77
- —incidental equitable relief, 13.76
- —reformation, mutual mistake, 3.18

Services, contracts for, 13.68 Time, failure to act as waiver of, 13.63

U.C.C., sale of goods, 13.11 Waiver

- —generally, 13.63
- —delay constituting, 13.63
- —excusable delay, 13.63

Standard of Review

Clearly erroneous, interpretation of contract, 5.18

De novo, interpretation of contract, 5.18

Insurance contract, 5.18

Question of fact

- —consideration, whether contract supported by, 2.52
- —extrinsic evidence, interpretation generally and U.C.C., 5.16, 5.17
- —intent of parties to ambiguous contract, 5.16
- —material breach, determination of, 12.18
- —reasonable time for revocation, U.C.C. sale of goods, 12.9

- —rescission, reasonable time to commence, 14.23
- —statutes of frauds, equitable enforcement, 4.27
- —warranty or opinion, statement as, 6.15

Ouestion of law

- interpretation of ambiguous contract, no extrinsic evidence exists, 5.14
- —interpretation of unambiguous contract, 5.14

Statement of Opinion

Distinguished from offer, 2.3
Distinguished from promise
establishing estoppel, 2.77
Distinguished from warranty, 6.14–
6.21

Statutes of Limitation

Accrual of cause of action, 1.36
Joint and several contracts, 10.16
Limitation on recovery of damages, 13.26
Seal, effect on, 15.78
Six-year limitation period, 1.34
Third-party beneficiary contract, 8.37
U.C.C., 1.35

Statutes of Frauds, ch. 4

Acceptance of goods, U.C.C. sales, enforcement, 4.16, 4.57

Arbitration clauses

- -generally, 4.67
- —marital property agreements, 4.67

Asserted as defense, 4.31

Assignment of wages, 4.61–4.63, 9.18

Compliance generally, 4.4

Confirmation, written, U.C.C. sales, enforcement, 4.57

Contracts for performance beyond one year, 4.48–4.50

Contracts to pay third party's debt, 4.51–4.54

Damages in lieu of specific performance for noncompliance, 4.27, 4.29

Equitable exceptions

-generally, 4.15

-common law, 4.22-4.24

-leasehold statute of frauds, 4.21

—real estate statute of frauds, 4.17–4.20

-U.C.C. sales, 4.16

Equitable remedies

-generally, 4.27

—common law, 4.30

-real estate statute of frauds, 4.29

-U.C.C. sales, 4.28

Estoppel, equitable enforcement of noncomplying contract

-generally, 4.23

-real estate contract, 4.19

Extrinsic evidence to determine terms, 4.11

Integration of multiple documents, 4.11

Intentional misrepresentation claims, 4.25

Judicial admission

-generally, 4.24

—U.C.C. sales, 4.16, 4.24, 4.57

Marital property agreements, 4.64–4.66

Merchants, U.C.C. sale of goods, 4.57

Modification of contract within

-generally, 4.12, 7.11

—U.C.C. sale of goods, 7.12

Payment, enforcement—U.C.C., sale of personal property, 4.16

Purpose, 4.3

Real estate contracts, 4.33-4.47

Reformation, as remedy for noncomplying real estate contract, 4.19, 4.29

Rescission

—noncomplying contract as ground for, 14.8

—oral, of contract within, 14.20

Restitution, as remedy for noncomplying contract, 4.27, 4.30, 14.37

Sales and marketing services agreement, 4.50

Signature, requirement as to, 4.7

Special manufacture of goods, U.C.C. sale of goods, enforcement, 4.16

Specific performance, as remedy for noncomplying contract, 4.19, 4.27

Terms, requirement as to, 4.10 Third-party beneficiary contracts, 8.35

Tort actions, 4.25

Trust conveyances

-generally, 4.58-4.60

—imposition of constructive trust, 4.60

U.C.C., sale of goods

—generally, 4.55–4.57

—grounds for enforcement, 4.16, 4.57

—oral modification, 7.12

U.C.C., sale of personal property

—grounds for enforcement, 4.16, 4.24

Unjust enrichment, equitable enforcement

-generally, 4.23

—real estate contract, 4.19

Unsuitability of sale to others, U.C.C. goods, enforcement, 4 57

Wisconsin statutes of frauds

-assignment of wages, 4.61-4.63

—contracts for performance beyond one year, 4.48–4.50

—contracts to pay third party's debt, 4.51–4.54

—marital property agreements, 4.64–4.66

- -real estate, 4.33-4.47
- —trust conveyances, 4.58–4.60
- —U.C.C. sale of goods, 4.55–4.57

Writing requirement

- -generally, 4.5-4.12
- -arbitration clauses, 4.67
- —form and location, 4.8
- —integration of multiple documents, 4.11
- —oral modification of contract, 4.12, 7.11, 7.12
- -signature, 4.7
- -terms, 4.10
- -tort actions, 4.25

Strict Construction

Exculpatory contracts, 3.29, 5.28 Indemnity contracts, 5.28 Mortgage clauses, 5.28

Strict Products Liability, 6.25, 8.9

Substantial Performance

Acceptance of partial performance as not waiving defense, 12.26 Applicability of doctrine, 12.22 Burden of proof, 12.26 Construction contracts, 12.25, 12.26, 12.27, 13.18

Defined, 12.21

Determination

- —cost of repairs or correction as test, 12.25
- —fulfillment of contract's essential purpose, 12.25
- -gross negligence, 12.24
- —inference of bad faith, factors, 12.24
- —necessity of good faith, 12.24 Elements, 12.24—12.26 Equitable nature of doctrine, 12.24 Personal taste or preference, performance to satisfaction of, 12.25

Purpose of doctrine, 12.21

Quantum meruit recovery for nonsubstantial performance, 12.29

Recovery, economic test for amount of, 13.18

Remedy for party not substantially performing, 12.29

Significance of finding, 12.27

Superior Authority, Impossibility, 12.59

Supervening Events, Impossibility, 12.56

Suretyship

Joint and several contracts, release affected by, 10.13 Third-party beneficiary contract

-defense, 8.34

-distinguished, 8.7

Surrounding Circumstances, as Aid in Construction, 5.36, 5.61

T

Tax Effects of Transaction, 15.21

Third Parties

Attorney fees, recovery for litigation with third parties, 13.22

Beneficiaries. *See* Third-Party
Beneficiary Contract
Benefit to or from as consideration,

Benefit to or from as consideration 2.62

Debt of third party

- —agreement to pay, third-party beneficiary contract, 8.56–8.60
- —assignment not created by promisee's order to promisor to pay, 9.8
- —contracts to pay, statute of frauds, 4.51–4.54

Drafting contract

-including as guarantors, 15.47

—multiple documentation, advisable in cases of submission to, 15.11-15.14

Innocent third parties, effect on recovery

—damages in lieu of specific performance, 4.27, 4.29, 13.77

—reformation, generally unavailable, 13.92, 13.97

Intellectual property rights, warranty against infringement of, 6.46

Modification of third-party beneficiary contract, 7.21, 7.26, 8.27

Novation, 8.6, 12.67 Satisfaction of, as condition precedent, 11.18, 12.8

Tort of bad-faith breach (insurance), 12.19

Warranties, 6.24

Third-Party Beneficiary Contract, ch. 8

Acceptance of third-party beneficiary, 8.23

Actions by promisees. See Remedies this heading

Agreement to make will, 8.62 Agreements to pay debts to or of

third party

-generally, 8.57

—assumption of company debt, 8.60

—assumption of mortgage, 8.58

-unrelated debt, 4.51-4.54, 8.59

Assignment distinguished, 8.6 Bad-faith tort (insurance), 8.54

Beneficiaries

-classified, 8.21

—identification of, 8.22

Breach of warranty and products liability distinguished, 8.9

Choice of law, 8.39

Classification of beneficiaries, 8.21

Conditions, third-party

beneficiary's right subject to, 8.32

Consideration, 8.14–8.16

Construction contracts, 8.43

Creditor beneficiary defined, 8.21

Defenses

—generally, 8.33

-miscellaneous, 8.38

—parol evidence rule, 8.36

—promisee's failure to perform, 8.33

-statutes of frauds, 8.35

—statutes of limitation, accrual of cause of action, 8.37

-suretyship, 8.34

Disclaimer, 8.23

Distinctions

-generally, 8.4

-assignment, 8.6

—breach of warranty and products liability, 8.9

-indemnity, 8.8

—negligent provision of professional services, 8.10

-novation, 8.6

-suretyship, 8.7

—trust, 8.5

Donee beneficiary defined, 8.21

Drafting preamble of contract, 15.46

Elements

—basic rule, stated, 8.12

—consideration, 8.14–8.16

—contract versus property right, 8.24

—intent to benefit, 8.18–8.22

—privity, 8.17

—third-party beneficiary's knowledge, acceptance, disclaimer, 8.23

—valid and enforceable contract, 8.13

Enforcement. *See* Defenses; Remedies *this heading*

Identification of beneficiaries, 8.22 Incidental beneficiary defined, 8.21 Indemnity distinguished, 8.8 Insurance

—agreements or requirements to procure or maintain, 8.53

-bad-faith tort, 8.54

—fire, property, and casualty, 8.51

—liability and indemnity, 8.49

—life, 8.52

-reinsurance, 8.509

Intended beneficiary defined, 8.21 Intent of parties to benefit third party

-generally, 8.19

—disclaimer of, 8.21

Knowledge of third-party beneficiary, 8.23

Labor, 8.64

Leases, appraisals, and other real property agreements, 8.65

Legal fiction creating privity between promisor and third party

—generally, 8.17

—creating requirement of thirdparty beneficiary's assent to modification, 8.27

Loan commitments and agreements, 8.45

Mitigation, duty, 8.38

Modification, 7.26, 8.27

Nature of doctrine and historical development, 8.2

Negligent provision of professional services, distinguished, 8.10

Novation distinguished, 8.6

Parol evidence rule

-as defense, 8.36

determination of promisor's obligations to third-party beneficiary, 8.36

Payment and performance bonds, 8.42

Pleading, third party duty to, 8.29 Privity, 8.17

Promisor's obligations to thirdparty beneficiary, parol evidence to determine, 8.36 Property right versus contract right,

Property right versus contract right, 8.24

Public contracts, 8.46

Public servant bonds, 8.43

Release, 8.27

Remedies

—of promisee, 8.30

-of promisor, 8.31

—of third-party beneficiary, 8.29

Sale of goods, 8.47

Shareholders as third-party

beneficiaries, 8.19

Statute of frauds as defense, 8.35

Statutes of limitation, accrual of

cause of action, 8.37

Support and maintenance

agreements, 8.61

Surety, promisee of contract to pay debt owing to beneficiary liable as, 8.34

Suretyship distinguished, 8.7

Trust distinguished, 8.5

Validity of contract, third-party beneficiary's rights subject to, 8.27, 8.33

Vesting and defeasance of rights

—conditions, 8.26, 8.33

-modification, 7.26, 8.27

-release, 8.27

Title to Goods. *See* Warranty of Title

Title to Registered Motor Vehicles. *See* Warranty of Title

Tort

Accrual rule, statutes of limitation, 8.37

Assignment of tort cause of action, 9.19

Bad-faith breach (insurance)

-generally, 12.19

- -damages, 13.47
- —third-party beneficiary contract, 8.54

Economic loss doctrine, 6.73–6.88, 13.31

Election between tort claim and rescission, 14.30

Misrepresentation

- -generally, 3.4
- —avoidance of contract by minor lying about age, 3.52

Warranty, distinguished from contract action, 6.12

Tortious Interference with Contract

Third-party beneficiary's right, 8.29

Trust Conveyances

Generally, 4.59–4.60 Imposition of constructive trust, 4.60

Trusts

Constructive trust, imposition of, 4.60

Third-party beneficiary contract distinguished, 8.5

Trust agreements, modification of, 7.28

U

U.C.C.

Generally, 1.7

Adoption in Wisconsin, 1.7

Construction and interpretation

- -choice of law, 5.7, 5.11
- —extrinsic evidence, custom and usage, 5.17, 5.41

Seal, 15.80

Statutes of limitation, 1.35

U.C.C. Commercial Paper, Negotiable Instruments

Assignment, endorsement as conveying entire instrument, 9.22

Joint and several contracts, 10.27

U.C.C. Lease of Goods

Warranty

- -generally, 6.51
- —finance lease, 6.51
- —limitation of remedies, 6.67, 6.70–6.72

U.C.C. Sale of Goods

Acceptance of offer

- —by partial performance, 2.42
- —qualified, 2.34

Assignment, contractual provisions barring, effect of, 9.24

Assurance of performance, demand for, 12.45

Battle of the forms, construction and interpretation

- —contract, 5.68
- -warranty, 6.34

Delegation, limitations on, 9.36

Modification

- —consideration, 7.6
- —oral of written contract, 7.12, 7.17

Parol evidence rule, exceptions, 5.54, 5.64

Performance and breach

- -generally, 12.9
- -acceptance of goods, 12.9, 12.69
- —accord and satisfaction, reservation of rights, 12.77
- —assurance of performance, demand for, 12.45
- —commercial impracticability, 12.62
- —damages for breach, 12.9, 13.11, 14.17
- —flowchart, app. 12A
- —impossibility, 12.62

- —notice of breach, 12.9
- —perfect tender rule, 12.9
- —rejection, revocation, cancellation of goods, 12.9, 13.11, 14.3, 14.17
- —rescission, 14.17
- —substantial impairment of goods, 12.9
- —unilateral rescission for defective performance, 12.9, 14.17
- —waiver of rejection, 12.9

Statute of frauds

- -generally, 4.16, 4.55-4.57
- —acceptance of goods, 4.57
- —judicial admission, 4.57
- —oral modification, 7.12
- —specially manufactured goods, 4.57
- —unsuitability of goods for sale to others, 4.57
- —written confirmation, 4.57

Warranty

- —advertising, creating express, 6.30
- —against infringement of intellectual property rights, 6.46
- -beneficiaries, 6.25
- —conduct of parties, creating implied, 6.34
- —disclaimer, express, 6.43
- —fitness for purpose, implied, 6.48
- —limitation of remedies, 6.67, 6.70–6.72. *See also* Economic Loss Doctrine
- -merchantability, implied, 6.47
- —mixed contracts of goods and services, 6.61
- —part of basis of bargain, 6.17–6.21
- —sample or model, creating express, 6.27, 6.42
- —title to goods, 6.44
- —trade practice, creating implied, 6.35

Unconscionable contracts, 3.37

U.C.C. Sale of Investment Securities

Warranty, 6.63

U.C.C. Sale of Personal Property

Statute of frauds

-exceptions, 4.16

U.C.C. Secured Transactions

Assignment, rights in property to secure payment of debt, 9.28 Defenses and counterclaims of promisor against assignee, 9.30

Unconscionability. See also

Illegality

Generally, 3.36

Breach of warranty, contractual provision limiting remedy, 3.38, 6.72

Commercially reasonable terms, 3.36

Contracts

- -generally, 3.36
- -U.C.C., sale of goods, 3.37

Damages, limitation on recovery, 13.23

Specific performance, limitation on, 13.61

U.C.C.

- —generally, 3.38
- —unconscionable limitation of remedies for breach of warranty, 3.38, 6.72

Unequal bargaining power, 3.36 Warranties, unconscionable limitation of remedies, U.C.C., 3.38, 6.72

Undue Influence

Generally, 3.47 Rescission and restitution, ground for, 14.8

Unenforceable Contract, 1.23

Unenforceable Promises, as Consideration, 2.66

Uniform Computer Information Transactions Act (UCITA)

Scope, 16.37

Uniform Electronic Transactions Act (UETA), chs. 1, 16. See

also Electronic Transactions
Adoption by NCCUSL, 1.8, 16.1
Approach, 1.8, 16.12–16.16
Background, 1.8, 16.2–16.5
Interplay with traditional contract principles, 1.8, 16.7–16.11
Operative provisions, 1.8, 16.19–
16.33
Related laws, 16.34–16.37
Transactions subject to UETA, 1.8, 16.17
Wisconsin status, 1.8, 16.5

Unilateral Contract

Generally, 1.22 Partial performance as acceptance, 2.41

Unjust Enrichment

Restitution, ground for

- —generally, 14.39–14.45
- -elements of claim, 14.40
- —implied-by-law contracts, 14.42–14.45
- —implied-in-fact contracts, 14.41
- —partial performance by breaching party, 14.46

Restitution, measure

- -generally, 14.51
- —implied-by-law contracts, value of benefit conferred, 14.53
- —implied-in-fact contracts, reasonable value of services or goods, 14.52
- —partial performance by breaching party, 14.53

Statutes of frauds, equitable enforcement

- -generally, 4.23
- -real estate, 4.19

V

Void and Voidable

Generally, 1.24, 3.2
Contracts with problems in formation, ch. 3
Distinction between, 1.24, 3.2
Reformation, ground for, 3.2
Rescission, ground for, 14.8
Restitution, ground for, 14.37, 14.48
Statutes declaring contract void, 1.16

W

Wages

Assignment of wages. See
Assignment of Wages
Increase in, generally not
amounting to impossibility,
12.56
Labor, third-party beneficiary
contract, 8.64

Waiver

Acceptance of performance as

- —generally, 12.38, 12.69
- —delayed performance, 12.15, 14.12
- -latent or hidden defects, 12.70
- -partial performance, 12.38
- ---payment, 12.70
- —U.C.C., sale of goods, 12.9, 12.69

Anticipatory breach, waiver of, 12.41

Conditions

- —as excuse for nonoccurrence of condition, 11.23
- —implied waiver, 11.23

—unilateral waiver of condition creating invalidity, 7.11

Consideration, waiver of right as, 2.59

Construction contracts, waiver of defective performance, 12.70

Damages waived by rescission, 14.28

Delayed performance, waiver of and reinstatement, 12.15, 14.12

Drafting, use of nonwaiver clause, 15.70

Essential time provisions, 12.15, 14.12

Express or implied waiver of performance, 12.69

Jury trial, contractual provision waiving, 3.27, 3.36

Latent defects in performance, waiver of, 12.70

Mistake, waiver of relief for, 3.12 Mitigation of damages, waiver of defense, 13.30

Reformation, waiver as defense, 13.88

Rejection, waiver of, U.C.C. sale of goods, 12.9

Rescission, waiver of right to, 12.15, 12.34, 14.12, 14.23

Specific performance, waiver of right to, 13.63

Time, failure to act as waiver

-right to rescission, 14.23

—right to specific performance, 13.63

U.C.C., sale of goods, waiver of rejection, 12.9

Unilateral, of condition creating invalidity, 7.11

War, Impossibility, 12.59

Warranties and Disclaimers, ch. 6 Generally, 6.2–6.25 Advertising and creation of express warranty, 6.30 Beneficiaries, privity requirement

-generally, 6.24

—elimination from time-ownership share interests, 6.57

—elimination from U.C.C. finance lease, 6.51

—express designation of additional, 6.24

—U.C.C., sale of goods, 6.25

Checks. *See* Securities and other instruments *this heading*

Condition, warranty as and remedy for breach, 6.11

Consideration

—general requirement, 6.3

—oral statements subsequent to contract, 6.29

Course of conduct

exclusion of implied warranty of merchantability, 6.47

-implication of warranty, 6.34

Creation and disclaimer

-generally, 6.38

-express warranties, 6.26-6.30

-implied warranties, 6.31-6.36

-lease of goods, U.C.C., 6.51

-real estate, 6.52-6.57

—sale of goods, 6.39–6.50

—securities and other instruments, 6.62–6.64

---services, 6.59-6.61

---U.C.C., 6.40-6.48, 6.51, 6.61, 6.63

Custom and usage

—exclusion of implied warranty of merchantability, 6.47

—implication of warranty, 6.35

Defined by Wisconsin Supreme Court, 6.3

Distinctions

- —contract claim and tort claim, 6.12
- —warranty and remedy, 6.22
- —warranty and statement of opinion, 6.14–6.21

Drafts drawn under letters of credit. See Securities and other instruments this heading

E-Warranty Act of 2015, 6.49 Elements, 6.3

Express warranties

- —creation outside face of contract by advertising or oral statements, 6.29–6.30
- —no particular language required, 6.27
- -nonverbal, 6.27
- —real estate, 6.53
- —sale of goods, U.C.C., 6.27, 6.30, 6.40–6.43
- —time-share ownership interests, 6.57

Fitness for purpose, U.C.C. implied warranty of, 6.48

Implied warranties

- -generally, 6.32
- against infringement of intellectual property rights, U.C.C. sale of goods, 6.46
- —consumer products, Magnuson Moss Act, 6.49
- course of conduct excluding implied warranty of merchantability, 6.47
- custom and usage excluding implied warranty of merchantability, 6.47
- —implied by law, 6.36
- —implied in fact from course of conduct or custom and usage, 6.33–6.35
- —lease of goods, U.C.C., 6.51
- —merchantability and fitness for purpose, U.C.C. sale of goods, 6.47, 6.48
- —real estate, new improvements by vendor, 6.55
- —sale or lease of new motor vehicles, Wisconsin lemon law, 6.50
- -securities, U.C.C., 6.63

- -services, 6.60
- —time-share ownership interests, 6.57
- —title to goods, U.C.C. sale of goods, 6.44
- —title to registered motor vehicles, 6.45

Indemnification, 6.5

Intent to warrant

- -generally, 6.16
- —U.C.C., sale of goods, 6.17

Lease of goods, U.C.C.

- —generally, 6.51
- -advertising, 6.30
- —finance lease, 6.51
- —limitation of remedies for breach, 6.67, 6.71–6.72. *See* also Economic Loss Doctrine
- —part of basis of bargain, 6.17–6.21

Leases, residential and other, 6.58 Limitations of remedies for breach. *See also* Economic Loss Doctrine

- -generally, 6.66
- —economic loss doctrine as ground for avoiding, 6.73–6.88
- —failure of warranty's essential purpose as U.C.C. ground for avoiding, 6.71
- —grounds for avoiding, 6.68–6.72
- —liquidated damages generally, 6.66
- —liquidated damages, U.C.C. sale of goods, 6.67
- —repair or replacement of parts, U.C.C. sale of goods, 6.67
- —U.C.C., 6.67, 6.70–6.72
- —unconscionability as U.C.C. ground for avoiding, 6.72

Limited warranty defined, 6.22 Magnuson-Moss Warranty Act, 6.49

Merchantability, U.C.C. implied warranty of, 6.47

Misrepresentation, tort action, 6.12

Motor vehicles, sale or lease of, 6.50

Negotiable instruments. *See*Securities and other instruments *this heading*

Privity requirement

- -generally, 6.24
- —elimination from time-ownership share interests, 6.57
- —elimination from U.C.C. finance lease, 6.51

Real estate

- —common law, 6.53
- —statutory—new improvements by vendor, 6.55
- —statutory—residential-seller disclosure, 6.56
- —statutory—time-share ownership interests, 6.57

Reliance of buyer

- —distinction between warranty and statement of opinion, 6.15, 6.16
- —no "due diligence" requirement,
- —on warranted facts without confirmation, 6.6
- —tort claim for intentional misrepresentation or fraud, 6.12
- —U.C.C. implied warranty of fitness for purpose, 6.48
- —U.C.C., sale of goods, 6.18, 6.19
- Remedies for breach of warranty.

 See also Economic Loss
 Doctrine
- —generally, 6.8
- -damages, 6.10
- —distinguished from warranty itself, 6.22
- —effect of time of breach, 6.9
- —limitations of, 6.22, 6.65–6.72
- —proof of claim versus proof for action in tort, 6.12
- —rescission and restitution when warranty is a condition, 6.11

- —rescission for breach of residential-seller disclosure, 6.56
- —Wisconsin lemon law, sale or lease of new motor vehicles, 6.50

Residential and other leases, 6.58 Sale of goods, U.C.C. See also U.C.C. this heading

- —generally, 6.41
- -beneficiaries, 6.25
- express warranties and disclaimer, 6.27, 6.30, 6.42, 6.43
- —implied warranty of fitness for purpose; disclaimer, 6.48
- —implied warranty of merchantability; disclaimer, 6.47
- —infringement of intellectual property rights, 6.46
- —limitation of remedies for breach, 6.67, 6.71–6.72
- —part of basis of bargain, 6.17–6.20
- —title to goods, 6.44
- Sample or model and creation of warranty, U.C.C. sale of goods, 6.27

Securities and other instruments

- -common law, 6.64
- —implied warranties in presentment and transfer, U.C.C., 6.63

Services

- -generally, 6.60
- —distinction between routine and professional services, implied warranty, 6.60
- —mixed contracts of services and goods, 6.61
- professional services, negligence requirement for implied warranty, 6.60
- -workmanlike service, 6.60

Statement of opinion distinguished, 6.14–6.21

Statutory warranties on real estate, 6.54–6.58

- —leases, residential and other, 6.58
- -residential-seller disclosure, 6.56
- —time-share ownership interests, 6.57
- —vendor improvements, 6.55 Strict products liability, 6.25

Time of breach, effect on remedies, 6.9

Time-share ownership interests, 6.57

Title to goods, U.C.C. sale of goods, 6.44

Title to registered motor vehicles, 6.45

Tort claim distinguished from contract claim, 6.12

U.C.C. See also Sale of goods, U.C.C.; Lease of goods, U.C.C.; Securities and other instruments this heading

- —beneficiaries of warranty, 6.25
- -lease of goods, 6.51
- —limitation of remedies for breach of warranty, 6.70–6.72
- —mixed contracts of goods and services, 6.61
- —part of basis of bargain, 6.18–6.20
- -sale of goods, 6.39-6.48
- —securities, 6.63

Warehouse receipts, bills of lading. See Securities and other instruments this heading

Wisconsin lemon law, 6.50

Workmanlike service, implied in contract for services, 6.60

Warranty of Title

To goods, U.C.C., 6.44 To registered motor vehicles, 6.45

Wisconsin Consumer Act, Rescission. 14.18

Wisconsin Fair Dealership Law, 1.30, 3.24, 5.6, 8.66, 15.10

Wisconsin Franchise Investment Law, 14.18

Wisconsin Uniform Securities Law. 14.18

Withholding from Competition, as Consideration, 2.61

Writing Requirement

Generally, 4.5–4.12

Assignment of rights, 9.6, 9.18, 9.26

Electronic transactions, 16.9

Form and location, 4.8

Integration of multiple documents, 4.11

Oral modification of contract, 4.12, 7.11, 7.12

Signature, 4.7–4.9, 15.71–15.73, 16.10, 16.24, 16.29

Terms, 4.10