I. Introduction
- 2 questions that must be answered in Contract law
  o What promises should be legally enforced?
  o What remedies should be available for breach of a legally enforceable promise?

II. The Classical (Bargain) Theory of Contracts
- What promises are enforceable?
  o only those which are part of a bargain
- What is a bargain?
  o it must have offer, acceptance, and consideration (what are those?)
  o consideration
    ▪ must consideration be objective or can it be objective also?
    ▪ how about adequacy of consideration?
    ▪ how is the "new" or modern theory of contracts different than the old?
- Gift promises as compared to bargain promises
  o what is a gift promised?
  o according to classical theory, should it be enforced?
  o according to economic theory, should it be enforced?
    ▪ What is the economic purpose of enforcing any promise?
    ▪ examples.
    ▪ how can we make gift promises enforceable?
      • classical bargain theory
      • modern theory
- Remedies for breach of enforceable promises (Bargain theory of contracts)
  o expectation damages
    ▪ definition
    ▪ why is this the correct remedy under the bargain theory?
  o reliance damages
  o specific performance
  o restitution damages

III. An economic theory of Contracts
- What is a "perfect contract"?
  o definition
  o when should perfect contracts be enforced?
- Perfect contracts as compared to a perfectly competitive market
  o what happens in a perfectly competitive market?
    ▪ exchange
    ▪ efficiency
  o What are the assumptions of a perfectly competitive market?
    ▪ individual rationality (what does this mean?)
      • stable, well-ordered preferences (what does this mean?)
      • constrained choice (i.e., scarcity)
      • individuals are maximizing their utility
• legal doctrines associated with each
  • perfectly competitive market environment
  • many buyers and sellers
  • Full information to both parties
  • no negative externalities
  • zero transaction costs
  • legal doctrines associated with each

- What is a perfect contract?
  o results from perfectly competitive market conditions

- The economic theory of contracts evaluates legal doctrines to see how they fill the gaps caused by violations of a perfectly competitive market.

IV. According to the economic theory of Contracts, what should be a legally enforceable promise?

- Formation and performance defenses for breach of contract
  o definition of both
  o 2 general economic themes for both defenses for breach of contract
  o how can a particular defense be constructed to maximize the flow of relevant information between the bargaining parties?
  o how can a particular defense be constructed to improve the allocation of risk between the parties?
    • what risk?

V. Analysis of Formation defenses

- Coercion or Duress
  o all bargaining involves threats (why?)
  o what type of threats should not be allowed (i.e., allow the contract to be breached?)
  o economic justification

- Incapacity/Incompetence
  o law assumes competency with two exceptions
    • immature (children)
    • insane/mentally handicapped
  o economic justification?

- Mutual Mistake
  o what is a mutual mistake?
  o what is a unilateral mistake?
  o which is enforceable and which not?
  o economic justification?
    • is the mistake based upon redistributive or productive information?
      • definition of both
      • how do we tell the difference between the two?

- Fraud (misrepresentation and the duty to disclose)
  o what is destructive information?
  o definition of fraud
  o economic justification?
  o recent expansion in the doctrine of fraud. why?

- Unconscionability
  o substantive unconscionability
  o procedural unconscionability
- how might "unconscionable" contracts actually benefit consumers from an economic standpoint.
  - examples? (for each what is the definition? and the economic justification?)
    - Add on clauses
    - exclusion of consequential damages in warranties
    - termination at will clauses in franchises
- 4 proposed grounds for allowing unconscionability defense (for each know the economic justification)
  - distress (duty to rescue)
  - transactional incapacity
  - unfair persuasion
  - price ignorance

VI. Analysis of Performance Defenses

- Defendant:
  - admits that a valid contract was formed
  - claims circumstances have changed since formation which should excuse performance
  - => talking about contingencies that arise that should invalidate performance
- The court can:
  - grant defense and excuse performance
  - declare breach and design a remedy
- Economics of performance defenses
  - what is the correct allocation of risk?
    - is risk explicitly allocated in the contract?
    - is risk implicitly allocated in the contract?
    - if neither, how should the court decide?
- impossibility performance defense
  - 3 valid excuses for impossibility
- Economics - is the risk foreseeable at reasonable cost? If so => the contract should assign risk.
    - facts of the case
      - does the contract assign risk? how?
      - suppose the contract does not assign risk, then what?
- Commercial impracticibility defense
  - 3 conditions for excuse of performance
  - economic justification?
    - example = westinghouse case

VII. The economics of remedies for breach of contract

- types of remedies
  - liquidated damages
  - legal relief
    - expectation damages
    - reliance damages
    - restitution damages
  - equitable relief = specific performance
- efficient breach
  - definition of an efficient breach (example)
    - breach is efficient iff the costs of performance exceed the benefits of performance
- Contingencies which can lead to efficient breach
  - Windfall contingency
  - Accidental loss contingency

- Which remedy is most likely to result in breach only when it is efficient?
  - If transaction costs are zero?
  - If transaction costs are positive?
    - The best remedy is the one which minimizes transaction costs and court costs.
    - Tradeoff between the two
      - Legal relief (which cost is highest?)
      - Equitable relief (which cost is highest?)

- Liquidated damages
  - Will courts enforce?
  - Is it efficient to enforce?
  - What if the liquidated damage clause includes punitive damages?
  - Might enforcement cause inefficient performance?
  - Might enforcement induce breach?

- Legal relief = court appointed damages
  - Look at expectation and reliance damages
  - What are the differences between the two measures?
  - The efficiency of expectation damages
    - Game theory model
    - Result =?
  - Expectation damages and reliance
    - Expectation damages cause over-reliance => inefficient
    - Reliance damages cause inefficient breach => inefficient
    - What is the solution?

- Specific performance
  - Why is specific performance not much used?
  - The economics of specific performance
    - Are transaction costs low or high?
  - Relationship between court costs and transaction costs - which is highest? (Why does it matter?)
    - What are the advantages of awarding specific performance?
    - Criticisms and problems