



Chapter 6

Performance and Breach of Contract

I. Performance and Breach of Contract

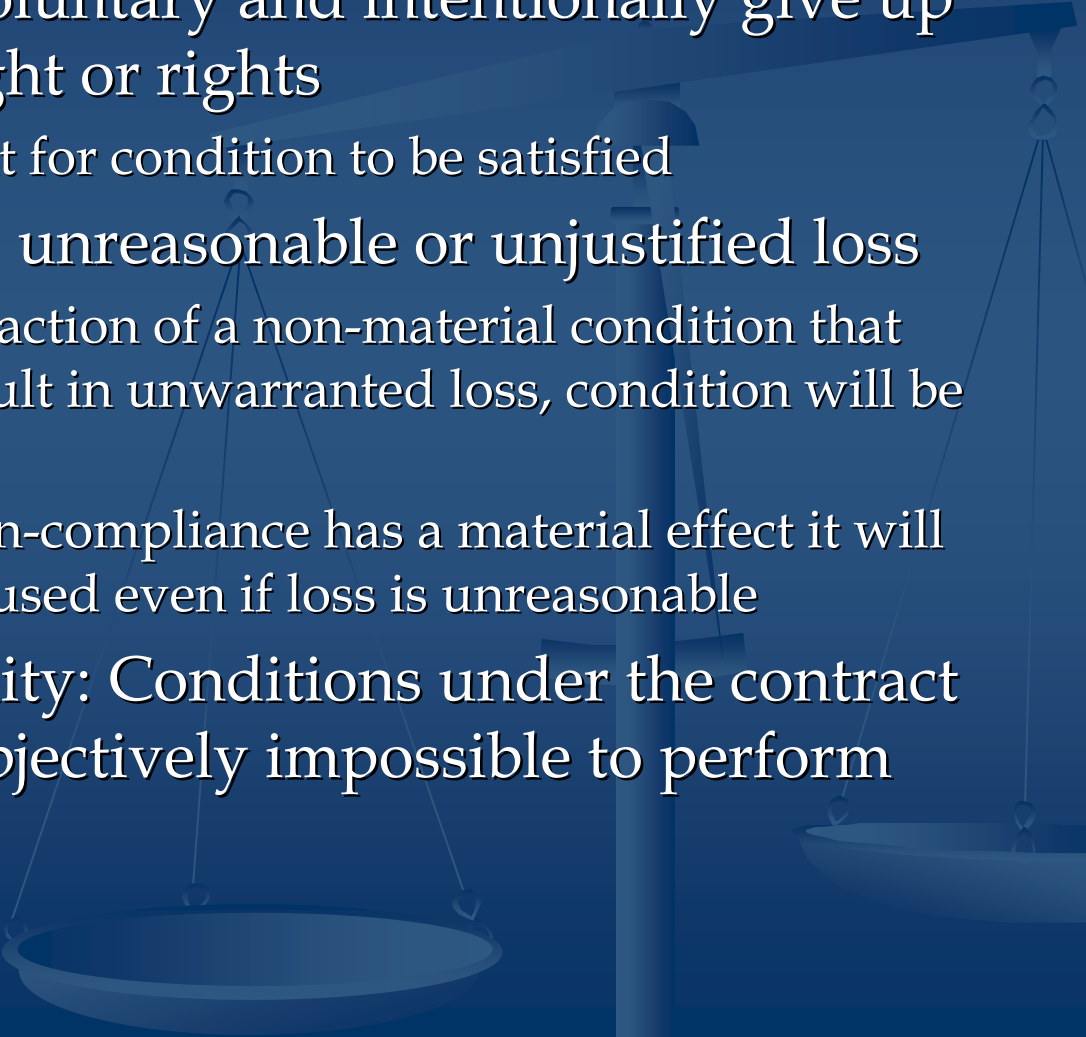
- * Focus is no longer on whether contract was made but to whether there was adequate performance
- A. Absolute v. Conditional Promises
 - 1. Absolute Promise: aka covenant
 - A. An actual obligation to perform
 - B. Must show an absolute duty to perform under the contract
 - C. Breach if:
 - No performance
 - Incomplete performance
 - Defective performance
 - *For breach to occur must have failure of performance when and where performance was due*

■ 2. Conditional promise

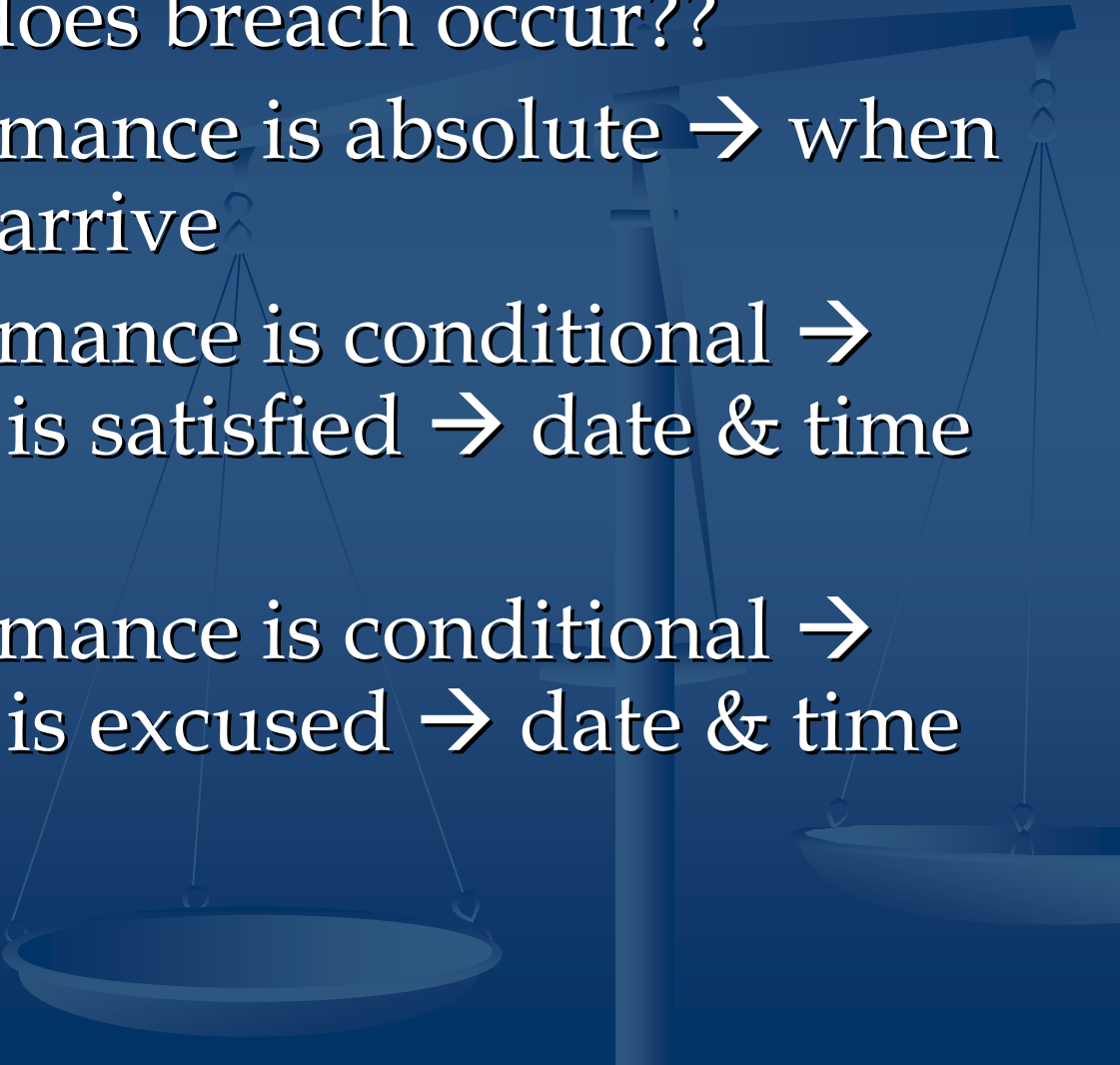
- A. time
 - i. precedent to duty to perform
 - (gives rise to duty to perform)
 - ii. Subsequent to duty to perform
 - (cuts off duty to perform)
 - iii. Concurrent
 - (simultaneously brings out the duty of both parties to perform)
- B. Condition placed in the contract
 - i. Express
 - (stated in the contract)
 - Not stated in the contract but placed there by law
 - ii. Implied in fact
 - (assumed to be part of the bargain)
 - iii. Implied in law
 - (public policy dictates)
 - GOOD FAITH AND FAIR DEALING
 - P 121 Assignment

■ B. Excuse of conditions

- 1. Removal of the requirement of satisfaction of a condition in a promise
 - Satisfaction of contract being unfairly manipulated
 - Condition will be excused
 - *Mercedes example p. 123
- 2. Prevention – party deliberately prevents a condition or the other party's performance from occurring
 - Must have wrongful behavior by party favored by condition

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- 3. Other excuses to perform even though condition not satisfied
 - A. Waiver: voluntary and intentionally give up known legal right or rights
 - Waiver of right for condition to be satisfied
 - B. Forfeiture: unreasonable or unjustified loss
 - Non-satisfaction of a non-material condition that would result in unwarranted loss, condition will be excused
 - BUT, if non-compliance has a material effect it will not be excused even if loss is unreasonable
 - C. Impossibility: Conditions under the contract have become objectively impossible to perform

II. Nature of Contract Breach

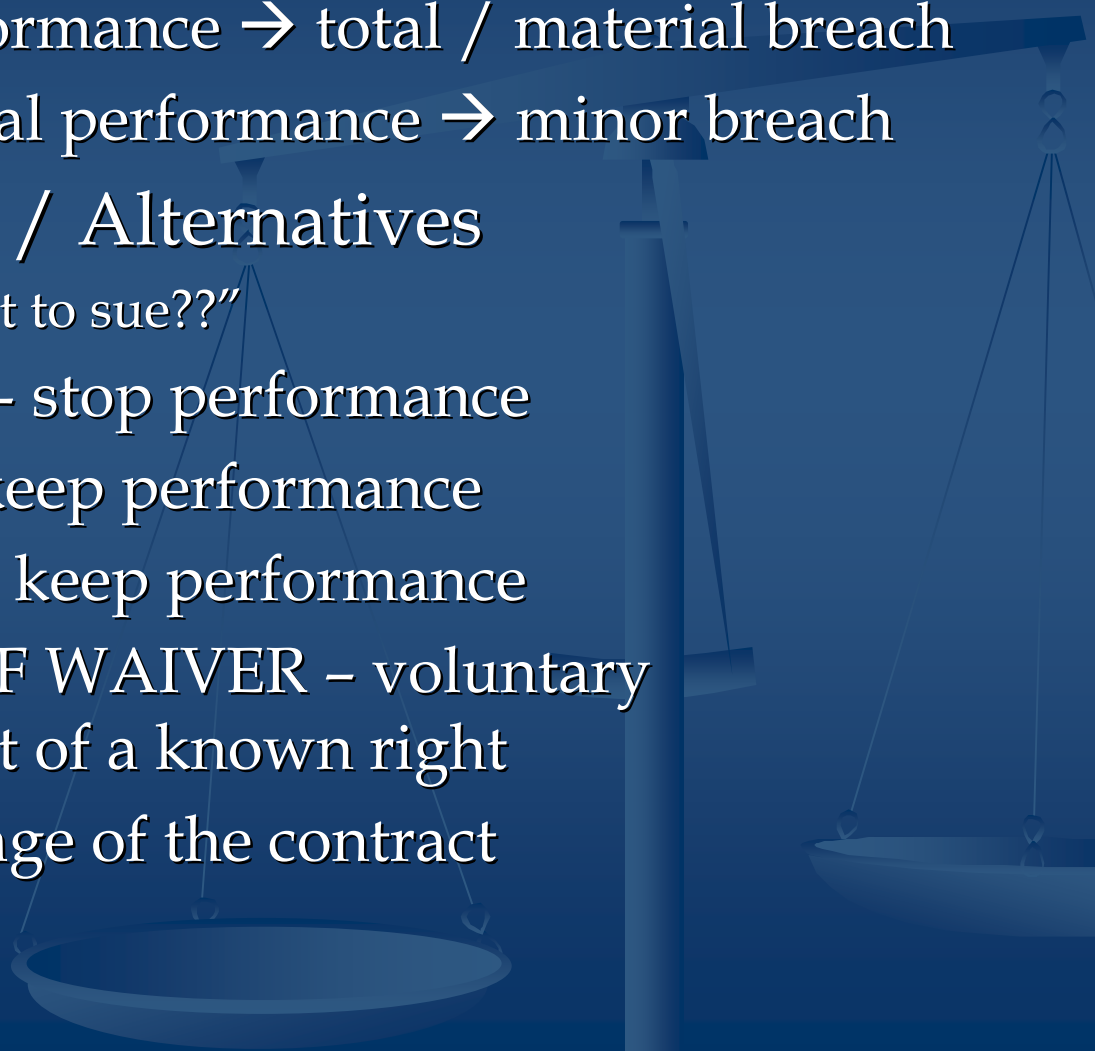
- Review: When does breach occur??
 - 1. When performance is absolute → when the date & time arrive
 - 2. When performance is conditional → when condition is satisfied → date & time arrive
 - 3. When performance is conditional → when condition is excused → date & time arrive
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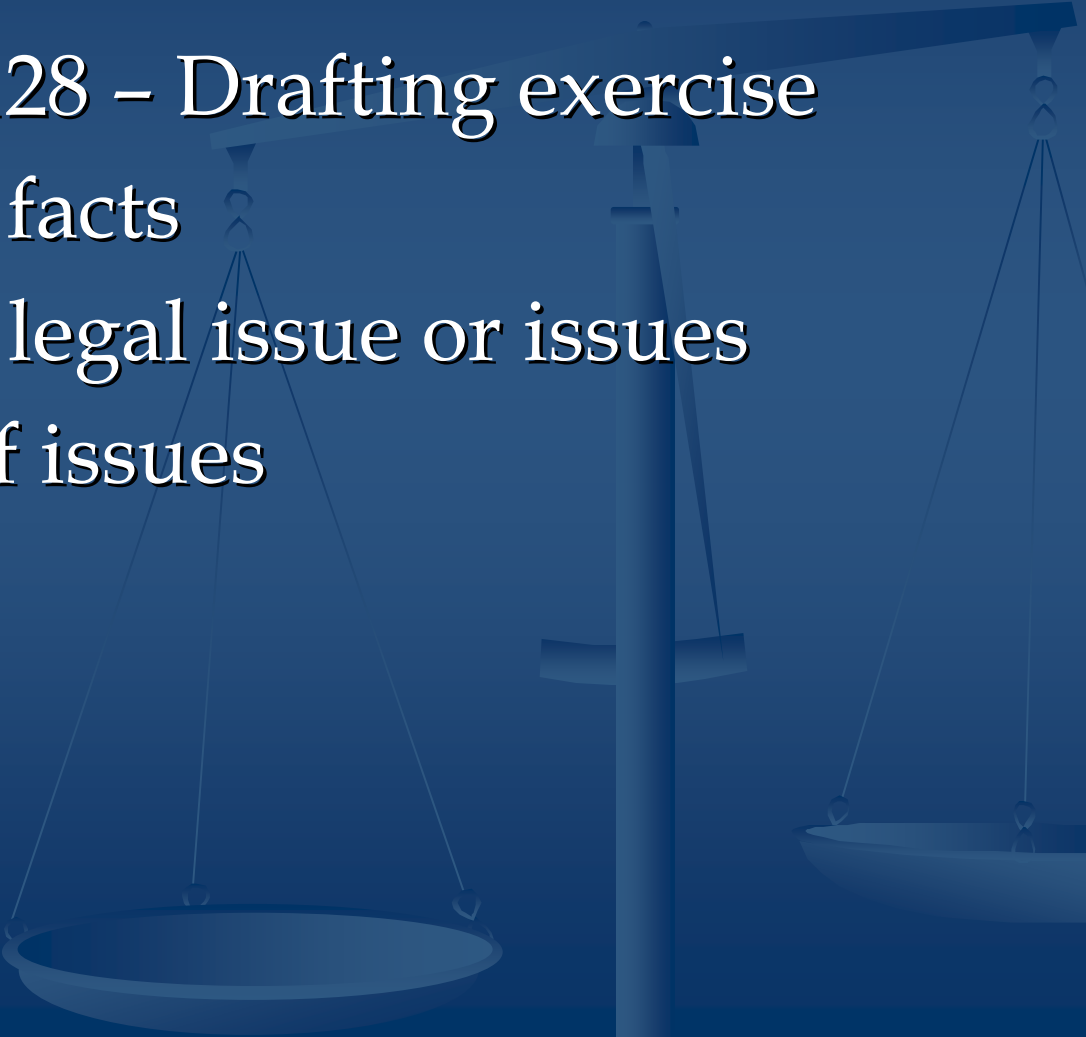
■ A. Seriousness of breach

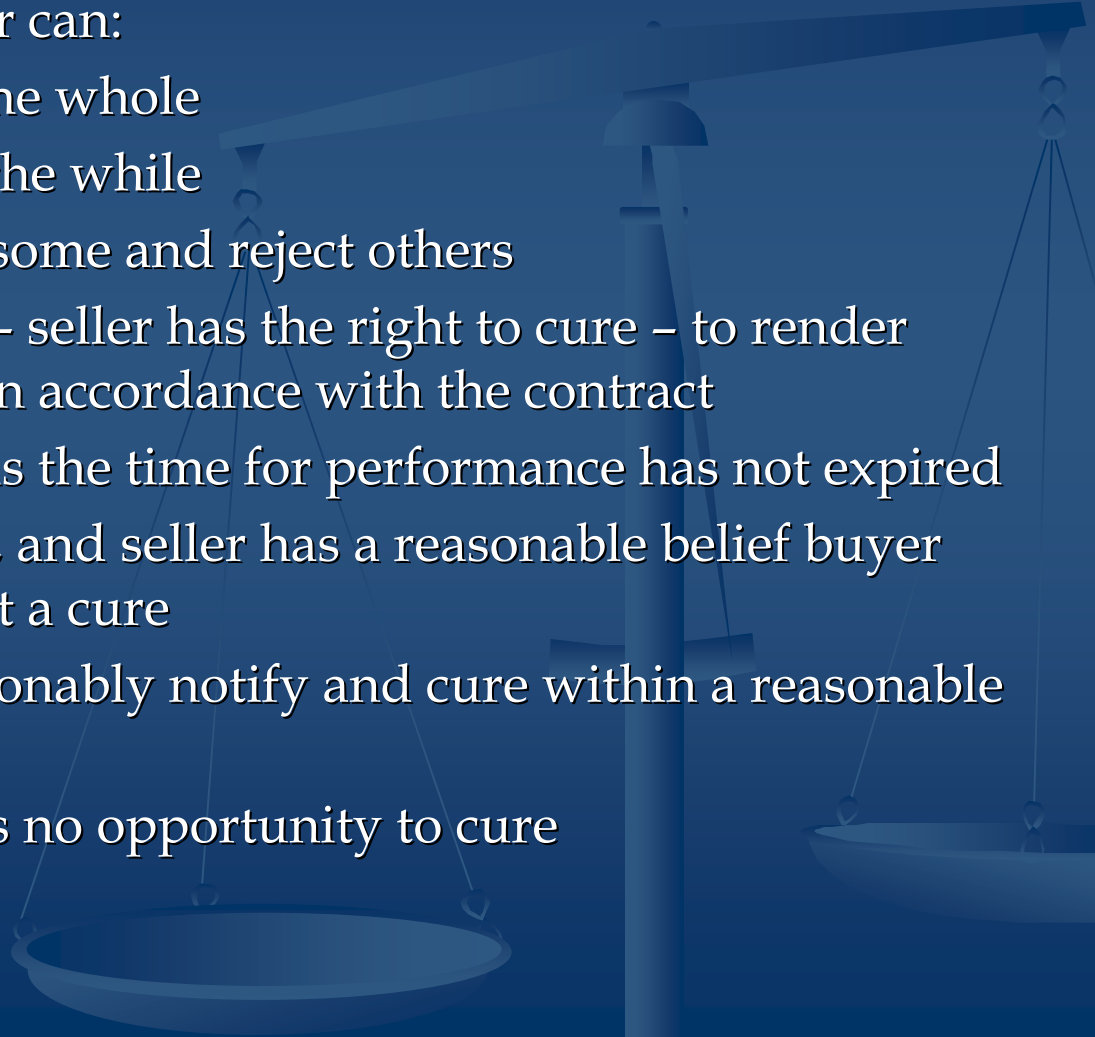
- 1. Material breach / Total breach
 - Little performance threatening a significant part of the contract
- 2. Minor breach / partial breach
 - Breach doesn't cause significant interference

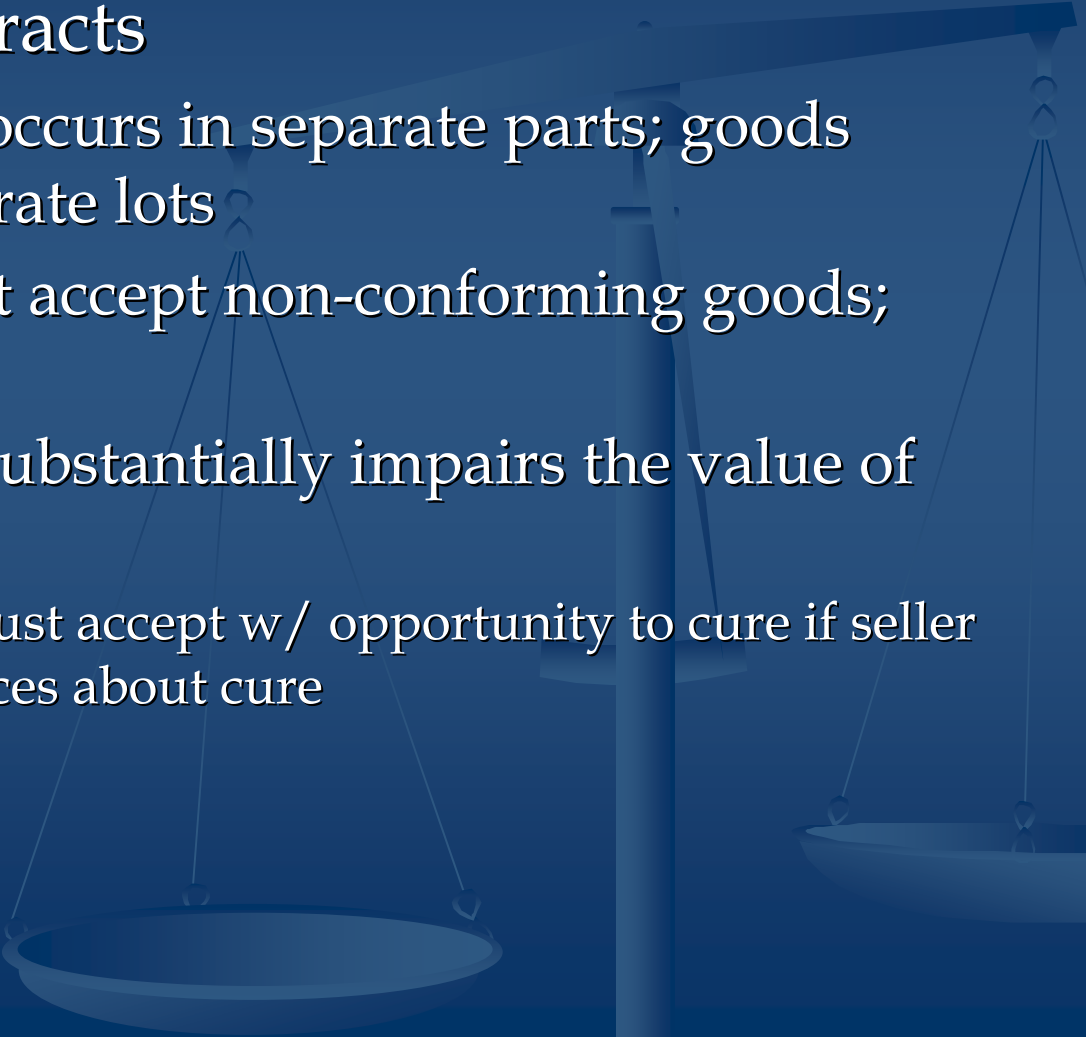
If breach, non-breaching party can file complaint
Can only get out of contract if total breach

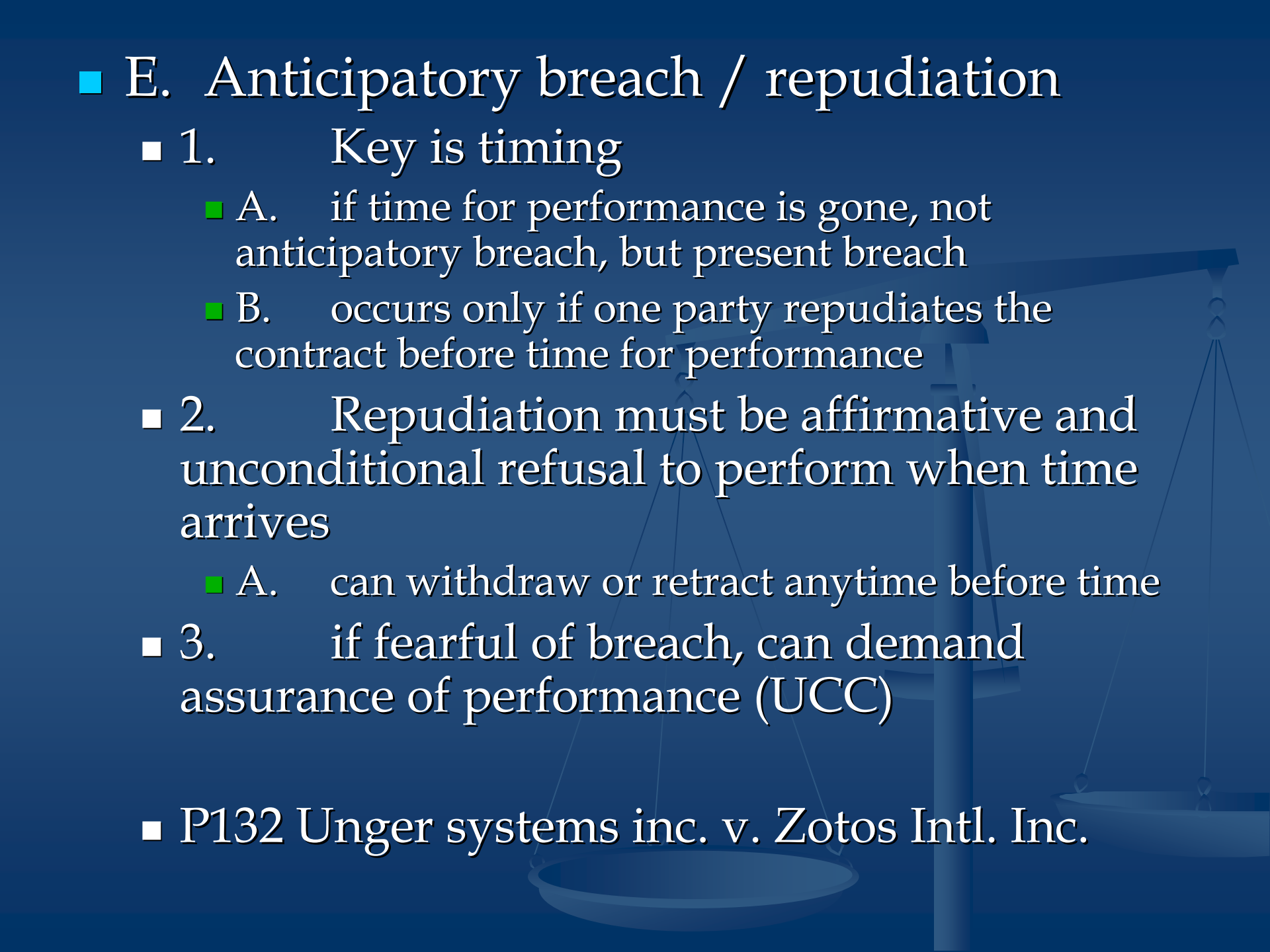
R.2d – Partial, material and total – cannot excuse performance unless total breach
- varying degrees of severity of breach

- B. Also, look at what was done right – how much of performance was completed
 - 1. non-performance → total / material breach
 - 2. Substantial performance → minor breach
 - C. Election / Alternatives
 - “To sue or not to sue??”
 - 1. Material – stop performance
 - 2. Minor – keep performance
 - 3. Not sue – keep performance
 - * CAREFUL OF WAIVER – voluntary relinquishment of a known right
 - Look at language of the contract
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- Assignment p. 128 – Drafting exercise
 - 1. Statement of facts
 - 2. Statement of legal issue or issues
 - 3. Discussion of issues
 - 4. Conclusion

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- D. UCC – Perfect tender rule 2-601
 - 1. UCC rejects substantial performance
 - 2. performance and readiness to perform must be perfect
 - 3. 2-601: buyer can:
 - A. reject the whole
 - B. accept the whole
 - C. accept some and reject others
 - 4. Seller Cure – seller has the right to cure – to render performance in accordance with the contract
 - - so long as the time for performance has not expired
 - If expired, and seller has a reasonable belief buyer will accept a cure
 - Must seasonably notify and cure within a reasonable time.
 - Buyer gets no opportunity to cure

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- 4. Perfect tender rule does not apply to installment contracts
 - -- performance occurs in separate parts; goods shipped in separate lots
 - A. buyer must accept non-conforming goods; unless
 - B. shipment substantially impairs the value of the contract;
 - If not, buyer must accept w/ opportunity to cure if seller makes assurances about cure

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- E. Anticipatory breach / repudiation
 - 1. Key is timing
 - A. if time for performance is gone, not anticipatory breach, but present breach
 - B. occurs only if one party repudiates the contract before time for performance
 - 2. Repudiation must be affirmative and unconditional refusal to perform when time arrives
 - A. can withdraw or retract anytime before time
 - 3. if fearful of breach, can demand assurance of performance (UCC)
 - P132 Unger systems inc. v. Zotos Intl. Inc.