The George Washington
University Law School

May 29, 2022

Grading Guides for Past Final Examinations In

CONTRACTS

(Course No. 6202)

Professorial Lecturer Gregory E. Maggs

This document contains the grading guides for the Contracts examinations that I gave on these dates:

April 26, 2022
December 13, 2021
December 10, 2020

Please see also the grading guides for my past examinations in Contracts I and Contracts II.

The George Washington
University Law School

April 26, 2022

Grading Guide for the Final Examination in

CONTRACTS

(Course No. 6202-13)

Professional Lecturer Gregory E. Maggs

This document contains the grading guide that I used in scoring your examinations. Each problem asked you to "[w]rite an essay in which you identify and discuss any claims and defenses that the parties might assert and any remedies they might seek." Accordingly, in grading your answers, I awarded points for each problem based on how well you wrote essays identifying and discussing the claims and defenses that the parties might assert and the remedies that they might seek. Each of the five problems was worth 30 points, for a total of 150 points. After grading everyone's answers, I translated the total scores into letter grades in accordance with the Law School's mandatory grading guidelines for first-year classes.

What follows is a list of the claims, defenses, and remedies that you might have identified and discussed in answering each problem. Please note that these lists are not "model answers" because they are not written in essay form using proper paragraphs as the instructions require and because they contain explanations, headings, and other additional details that model answers would not.

Everyone sees things a little differently. Accordingly, nearly all answers earned partial credit even if they were not completely correct or they varied from this guide. The most common ways to lose points were (1) to overlook claims and defenses that the parties might assert or remedies that they might seek; (2) to indicate an incorrect understanding of the applicable legal rules; (3) to discuss insufficiently the application of the law to the facts; and (4) to run out of time at the end of the examination. Many of the problems contained facts that were very similar to the facts of cases that we had read but that actually had important differences; answers often overlooked these differences and therefore did not receive full points.

The instructions required answers to be written in essay form using complete sentences and proper paragraphs. Unfortunately, as in past years, some answers did not comply with this simple but important requirement. Some contained outlines, bullet points, or numerous sentence fragments without capital letters or punctuation. These answers could not receive full credit, even if they correctly addressed issues. To be sure, writing essays well is difficult under the time pressure of an examination. But as lawyers, all of your written work must be as polished as you can make it. Well written documents will impress your professors, employers, judges, and clients.

In addition, whenever you take examinations, write papers, or prepare legal documents, make sure that you follow very carefully any applicable format instructions and length limitations. A few answers did not comply with the specific instruction of leaving a blank line between paragraphs and indenting the first line of each paragraph (which is the standard way of preparing any single-spaced document). Other answers lost points because they exceeded the 4500-word limit. Making them concise and easy to read was necessary for prompt and accurate grading.

PROBLEM I.

[Points per item: 1. 4; 2. 2; 3. 2; 4. 2; 5. 2; 6. 1; 7. 3; 8. 1; 9. 2; 10. 1;

11. 2; 12. 2; 13. 1; 14. 1; 15. 2; 16. 2; 17. n/a.]

BONNIE v. COLIN INSURANCE

Claim:

1. Breach of contract. Bonnie might sue Colin Insurance for the breach of two contracts, claiming (1) that Colin Insurance promised Alex in the health insurance policy that it would pay for his health services, that she is the assignee of that promise to Alex, and that Colin Insurance broke that promise when it did not pay for the surgery; and (2) that Colin Insurance separately promised her that it would pay her for the surgery and that Colin Insurance broke that separate promise when it did not pay her.

Defenses:

2. Lack of Privity. By asserting that it does not have to pay Bonnie because she is not a customer, Colin Insurance appears to be arguing that Bonnie lacks privity. Bonnie will respond that she has privity and can enforce both of the contracts that she alleges were breached because (1) Alex assigned to her his rights under the insurance policy and (2) in any event Colin Insurance made a separate promise directly to her. Colin insurance may challenge the validity of the purported assignment. Colin Insurance will argue that the phrase "[a]ny money paid to Alex by Colin Insurance . . . will become the property of Bonnie" sounds more like a promise by Alex to reimburse Bonnie when he receives payment than an assignment to Bonnie of the right to receive payment directly from Colin Insurance. Rest. 317; Shiro v. Drew; Irace v. Herzog.

3. Lack of consideration. By asserting it does not have to pay Bonnie because she has not "paid us anything," Colin Insurance appears to be arguing that its promise to pay Bonnie lacks consideration. Rest. § 71. But Bonnie may respond that her promise is enforceable on the basis of reliance because the promise foreseeably induced her to perform the surgery. Rest. § 90; Feinberg v. Pfeiffer.

4. Non-Occurrence of an express condition. Colin Insurance also may argue that its coverage was excused by the non-occurrence of an express condition, namely, that Colin Insurance find the services to be "medically appropriate." Rest. § 224. Although Bonnie might respond that she and other surgeons thought the operation was the "best option," Colin will respond that the insurance policy gave it "the sole discretion" to make that determination and that it did not act in bad faith because the operation was unsuccessful. Gibson v. Cranage

5. Half-truth. Colin Insurance will also argue that its promise directly to Bonnie is not enforceable because it was induced by a half-truth. Colin Insurance will argue that although Bonnie accurately described the operation to Colin Insurance, she did not mention that the operation might be unsuccessful. Kannavos v. Annino.

Remedy:

6. Expectation damages. Bonnie will seek expectation damages equal to her loss in value ($8500) plus other loss (none indicated) minus her costs and other losses avoided (apparently none because she performed the operation). Rest. § 347.

BONNIE v. ALEX

Claim:

7. Breach of contract. If Bonnie cannot recover from Colin Insurance, Bonnie might sue Alex for breach of contract, claiming that Alex promised to pay her for the surgery and has refused to pay.

Defenses:

8. Infancy. If Alex only has a learner's permit for his motorcycle, he might be an infant because many holders of learner's permits are younger than 18 years old. If he is an infant, he can assert his infancy as a defense. Rest. § 14; Douglass v. Pflueger Honda.

9. Overreaching. Alex might argue that the contract is voidable on the basis of overreaching because Bonnie took unfair advantage over him when she negotiated the contract with him while he was still in agony and taking pain medication. Rest. § 177; Howe v. Palmer; Odorizzi v. Bloomfield School Dist.

10. Indefiniteness. Alex might argue that the contract is too indefinite to enforce because the parties did not agree on a price. Rest. § 33; Varney v. Ditmars.

11. No breach of promise to pay. Alex might defend on ground that he already paid Bonnie in full by assigning her his rights against Colin Insurance. Rest. § 317. Although Bonnie might argue that the assignment is worthless because Colin Insurance won't pay her, Alex may respond that the assignment is still consideration because he had a good faith and reasonable belief in the validity of his claim against Colin Insurance. Rest. § 74(1); Dyer v. Nat'l Byproducts.

12. Frustration of purpose. Alex may argue that he does not have to keep his promise because his purpose was substantially frustrated when the operation did not help him. Rest. § 265; Krell v. Henry.

13. Mutual mistake. Alex might argue that he does not have to keep his promise because it was induced by a mutual mistake. He will assert that both he and Bonnie thought that Alex's health insurance policy covered the surgery and it did not. Rest. § 152; Sherwood v. Walker.

Remedy:

14. Expectation damages. Bonnie will seek expectation damages equal to her loss in value ($8500) plus her other loss (none indicated in the facts) minus her costs avoided (none because she performed the surgery) minus her other loss avoided (none indicated in the facts). Rest. § 347.

BONNIE v. ALEX

Claim & Remedy:

15. Restitution. If Bonnie cannot recover from either Colin Insurance or Alex for breach of contract, she might sue Alex in restitution, claiming that he was unjustly enriched by the operation if he does not have to pay for it. Rest. of Restitution § 1. Alex might respond that he was not enriched because the operation was unsuccessful, but Bonnie will reply that he was enriched by the possibility of its success. Cotnam v. Wisdom.

ALEX v. COLIN INSURANCE

Claim, Defenses, and Remedy:

16. Breach of contract. By telling Bonnie that Colin Insurance's refusal to

pay is "your problem now," Alex appears to be saying that he does not intend to sue Colin Insurance. But if Alex has to pay Bonnie, he might change his mind and sue Colin Insurance for breach of contract, claiming that Colin Insurance promised to pay for his medical expenses and broke hat promise by not paying for his surgery. Colin will assert as defenses both lack of privity (see above) and the non-occurrence of an express condition (see above). If Alex did sue Colin insurance, he would seek the same expectation damages that Bonnie would seek (see above).

OTHER

17. Other

Note:

Alex is unlikely to sue Bonnie because the facts say he was "fully informed of the risks" and Alex admits that Bonnie "did what [she] promised."

PROBLEM II.

[Points per item: 1. 3; 2. 4; 3. 3; 4. 1; 5. 3; 6. 2; 7. 2; 8. 3; 9. 3; 10. 3; 11. 3; 12. n/a.]

EARL v. DANIELLE

Claim:

1. Breach of contract. Earl might sue Danielle for breach of contract, claiming that Danielle first promised to pay him $750,000 and then promised to pay him an additional $15,000 (for a total of $765,000), and that she broke these promises when she paid him only $100,000.

Defenses:

2. No assent. Danielle has asserted that she "never assented to pay more" than $650,000. Earl may respond that Danielle assented to the terms of the final plans, even if she did not read them, because she signed them and had "reason to believe that like writings are regularly used to embody terms of agreements of the same type." Rest. § 211(1); Klar v. H & M Parcel. In addition, Earl may respond that if Danielle did not intend to be bound, she needed to manifest this intention so that either Earl knew it or a reasonable person would have known that she was not assenting to be bound. Lucy v. Zehmer.

   Note: Under the parol evidence rule, if Danielle assented to the final plans, they would discharge any prior agreement to pay only $650,000. Rest. § 213(1); Mitchill v. Lath.

3. Pre-existing duty rule. Danielle will argue that there is no consideration for her promise to pay the additional $15,000 because Earl had a pre-existing duty to build the entire house. Rest. § 73; Alaska Packers v. Domenico. If the contract is governed by the laws of a jurisdiction that follows Rest. § 89 and Watkins & Sons v. Carrig, Earl may respond that the $15,000 price increase was a fair and reasonable modification made to meet a change in circumstances and therefore it does not require consideration.

4. Statute of frauds. By being "careful not put [her] promise [to pay the additional $15000] in writing," Danielle appears to think that a lack of writing will make the promise unenforceable. But Earl will respond that the statute of frauds does not cover such a promise.

Note: The statute of frauds in UCC § 2-201 covers contracts to buy goods (like construction materials) but the contract between Earl and Daniel is not a contract for the sale of goods.

5. Constructive condition. Danielle might argue that her payment was constructively conditioned on Earl's performance without a material breach and that Earl materially breach the contract by building a detached garage and failing to install some overhead lights and twenty similar minor items. Rest. § 237. Early may respond that even though he breached the contract, the breach was not material. Plante v. Jacobs.

Remedy:

6. Expectation damages. Earl will seek expectation damages equal to his loss in value ($765,000-$100,000) plus other loss (none) minus his costs avoided (the costs expected for the work he did not do) minus other loss avoided (none).

7. Allowance for damages. Danielle ask to have subtracted from any amount she must pay an allowance for her damages equal to the cost of completion (i.e., $125,000 for moving the garage and completing the other work). Earl might argue that this amount is grossly disproportionate to the probable loss in value to Danielle. Rest. § 348(2). Jacob & Youngs v. Kent. But Danielle will respond that it is not grossly disproportionate because Fiona's work was not a waste but instead "greatly increased the market value of the house" and thus presumably also increased the value to Danielle.

EARL v. DANIELLE

Claim & Remedy:

8. Restitution. If Earl cannot enforce the promise, he will seek restitution, claiming that Danielle would be unjustly enriched by the work he did if she does not pay him. Rest. of Restitution § 1; Cotnam v. Wisdom. The amount of restitution he will claim will be the contract price minus the cost of that substitute performance and any other loss. Britton v. Turner.

DANIELLE v. EARL

Claim & Remedy:

9. Reformation. Danielle might seek reformation of the final plans on grounds that her assent to them was induced by Earl's fraudulent misrepresentation as to their contents. Rest. § 266; cf. Bollinger v. Central Penn. Quarry. Earl told her he would revise the plans to reduce the cost to $650,000 but then did not do it.

FIONA v. DANIELLE

Claim:

10. Breach of contract. Fiona might sue Danielle for breach of contract, claiming that Danielle promised to pay her $125,000 to correct the problems with Earl's performance and then did not pay her.

Note: Danielle does not appear to have any defenses.

Remedy:

11. Expectation damages. Fiona will seek expectation damages equal to her loss in value ($125,000) plus other loss (none) minus her costs avoided (which she will claim are none) minus other loss avoided. But Danielle will argue that some of the costs could have been avoided if she had stopped working. Luten Bridge v. Rockingham County.

OTHER

12. Other

Note: Fiona probably cannot recover in restitution for any improvements she made in excess of what Danielle has to pay her because if she continued to work after Danielle told her to stop, she was like an officious intermeddler and therefore there is no injustice in not paying her for any costs she could have avoided.

PROBLEM III.

[Points per item: 1. 3; 2. 2; 3. 2; 4. 1; 5. 2; 6. 2; 7. 2; 8. 2; 9. 2; 10. 2; 11. 3; 12. 2; 13. 2; 14. 3; 15. n/a.]

HERMINE v. GASTON

Claim:

1. Breach of contract. Hermine might sue Gaston for breach of contract, claiming that Gaston (1) promised to sell her the property for $250,000 and broke this promise by refusing to sell it, and then (2) promised to sell the property for $350,000 and broke this second promise by again refusing to sell it.

Defense:

2. Lapse of the offer. Gaston might argued that the initial offer lapsed at the end of the period of the lease because that was a reasonable time for Hermine to make a decision. Rest. 41 (offer lapses at a reasonable time if no time is stated). Although Hermine has pointed to the clause saying that the option is "irrevocable," Gaston will explain that revocation and lapse are two separate ways for an offeree's power of acceptance to end. Compare Rest. § 36(1)(b) with 36(1)(c). He is not arguing that he revoked the offer.

3. Parol evidence rule. Gaston will argue that under the parol evidence rule, if the second lease is a complete integration, then it discharged the option to purchase the property that was in the first lease because that option would be within the scope of the second lease. Rest. 213(2); Mitchell v. Lath.

   Note: The facts do not provide enough information to determine whether Hermine has a response. The facts indicate that the second lease does not contain a merger clause but a contract can be a complete integration even without a merger clause. If the second lease is not a complete integration, then it would not discharge the option provided that the option is not inconsistent with anything in the second lease.

4. No acceptance by Hermine ($250,000). Gaston further may argue that, even if the option did not lapse and was not discharged, Hermine's statement that "she would like to exercise the option to purchase the property" was not an effective acceptance of his offer to sell the property. Gaston will argue that an acceptance of an offer must be made in a reasonable manner (if no specific manner is stated in the offer), Rest. § 30(2), and that merely telling him that she wanted to exercise

the option--without signing a written promise despite being made a written offer--was not reasonable. More facts are necessary to evaluate this defense.

5. No offer by Gaston ($350,000). Gaston will argue that he did not offer to sell the property for $350,000 but merely said that he was hoping to sell it for $350,000. He will assert that the facts are very similar to those of Owen v. Tunison. Rest. § 26.

6. Statute of frauds. Gaston will argue that he does not have to keep his promise to sell the property for $350,000 because that promise was merely spoken and is not evidenced by a signed writing as required by the statute of frauds for land contracts. Rest. § 125.

Remedies:

7. Specific performance or expectation damages. By saying that she "will get a court order for the transfer of the property," Hermine has indicated that she wants specific performance (which is generally available as a remedy for breach of a contract to sell land). Alternatively, Hermine might seek expectation damages equal to her loss in value (a building worth $350,000) plus other loss (perhaps any additional cost of renting alternative space) minus her costs avoided (either $250,000 or $350,000, depending on which offer Hermine can prove was accepted) minus other loss avoided.

IONA v. HERMINE

Claim:

8. Breach of contract. Iona might sue Hermine for breach of contract, claiming that Hermine promised to employ her at an annual salary of $100,000, and broke that promise when she temporarily suspended her.

Defense:

9. Employee at will. Hermine may argue that she did not breach the contract because if Iona was employed for an "indefinite time" then she should be considered an employee at will and as such her employment can be terminated at any time.

Remedy:

10. Expectation damages. Iona will seek expectation damages equal to her loss in value (her $100,0000 annual salary for the required period of her employment -- which Hermine says is none) plus other loss (none indicated) minus costs avoided (the labor she saved, valued at $60,000 if that is all she can earn elsewhere) minus other loss avoided.

HERMINE v. IONA

Claim:

11. Breach of contract. Hermine might sue Iona for breach of contract, claiming that she promised not to compete for two years if she "for any reason left Hermine's employment," and broke that promise by immediately going to work for a competitor.

Defenses:

12. No basis for enforcement. Iona might assert that her promise not to compete lacks consideration because she did not receive anything in

exchange for it. Rest. § 71. But Hermine might respond (1) some courts still would find her continued employment to be consideration (even though it was not really bargained for), see, e.g., Lakewood Employment v. Columber; and (2) in any event the promise is enforceable on the basis of reliance because her promise not to compete induced Iona to continue to employ her, Rest. § 59.

13. Non-Occurrence of a constructive condition. Iona will argue that she does not have to keep her promise because her performance was constructively conditioned on Hermine's performance without a material breach and Hermine breached the contract by firing her. Hermine has two responses. First, Hermine will assert that she did not breach the contract because Iona was an employee at will (see above). Second, Hermine will argue that Iona's promise not to compete was not dependent on Hermine's performance. Hermine will explain that even if she breached the contract, allowing Iona to compete -- in addition to receiving whatever damages she might recover -- is too great a remedy. See Kingston v. Preston (whether promises are dependent or independent turns on the evident sense and meaning of the contract); Rest. § 232 illus. 3 (included in Syl. App. 3).

Remedies:

14. Specific performance. Hermine might seek specific performance on grounds that damages would not be an adequate remedy because she cannot measure the harm of her competitor's having her confidential business information.

OTHER

15. Other

PROBLEM IV.

[Points per item: 1. 4; 2. 3; 3. 3; 4. 2; 5. 4; 6. 3; 7. 4; 8. 3; 9. 2; 10. 2; 11. n/a.]

KARL COLLEGE v. JULIA'S COMPANY (JULIA)

Claim:

1. Breach of contract. Karl College might sue Julia for breach of contract, claiming that Julia promised to provide janitorial services for a year and broke that promise when Julia ceased her work.

Defenses:

2. Non-disclosure/confidential relations. Julia has argued that Karl College "should have told" her about the change in the student enrollment. In support of this argument, she might assert (1) a non-disclosure is equivalent to an assertion when the parties have a relationship of trust and confidence, Rest. § 161(d); (2) in this case the parties had such a relationship based on their 20 years of doing business together; (3) by not disclosing the change in enrollment, Karl College effectively was asserting that the enrollment was not changing; and (4) such an assertion was a material misrepresentation because the additional students made her work more onerous. Karl College might respond that the parties had an ordinary arms-length business relationship, not a confidential relationship, and that it merely engaged in a non-disclosure, which has no effect on a contract. Swinton v. Whitinsville Savings Bank.

3. Unilateral mistake. If the law of the jurisdiction recognizes unilateral mistake as a defense, Julia also might argue that her promise is not enforceable because it was induced by such a mistake. Rest. § 153. Specifically, Julia will assert that she assumed that the number of students would be the same as in previous years, that the number of students is a basic assumption when making a janitorial contract, and the mistake about the number was material because the increase made her work much more onerous.

Remedy:

4. Expectation damages. Karl will seek expectation damages equal to its loss in value (which it will seek to measure by the cost of hiring the other janitorial service company) plus other loss (none indicated) minus costs avoided (whatever it did not have to pay Julia) and other loss avoided (none indicated). Rest. § 347. But Julia will argue that the loss in value should not include the increased price attributable to the higher cost of more ecological cleaning supplies.

LISA and other instructors v. KARL COLLEGE

Claim:

5. Breach of contract. Lisa and the other instructors who were fired might sue Karl College for breach of contract, claiming that Karl College (1) promised to pay them their full salaries for the fall semester and broke that promise by withholding their final fall paychecks; and (2) promised to employ and pay them in the spring semester and broke that promise by firing them.

Defenses:

6. Non-disclosure. If Karl College argues that its contract with Lisa was voidable because she did not disclose her arrest and jailing, Lisa will respond that (1) a bare non-disclosure does not make a contract voidable absent a confidential relationship; (2) the facts of her arrest and jailing in any event were not material because she was acquitted; and (3) Karl College was so desperate to hire additional instructors to handle the increased enrollment that it would have hired her anyway.

7. Implied promise/non-occurrence of constructive condition. Karl College may argue that (1) Lisa and the other instructors made an implied-in-fact promise to make up any class sessions they missed, Wood v. Lucy; (2) that the College's duty to pay Lisa and the other instructors was constructively conditioned on their performance of this implied promise without a material breach, Rest. § 237; and (3) that they materially breached this implied promise by missing so many class sessions without making them up. Lisa and the other instructors may dispute whether such a promise was really implied-in-fact; sometimes teachers are expected to make up classes missed because of illness and sometimes schools are expected to provide substitute teachers.

   Note: Karl College is not likely to argue that Lisa and the other instructors were expected to teach class when they had COVID symptoms but that is a separate question from whether they were expected to make up missed classes.

Remedy:

8. Expectation damages. Lisa and the other instructors will seek expectation damages equal to their loss in value (their last paycheck for the fall and their salary for the spring) plus other loss (none

indicated) minus their costs avoided and other loss avoided. In calculating their loss avoided (i.e., cost expected – costs incurred), they will assert that they are entitled to include constructive service for "costs incurred" to the extent that they are not able to find comparable substitute employment. Parker v. 20th Century Fox.

STUDENTS v. KARL COLLEGE

Claim:

9. Breach of contract. Students in the courses taught by Lisa and the other instructors (who have been following developments with considerable interest) might sue Karl College, claiming that Karl promised to provide them with complete instruction, and breached this promise because their instructors missed numerous classes without making them up.

Remedy:

10. Expectation damages. The students will seek expectation damages equal to their loss in value (the value of their missed classes) minus their costs avoided (none, provided that they paid full tuition).

OTHER

11. Other

PROBLEM V.

[Points per item: 1. 4; 2. 3; 3. 3; 4. 4; 5. 3; 6. 4; 7. 3; 8. 3; 9. 3; 10. n/a.]

NICOLE v. OWEN

Claim:

1. Breach of contract. Nicole might sue Owen for breach of contract, claiming in the alternative (1) that Owen promised to buy a specific quantity of coal from her and then repudiated that promise by reducing the quantity that he would buy, and (2) that Owen promised to pay her $100,000 to settle her claim against him and broke that promise when he did not pay her the $100,000.

   Note: The problem does not provide details about the quantity of coal that Owen promised to buy or was willing to buy.

Defenses:

2. Frustration of purpose. Owen might argue that he does not have to keep his promise to buy the agreed upon quantity of coal (whatever it is) from Nicole because his purpose was frustrated by the new environmental regulations that reduced the quantity of coal that he could use. Krell v. Henry; Rest. 265.

3. Non-occurrence of an express condition. Owen also might argue he does not have to keep his promise to buy the agreed upon quantity of coal from Nicole because his promise was subject to an express condition that the contract would be renegotiated if the market price "drops by more than 10%" and the price fell by 10.02%. He will assert that even though the price 0.02% is a small amount, express conditions must be strictly enforced. Luttinger v. Rosen. In response, Nicole might

investigate whether a custom or usage of trade requires 10.2% to be rounded to 10%. See Hurst v. Lake.

4. No consideration (settlement). Owen may argue that he does not have to keep his promise to pay $100,000 because there was no consideration for this promise. He will argue that Nicole's forbearance to assert her breach of contract claim was invalid, and therefore does not count as consideration, given his defenses to enforcement of the original promise (i.e., frustration of purpose and non-occurrence of an express condition). But Nicole will respond that Owen's promise had consideration because she had a good faith and reasonable belief in the possible validity of her claim at the time that she and Owen made the settlement. Rest. § 74; Dyer v. National By-Products.

Remedy:

5. Expectation damages. Nicole will seek expectation damages. If the sales contract is enforced, she will assert that her damages equal the loss in value (the contract price for the coal that was not purchased) minus her costs avoided (the market price of the coal that was not purchased). Compare UCC § 2-708(1) with Rest. § 347 (providing essentially the same measurement for contracts for the sale of goods and non-goods). If the settlement is enforced, she will seek expectation damages equal to her loss in value ($100,000) minus her costs avoided (none because she gave up her claim).

MARTIN v. NICOLE

Claim:

6. Breach of contract. Martin might sue Nicole for breach of contract, claiming that she promised to pay him $2 million per year for 10 years and broke that promise when she stopped shipping coal with him and (presumably) stopped paying him.

Defense:

7. Statute of frauds. Nicole might raise the one-year provision of the statute of frauds as a defense. She would assert that her promise must be evidenced by a signed writing because Martin could not possibly keep his promise to haul her coal for ten years in one year. See Rest. § 125(1) (providing that where any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the statute of frauds); C.R. Klewin v. Flagship Properties. She would assert further that the writing that she signed is insufficient to satisfy the statute of frauds because at the time she signed the writing it did not include an essential term, namely, the maximum quantity of coal that she could require Martin to haul. Rest. § 131(c) (requiring the writing to include essential terms).

8. Frustration of purpose. Nicole might argue that the reduction in coal sold to Owen frustrated the purpose of the hauling contract. Krell v. Henry. Rest. § 265. But Martin will respond that the contract specifically says that Nicole has to pay $2 million no matter how much she ships. Accordingly, the parties did not make the contract on the basic assumption that the quantity of coal would remain unchanged.

Remedy:

9. Expectation damages. Martin will seek expectation damages equal to his loss in value ($2 million per year for the years remaining) plus other

loss (not indicated) minus cost avoided (the expected cost of shipping Nicole's coal) minus other loss avoided (whatever profit he makes on the new contract that he could not have made if Nicole had not breached).

OTHER

10. Other

The George Washington
University Law School

December 13, 2021

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PROBLEM I.

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ANA v. BILL

Claim:

1. Breach of contract. Ana might sue Bill for breach of contract, claiming (1) that Bill promised to pay her $5000 for using the property for one month and broke that promise when he did not pay her anything; and (2) that Bill promised to sign the lease if he "like[d] the property and the lease terms" and broke that promise when he did not sign the lease even though he "decided that he liked the property and lease terms." [Note: Some answers suggested that Ana also might sue Bill for breach of contract, claiming that he promised not to "mak[e] alterations, additions, or improvements to the storage tanks," and broke that promise by moving one of the storage tanks. Whether Bill really made this promise and whether he actually broke it are discussed below. But in any event, Ana is unlikely to sue Bill for moving the tank because she could not recover any damages given that she "admits the storage tank now is in a better location."]

Defenses:

2. No promise to pay rent. Bill might argue that even though he agreed to "try" using the property for a month, he did not specifically promise to pay $5000 rent for the trial month. Ana might reply that such a promise was implied in fact because Bill was also trying out the "lease terms" and those terms included payment. Wood v. Lucy, Lady Duff-Gordon (recognizing terms implied-in-fact); Dalton v. Educational Testing Service (same).

3. No assent to be bound. By asserting "[w]hen I agreed to try using the property, I wasn't thinking of a binding contract," Bill appears to be arguing that he did not assent to be bound by any implied promise that he might have made. But Ana will assert that given the commercial context of their negotiations, any reasonable person would understand that this was an enforceable business arrangement. Lucy v. Zehmer.

4. Material breach of implied promise to act in good faith. Bill also might argue that he does not have to perform his promises because his performance was constructively conditioned on Ana's performance without a material breach. Rest. § 237; Kingston v. Preston. He will assert that Ana made an implied promise to act in good faith, see Rest. § 205; Mattei v. Hopper; and she materially breached this implied promise when she unfairly prevented Bill from recovering from Claudette Insurance. [Note: In addition to raising this point as a defense, Bill also might sue Ana for breach of contract, claiming that she promised to act in good faith and broke that promise. See below.]

5. Statute of Frauds. Bill might raise the statute of frauds as a defense to his alleged promise to sign a five-year lease with Ana. He would argue that a promise to sign a five-year lease is equivalent to a promise to lease property for five years. He then would argue that such a promise falls within both the one-year provision and the land provision of the statute of frauds. Ana might partially reply that the land provision is satisfied by the part performance doctrine because Bill moved onto the property and made an improvement by moving the storage tank. Most states, however, require the payment of some money for this exception to apply, and Bill has not yet paid any money. Rest.

§ 129 cmt. a; Beaver v. Brumlow. [Note: Bill cannot use the statute of frauds as a defense to the alleged promise to pay $5000 rent for one month during the trial period because then land provision of the statute of frauds in most states does not cover leases for one year or less.]

Remedy:

6. Expectation damages. For breach of the first alleged promise, Ana will seek expectation damages equal to her loss in value ($5000), minus her costs avoided (none). Rest. § 347. For breach of the second alleged promise, Ana will seek expectation damages equal to her loss in value ($5000 per month for 5 years) minus her costs avoided (the fair rental value of the property for $5000). Rest. 347.

ANA v. BILL

Claim, defense, and remedy:

7. Restitution. If Ana cannot recover from Bill for breach of contract, she might sue him for restitution, claiming that he would be unjustly enriched if he could use the property for a month without paying. Rest. of Restitution § 1; Cotnam v. Wisdom. Bill might respond that Ana provided this benefit to him as a volunteer when she decided to let him try the property to see if he liked it, in anticipation that the arrangement might lead to a lease. Ana will seek the fair rental value of the property for one month. Rest. of Restitution § 155; Cotnam v. Wisdom.

BILL v.ANA

Claim, defense, and remedy:

8. Restitution. Bill might sue Ana for restitution, claiming that she was unjustly enriched by his moving the storage container. Restatement of Restitution § 1; Cotnam v. Wisdom. Ana may respond that Bill cannot recover because he was a volunteer and moved the storage container without any expectation of compensation. Rest. of Restitution § 57. Bill will seek compensation equal to the reasonable amount it would cost to move a storage tank. Rest. of Restitution § 155; Cotnam v. Wisdom. [Note: The damage to his crane is not part of his recovery because that damage did not enrich Ana.]

BILL v. CLAUDETTE INSURANCE CO. and ANA

Claim:

9. Breach of contract. Bill might sue Claudette Insurance Co. for breach of contract, claiming that Claudette Insurance Co. promised to cover losses suffered by Ana's tenants and then broke that promise when it refused to cover the damage to his crane. Bill also might sue Ana for breach of contract, claiming that she made an implicit promise to act in good faith and broke that promise when she instructed Claudette Insurance Co. not to pay Bill merely to prevent her rates to increase.

Defenses:

10. Lack of privity. Claudette Insurance Co. might argue that the insurance contract was between Claudette Insurance Co. and Ana and that Bill therefore lacks privity of contract and cannot enforce the promise. Bain v. Gillispie. Bill might respond that he can enforce the promise because he is an intended third-party beneficiary. Rest. §§ 302, 304; Seaver v. Ransom. Bill will assert that the parties intended for him to

receive the benefit of the promise because the insurance policy covers a tenant's losses. He further will assert that recognition of a right to enforce the insurance policy is appropriate because Ana has no incentive to enforce a promise that will provide only Bill with benefits. But Ana will reply that she did not intend to allow her tenants to enforce the insurance policy and it is not appropriate to allow tenants to do so because enforcement will cause her rates to increase.

11. Losses not covered. Claudette Insurance Co. might argue that the insurance policy does not cover Bill's losses for two reasons. First, the insurance policy covers only Ana and her "tenants," and Bill is not a "tenant" because Bill has argued that he was not bound to a lease (see above). Second, the policy does not provide coverage for losses incurred by actions that violate lease terms and Bill violated these terms by moving the storage tank. Bill will respond that the policy should be strictly construed against its drafter (which is surely Claudette Insurance Co. because insurance companies typically draft their insurance policies). Bill will assert that, strictly construed, he was a "tenant" even if he did not have to pay rent and the limitation applies only to "alterations, additions, or improvements" and not to the "moving" of a tank. Rest. § 202; Galligan v. Arovitch.

Remedy:

12. Expectation damages. Bill will seek expectation damages equal to his loss in value (coverage for the loss he suffered) minus his costs avoided (nothing). Rest. § 347.

OTHER

13. Other

PROBLEM II.

[Points per item: 1. 3; 2. 3; 3. 3; 4. 3; 5. 2; 6. 3; 7. 3; 8. 3; 9. 3; 10. n/a]

DANNY v. ELSA

Claim:

1. Breach of contract. Danny might sue Elsa for breach of contract, claiming that Elsa, in the letter of intent, made (1) an express promise to negotiate with him for the next 30 days; (2) an express promise to sign an investment contract with him within 30 days; and (3) an implied promise to act in good faith. Danny will assert that Elsa broke all three promises when she immediately ended negotiations and entered a contract with Fred instead of him. Channel Home Center v. Grossman.

Defenses:

2. No assent to be bound. Elsa appears to be arguing that their promises are not binding because they sufficiently manifested that they did not assent to be bound by them. Lucy v. Zehmner. By stating "you know a letter of intent is not binding," she appears to be asserting that a reasonable person would understand that the parties did not assent to be bound because they called their writing a "letter of intent" rather than a "contract." But Danny will assert that sometimes a "letter of intent" may be binding, depending on its wording. Channel Home Center v. Grossman. He will contend that in this case a reasonable person would understand that Elsa had made an enforceable commitment because of the

commercial nature of the bargain.

3. Indefiniteness. By describing the assurances in the letter of intent as "vague," Elsa appears to be arguing that the promises in the letter of intent were too indefinite to enforce. Rest. § 33. She will assert that an "appropriate share" of the annual profits could be anything from a "nominal sum to a material part." Varney v.Ditmars. But Danny may respond that Elsa's agreement with Fred shows that 50% is an appropriate share. He further will respond that Elsa's promise to negotiate in good faith is not uncertain. Channel Home Centers.

4. No basis for enforcement. By asserting that Danny should not have relied on her assurances, Elsa appears to be arguing that her promises cannot be enforced on the basis of promissory estoppel. Rest. § 90; Feinberg v. Pfeiffer. But Danny may respond that at least her promise to negotiate in good faith can be enforced on the basis of consideration because it was bargained for. Channel Home Center v. Grossman.

Remedy:

5. Expectation or reliance damages. Danny will seek expectation damages, equal to his loss in value (the "good return" which would be the amount that he would have invested plus a profit) minus his costs avoided (the amount he would have invested). Rest. § 347. He will assert that these damages are at least $5000 based on evidence from the contract Elsa made with Fred. Specifically, if Fred actually earned $10,000 on an investment of $20 million, then Danny should have earned at least $5000 on an investment of "no less than $10 million" (i.e., half the profit Fred earned for half the investment). Alternatively, if he cannot prove his expectation damages with reasonable certainty, Rest. § 352, Danny will seek reliance damages equal to the amount that he paid the lawyers and business experts that he hired, Rest. § 349.

FRED v. ELSA

Claims:

6. Rescission based on misrepresentation. Because he is disappointed with the return on his investment, Fred might seek rescission of his promise to invest $20 million. He will argue that the promise was voidable because Elsa induced him to make the promise with a material misrepresentation that the investment was a "sure thing." Rest. § 164. Elsa will respond that her "sure thing" statement was mere puffing or just a bad prediction, not a misrepresentation of any fact. Rest. § 159. [Note: Fred does not appear to have a breach of contract action against Elsa because Elsa kept her promise to give him 50% of the business's profits.]

7. Rescission based on non-disclosure/confidential relations. Fred also might seek rescission on grounds that Elsa did not disclose potential future risks, arguing that as a "close friend" Elsa had a confidential relationship with him that required him to disclose all material facts. Rest. 161(d). Elsa will assert that their bargain is not voidable because it was a business deal made at arm's length and her silence was a bare non-disclosure. Swinton v. Whitinsville Savings Bank.

8. Rescission based on frustration of purpose. Fred might seek rescission on grounds of frustration of purpose, arguing that the severe and unexpected supply chain disruption was an intervening event that frustrated the purpose of the contract (namely, to make profits through e-commerce fulfillment) and that both parties assumed would not occur. Rest. § 265; Krell v. Henry. But Elsa will respond that the disruption

of the supply chain was a foreseeable risk that the parties surely took into account.

Remedies:

9. Rescission and Restitution. By saying that he wants his money back, Fred is asking for restitution, which is a proper remedy when a contract is rescinded. But Elsa will argue that Fred is not entitled to a "share of the anticipated profits" if he rescinds the contract because he would only be entitled to a profit if the parties had a contract.

OTHER

10. Other

PROBLEM III.

[Points per item: 1. 3; 2. 3; 3. 3; 4. 3; 5. 3; 6. 3; 7. 3; 8. 3; 9. 2; 10. n/a]

HENRI v. GRACE

Claim:

1. Breach of contract. If Grace actually has sold the property to Julian (see the discussion of Julian's claim against Grace below), Henri might sue Grace for breach of contract, claiming that she promised to pay him a commission equal to 10% of the sales price for helping her and broke that promise by not paying him anything. [Note: A few answers suggested that Grace might sue Henri, claiming that Henri promised to make minor repairs to the ranch and then advertise the sale and did not do so. But that seems unlikely. Kate has little incentive to sue Henri because she would not likely recover any damages from him. Although Grace's loss in value would include the cost of the repairs and advertising that Henri promised and did not deliver, Grace's costs avoided would equal the 10% commission she saved. The commission must have been expected to be larger than the advertising and repairs because otherwise Henri would not have agreed to the deal. If so, Grace would have suffered no damages. Most people who said Grace would sue Henri realized this when they got to discussing damages. That said, partial credit was awarded to answers that suggested that Grace might sue Henri.]

1st Defense:

2. Implied term. By telling Henri "[t]hat's not what we intended when we wrote the contract," Grace appears to be arguing that there is a term implied in fact that she would pay Henri a commission only if Henri actually facilitated the ultimate sale of the property. Dalton v. Educational Testing Service. Otherwise, the transaction would not have the "business efficacy" that both parties must have intended. Wood v. Lucy. [Note: If Grace asserts that this term is implied in fact, then she does not have to rely on parol evidence. The parol evidence rule has no effect on terms implied in fact. Cf. Dalton.]

2d Defense:

3. Non-Occurrence of a constructive condition. Grace may defend on grounds of non-occurrence of the constructive condition, arguing that Henri materially breached the contract by not making repairs or advertising the property and his performance without a material breach was a constructive condition of her performance. Rest. § 235; Walker & Co. v.

Harrison. But Henri may respond that (even if his promises to maker repairs and advertise were not discharged by the parol evidence rule, see below) his breach was not material because "prospective buyers already knew about the ranch and making minor repairs would not affect the sales price." [Note: We would have to know more about real estate sales in the area to decide who is correct.]

Reply to 2d Defense:

4. Discharge by the parol evidence rule. Henri may assert that any promises that they made during "their very explicit discussions before signing the agreement" were discharged by the parol evidence rule because these promises were not included in the written agreement. Rest. § 213(2); Mitchill v. Lath. But Grace would argue that this would only be true if the contract were a complete integration and therefore discharged all terms within its scope. The terms do not appear to be inconsistent with the written contract because there is no suggestion that the written contract said Henri did not have to make repairs or advertise the property.

Remedy:

5. Expectation damages. Henri would seek expectation damages equal to his loss in value (10% of the $2 million sales price) minus his costs and other loss avoided (what it would have cost to make minor repairs and advertise the property). Rest. § 347.

JULIAN v. GRACE

Claim:

6. Breach of contract. Julian might sue Grace for breach of contract, claiming that Grace promised to sell him the ranch for $2 million and then refused to convey it to him.

Defenses:

7. No offer. Grace would argue that she did not make an offer because she did not manifest a willingness to enter into a bargain. Rest. § 26. Grace would argue that her statement that "it would not be possible for me to sell unless I was to receive $2 million" was almost identical to the statement in Owen v. Tunison that was held not to be an offer. But Julian will respond that this case is distinguishable from Owen because Grace's direction that he send the money directly to the bank cannot be understood as anything except an expression of how she wanted Julian to accept her offer. See Fairmont Glass v. Crunden-Martin Woodenware.

8. Unilateral mistake. Grace also might argue that her promise to sell is voidable on the basis of a unilateral mistake because she "made a mistake in determining the value of the property." Rest. § 153. About half the jurisdictions recognize unilateral mistake as a ground for voiding contracts. But Julian will respond that even in a jurisdiction that recognizes unilateral mistake as a defense, the mistake still has to produce an unconscionable result. Rest. § 153. The sale of a ranch that possibly might be worth $2 million for a price of $1.9 million simply does not shock the conscience

Remedy:

9. Specific performance. Because Julian "adamantly insists that Grace transfer the property to him," he apparently will seek specific performance. In response, Grace appears to want to argue that damages

would be an adequate remedy "given that similar ranches are available for purchase." Rest. § 360. But courts traditionally have awarded specific performance as a remedy for breach of a contract to sell land. Tuckwiller v. Tuckwiller. In addition, Grace may respond that the court should deny specific performance because the bargain was unfair. She will argue that she made a mistake and agreed to sell the property for $100,000 less than it is worth. More facts would be necessary to assess this argument.

OTHER

10. Other

PROBLEM IV.

[Points per item: 1. 4; 2. 3; 3. 3; 4. 3; 5. 3; 6. 4; 7. 3; 8. 3; 9. n/a]

LARRY and MINDY v. KATE

Claim:

1. Breach of contract. Larry and Mindy (claiming to be Larry's assignee) each might sue Kate for breach of contract, claiming that Kate promised to pay $30,000 for the renovation of her pet grooming studio and broke that promise by not paying anything. [Note: A few answers suggested that Kate might sue Larry, claiming that Larry promised a complete the renovation and broke that promise because he did not install new curtains of vinyl flooring in the customer waiting area. But the facts say that Kate has not paid Larry anything even though he has done "most of the work." In this situation, Kate is not likely to sue Larry because she would not recover any damages from him. Kate's loss in value (the value of the promised renovation minus the value of renovation actually completed) certainly would be less than Kate's costs avoided ($30,000). Instead of suing Larry, Kate would wait for Larry to sue her for not paying him and then would raise Larry's breach as a defense and for an allowance for reducing his damages. See, e.g., Jacob & Youngs v. Kent; Walker & Co. v. Harrison; Plante v. Jacobs; Kirkland v. Archbold.]

Defenses:

2. Lack of privity. Kate will argue that she cannot be liable to both of them because one of them must lack privity of contract. She will assert that Larry lacks privity if Larry effectively assigned his rights to Mindy and Mindy lacks privity if Larry did not effectively assign his rights to Mindy. Larry will argue that the purported assignment is not effective because he did not manifest his intention to transfer his right to payment but instead just told Mindy that he would in the future direct Kate to pay Mindy. Rest. § 317(a); Shiro v. Drew. But Mindy may argue that the facts are not very different from Herzog v. Irace, where a client directed his law firm to pay settlement proceeds to his doctor.

3. Non-Occurrence of a constructive condition. Kate may argue that she does not have to pay because Larry materially breached the contract and his performance without a material breach was a constructive condition of her performance. Rest. § 237; Walker & Co. v. Harrison. But Larry may respond that he did not commit a material breach but instead substantially performed because he "did most of the work" and the curtains and flooring "were not a large part of the overall contract." Plante v. Jacobs. Alternatively, he might argue that the curtains and flooring were divisible from the rest of the project and that he should be paid for the allocable amount of the contract price for the work

completed. Rest. § 240. But see Kirkland v. Archbold.

Remedy:

4. Expectation damages. Larry or Mindy (whoever has privity) will seek expectation damages equal to the loss in value ($30,000) plus other loss (nothing) minus the costs and other loss avoided (i.e., the costs of installing the curtains and flooring, which is the "allowance for damages" that Kate can claim, see Jacob & Youngs v. Kent). In calculating the other costs avoided, Kate will argue that the limitation on receiving the cost to complete or remedy defective construction in Rest. § 348(2) does not apply because Larry has advised Mindy just to hire someone else to complete the project.

LARRY and MINDY v. GRACE

Claim and Remedy:

5. Restitution despite material breach. If Larry or Mindy (depending on whether the purported assignment was effective, see above) cannot recover from Kate because Larry committed a material breach, he or she might seek restitution from Kate on the theory that Kate would be unjustly enriched. Britton v. Turner (allowing recovery in restitution despite a material breach). Larry or Mindy would be entitled to recover for any benefit conferred in excess of any loss that his breach caused. Rest. § 374(1); Britton v. Turner.

MINDY v. LARRY

Claim:

6. Debt of an unspecified nature. Mindy may sue Larry, claiming that he owes her the $40,000 debt referenced in the problem and that he has not fully paid her. [Note: The facts do not specify whether this debt is based on contract, tort, unjust enrichment, or some other ground.]

Defenses:

7. Settlement. Larry may argue that he no longer owes Mindy anything because Larry and Mindy promised that she would accept Larry's promise to "direct Kate to send to Mindy the entire payment that Kate owes Larry as "payment in full satisfaction of the debt Larry owes her." But Mindy will respond that her promise lacks consideration and is therefore unenforceable. She will assert that while an agreement to compromise a debt has consideration if the debt is unliquidated and disputed, see Rest. § 74(1); Dyer v. Nat'l By-Products, the debt that Larry owes Mindy is neither. Larry and Mindy agreed that Larry owed Mindy the debt and that the amount of the debt was $40,000.

Remedy:

8. Payment of the remaining debt. As a remedy, Mindy will seek $40,000, less any amount that she has received from Kate.

OTHER

9. Other

PROBLEM V.

[Points per item: 1. 4; 2. 3; 3. 3; 4. 3; 5. 4; 6. 3; 7. 3; 8. 3; 9. n/a]

ODETTE v. NICHOLAS

Claim:

1. Breach of the implied warranty of merchantability. Odette might sue Nicholas for breach of the implied warranty of merchantability in UCC 2-314(1), claiming that the infected saplings that Nicholas provided were not merchantable because (according to the tree expert) the fungus would prevent them from "pass[ing] without objection in the trade" as required by UCC 2-314(2)(a). Koken v. Black & Veatch Construction.

Defenses:

2. Not a merchant. Nicholas may argue that he made no implied warranty of merchantability in UCC 2-314(1) because such a warranty is made only "if the seller is a merchant with respect to goods of that kind" and he is not a merchant. Cf. St. Ansgar Mills v. Streit. He will argue that even though he formerly taught agricultural science, he does not deal in tree saplings or hold himself out by his occupation to have knowledge or skill with respect to tree saplings. He will assert that he does not deal in (i.e., buy and then resell) saplings but instead merely grows them and gives them away as a charitable effort. He will assert that he does not hold himself out as having expertise by his occupation because he is retired and has no occupation.

3. Not a sale. Nicholas may argue that he made no implied warranty of merchantability under 2-314(1) because such a warranty is implied only in a "contract for their sale." He will assert that he did not sell the saplings to Odette. Instead, he donated them to her. He will explain that the money that she paid was only for fertilization, packaging, and transportation. Even if the contract could be construed as a hybrid, the services would appear to predominate because Odette had to pay for the services but not the saplings. Sally Beauty Co. v. Nexxus Products. [Note: The saplings are goods. If the saplings were already out of the ground when they were identified to the contract (as most saplings are when sold), then they were "things . . . which are movable." 2-105(1). If the saplings were still in the ground when identified to the contract, then they were "growing crops or other things attached to realty and capable of severance." 2-105(1), 2-107(2). The saplings, however, were not "timber to be cut" because saplings are not cut but instead sold whole, roots and all. 2-107(2).]

Remedy:

4. Expectation or Reliance Damages. Odette might seek expectation damages equal to her loss in value (the difference in value between the saplings as warranted and the saplings as delivered) plus her other loss (the cost of digging up the infected saplings and transporting and replanting -- but not acquiring -- replacement saplings) minus her costs and other losses avoided (none). Rest. § 347 or UCC 2-714(2). [Note: We did not discuss UCC 2-714(2) in class but in this case its application is indistinguishable from the application of Rest. § 347.] Alternatively, Odette might seek reliance damages equal to all the money she spent on packing, transporting, planting, and digging up the infected saplings. Rest. § 349.

PETER v. ODETTE

Claim:

5. Breach of contract. Peter might sue Odette for breach of contract, claiming that Odette promised to pay him $20 per sapling but only paid

him $15 per sapling.

Defenses:

6. Pre-existing duty rule. Odette will argue that she does not have to pay $20 per sapling because the parties had already agreed to a price of $15 per sapling and she received no new consideration for her promise to pay the additional $5. Rest. § 73; Alaska Packers' Ass'n v. Domenico. Peter might respond that the promise to pay the additional money should be enforceable under the modern modification rule in because the modification was fair and reasonable in light of changed circumstances, namely, the soil was much rockier than expected. Watkins & Sons v. Carrig; Rest. § 89. Even if Peter and Odette are in a state that applies the modern modification rule, Odette might argue that the changes are not fair and reasonable. She will assert that Peter is "an experienced local contractor" and therefore should have known the soil conditions. Instead, Peter assumed the risk that the soil might be rocky when he agreed to plant them for $15 without ever looking at the property. [Note: The facts of the problem do not appear to provide support for a contention that Peter and Odette canceled their original contract and then formed a new contract as in Schwartzreich v. Baumann-Basch.]

7. Duress/Undue Influence. Odette might argue that her promise to pay the additional $5 is voidable because it was induced by duress, namely, Peter's improper threat to break their existing contract in bad faith when she had no reasonable alternative but to agree because of her fear that the plants would die. Rest. §§ 175(1) & 176(1). But Peter might respond that he did not act in bad faith; he asked for more money because the soil was rockier than he expected, not because he was trying to take an unfair advantage. Alternatively, Odette might argue that the promise is voidable on grounds of undue influence because Peter unfairly took advantage of her worries that the saplings might die if not planted soon. Rest. § 177(1) & (2). But Peter might respond that this case is distinguishable from cases where extreme pressure is used to extract a promise, see, e.g., Howe v. Palmer, because all he did was to ask for more money.

Remedy:

8. Expectation damages. Peter might seek expectation damages equal to his loss in value (the difference between the $20 he was promised and the $15 he was paid for planting each sapling) plus his other loss (nothing) minus his costs and other loss avoided (nothing because he planted the saplings). Rest. § 347.

OTHER

9. Other

The George Washington
University Law School

December 10, 2020

Grading Guide for the Final Examination in

CONTRACTS

(Course No. 6202-13)

Professional Lecturer Gregory E. Maggs

This document contains the grading guide that I used in scoring your examinations. Each of the five problems was worth 30 points, for a total of 150 points. I awarded points for each problem based on how well you wrote essays identifying and discussing the claims and defenses that the parties might assert and the remedies that they might seek. I then translated the total scores into letter grades in accordance with the Law School's mandatory grading guidelines for first-year classes. As a whole, the class did very well.

What follows is a list of the claims, defenses, and remedies that you should have identified and discussed in answering each problem. Please note that these lists are not "model answers" because they are not written in essay form using proper paragraphs as the instructions require and because they contain explanations, headings, and other additional details that model answers would not.

Everyone sees things a little differently. Accordingly, nearly all answers earned partial credit even if they were not completely correct or they varied from this guide. The most common ways to lose points were (1) to overlook claims and defenses that the parties might assert or remedies that they might seek; (2) to indicate an incorrect understanding of the applicable legal rules; (3) to discuss insufficiently the application of the law to the facts; and (4) to run out of time at the end of the examination. Many of the problems contained facts that were very similar to the facts of cases that we had read but that actually had important differences; answers often overlooked these differences and therefore did not receive the full points.

The instructions required answers to be written in essay form using complete sentences and proper paragraphs. Unfortunately, as in past years, some answers did not comply with this simple but important requirement. Some contained outlines, bullet points, or numerous sentence fragments without capital letters or punctuation. These answers could not receive full credit, even if they correctly addressed issues. To be sure, writing essays well is difficult under the time pressure of an examination. But as lawyers, all of your written work must be as polished as you can make it. Well written documents will impress your professors, employers, judges, and clients.

In addition, whenever you take examinations, write papers, or prepare legal documents, make sure that you follow very carefully any applicable format instructions and length limitations. A few answers did not comply with the specific instruction of leaving a blank line between paragraphs and indenting the first line of each paragraph (which is the standard way of preparing any single-spaced document). Other answers lost points because they exceeded the 4500-word limit. These requirements are important. Altogether the examination answers exceeded 2000 pages in length; accordingly, making them concise and easy to read was necessary for prompt and accurate grading.

PROBLEM I.

[4 points for items 1-2 and 8; 2 points for items 3-7, 9, and 11; 1 point for item 10; 3 points for item 12]

AMANDA v. BORIS

Claim:

1. Breach of contract. Amanda might sue Boris for breach of contract, claiming that Boris promised to pay her $400 per hour to write his biography, and broke this promise by repudiating the contract and refusing to pay her.

Defenses:

2. Preliminary negotiations. Boris might argue that he and Amanda never got past preliminary negotiations. Rest. § 26. He will assert that when he asked her if she "would be willing to write" his biography, that question was not an offer. Rest. § 24; Owen v. Tunison. He will assert that he could not have been manifesting a willingness to enter into a bargain because he and Amanda had not discussed the terms of any bargain. And even if his statement could be construed as an offer, Amanda did not accept it. Her statement that she "would like to give it a try" was not a promise that she would perform because she made no commitment to complete a performance. Rest. §§ 4, 50. Further, even if she implicitly promised to complete the book by starting the work, she did not seasonably notify Boris that she was accepting the offer. Rest. § 56; White v. Corlies & Tift. Instead, he only learned about her performance two weeks after she had begun it. By that time, he will assert, any offer had lapsed. Rest. § 41.

3. Indefiniteness/Uncertainty. Boris might argue that even if he and Amanda formed a bargain, he did not make a promise that is sufficiently definite to enforce. Rest. § 33; Varney v. Ditmars. He will assert that a court could not determine whether a breach had occurred or what an appropriate remedy should be because he and Amanda never agreed on essential terms like the price that Boris would pay, the length of the biography, or the writing style to be used. Although Amanda might reply that Boris already knew her hourly rate, Boris will respond that the hourly rate that Amanda's clients pay for legal services is not necessarily the same rate Boris would pay her to write a biography.

4. Statute of frauds. Boris has argued that his promise is not enforceable because there was no "written contract." But Amanda will respond that no provision of a statute of frauds requires a promise to write a biography to be evidenced by a signed writing. Note: Writing a biography is a service and therefore the alleged contract was not for the sale of goods.

5. Non-occurrence of a constructive condition. Boris may argue that, even if he did promise to pay Amanda, his performance was excused when Amanda materially breached the contract. Rest. § 237; Walker & Co. v. Harrison; Jacob & Youngs v. Kent; Plante v. Jacobs. He will argue that Amanda implicitly promised that she would use a writing style that was appropriate for biographies, see Dalton v. Educational Testing Service, and breached that implied promise by using a dull writing style. Amanda might respond in two ways. First, she might deny that she made an implied promise to use any particular writing style because there are no

circumstances that suggest that she made such a promise. Cf. Wood v. Lucy. Second, she may respond that her breach is not material because it concerns only two chapters and might be corrected through editing.

6. Mutual mistake. Boris also might argue that his alleged promise to pay her is voidable because it was induced by a mutual mistake. He will assert that both parties incorrectly assumed that Amanda could write suitably for a biography ("I guess we were wrong to think you could write a good biography"), and that their mutual mistake about this has a material effect on their bargain. Rest. § 152; Sherwood v. Walker.

Remedy:

7. Expectation damages. Amanda will seek expectation damages equal to her loss in value (the $100,000 she thinks Boris would have paid her) plus her other loss (not specified in this promise) minus her costs avoided (the value of the total hours she would have spent writing the entire biography minus the 50 hours that she spent writing the first two chapters) minus her other loss avoided (the money she would have lost from other clients whom she can now represent). Rest. § 347.

BORIS v. CRISTINA

Claim:

8. Breach of contract. Boris might sue Cristina for breach of contract, claiming that she promised to write a 200-page biography for him for $80,000, and she breached that promise when she did not provide him with the manuscript.

Defenses:

9. Preliminary negotiations. Cristina might argue in defense that the parties never got past preliminary negotiations. She will assert that her statement that "[t]he lowest price is $80,000 for a 200-page book" was not a manifestation of willingness to enter into a bargain and therefore not an offer based on the precedent set in Owen v. Tunison in which similar language was not an offer. She will further explain Boris asked her two questions--whether she would write the biography and what the lowest price would be--and she only answered one. Harvey v. Facey. And although Boris may have offered to hire her when he said "[u]pon agreement to finish the book next year, you can begin at once," she will assert that she never expressly accepted the offer. White v. Corlies & Tift. But Boris will respond that she implicitly promised to write the biography by starting the work and that he received notice of this acceptance because they worked together on the project. Evertite Roofing v. Green.

10. Statute of frauds. If Cristina accepted Boris's offer, then she promised "to finish the book next year." Some answers suggested that Cristina might argue that completing the biography in less that an year would violate this promise. If this interpretation is correct then her promise would not be enforceable under the one-year provision of the statute of frauds unless it was evidenced by a signed writing. Cf. C.R. Klewin v. Flagship Properties. But Boris will argue that the interpretation is incorrect and that finishing the manuscript early would not be a breach of contract.

Remedy:

11. Expectation damages. Boris will seek his loss in value (the cost of getting someone else to write the biography) minus his other loss (the profits and the value of the publicity that would come from such a biography), minus his costs avoided (the $80,000 price that he was going to pay). Rest. § 347. Boris will say that his loss in profits can be measured by what Amanda sold the manuscript for. But Amanda will assert that Boris cannot prove the value of his lost publicity with reasonable certainty. Rest. § 352; Fera v. Village Plaza.

AMANDA v. CRISTINA

12. Restitution. Amanda might sue Cristina for restitution, claiming that Cristina was unjustly enriched at Amanda's expense when she used the two chapters that she had written without permission. Restatement of Restitution § 1; Cotnam v. Wisdom. Amanda will seek the reasonable value of those two chapters. Id. § 55; Cotnam v. Wisdom.

OTHER

13. Other

PROBLEM II.

[4 points for items 1 and 7; 3 points for items 2-3, 5-6, and 8-9; 2 points for items 4 and 10]

ELIDA v. DOUGLAS

Claim:

1. Breach of contract. Elida might sue Douglas for breach of contract, claiming that Douglas promised to pay her $2000 per month for at least two years and broke that promise when he stopped paying her after five months.

Defenses:

2. Misrepresentation. Douglas might argue that his promise to pay Elida is voidable because it was induced by a material misrepresentation. Rest. § 164(1). He will assert Elida's statements that Douglas "soon could earn $10,000 a month" and that the new business would only require "working very short days" were false because he earned only about $2000 per month despite working 60 hours per week. But Elida will respond that her statements were not misrepresentations but instead mere predictions and puffing. Rest. § 160

3. Right to terminate. Douglas might argue that he is not in breach because Elida promised on the telephone that he would have a right to terminate their business relationship within one year. He will contend that he simply exercised that right. But Elida will respond that her alleged promise was discharged by the parol evidence rule because it conflicts with a term in their final written agreement, which allows termination "only after two years." Rest. § 213(1).

Remedy:

4. Expectation damages. Elida will seek expectation damages equal to her loss in value (she was promised payments of $2000 per month for two years but only received payments for five months) plus her other loss (none indicated) minus her costs avoided (she expected the costs of providing technical advice and advertising for two years but only incurred these costs for five months). Rest. § 347.

DOUGLAS v. ELIDA

Claims & Remedies:

5. Rescission. Douglas might seek to rescind the contract on grounds that his promise was induced by Elida's misrepresentations (see above). If the contract is rescinded, he will seek restitution of his entire initial payment of $50,000 and all five monthly payments of $2000.

6. Breach of contract. Alternatively, if Douglas cannot rescind the contract, Douglas might sue Elida for breach of contract, claiming that she promised to refund half his initial payment if he terminated the contract within a year and broke that promise when she refused to refund it. As discussed above, she will assert the parol evidence rule as a defense. If Douglas prevails, he will seek expectation damages equal to his loss in value ($50,000 / 2 = $25,000) plus his other loss (none indicated) minus his costs avoided (which would be none if he has a right to cancel).

   Note: Some answers received partial credit for suggesting that Douglas would sue Amanda for breach of contract for breaking a promise to assist him in developing a successful kick boxing studio and would ask for expectation damages. But the facts specify that the relief that Douglas wants is "to terminate their agreement, and . . . his money back."

FAUSTO v. DOUGLAS

Claim:

7. Breach of contract. Fausto might sue Douglas for breach of contract, claiming that Douglas promised to reimburse him "for the medical costs of injuries sustained by kicks when sparring with others" and that Douglas refused to pay him for the injuries he suffered when he slipped in attempting a kick while sparring with another client.

   Note: Some anwers suggested that Fausto would sue Douglas in tort for negligence. I think that this suggestion is incorrect because the problem says that Fausto knows that Douglas was not negligent.

Defense:

8. No breach (injury not covered). Douglas will argue that he is not in breach because the clause does not cover injuries sustained by falling. Douglas will assert that the other client did not kick Fausto and also that Fausto did not himself complete a kick but only attempted one. Fausto might respond that the coverage of the phrase "injuries sustained by kicks when sparring with others" is ambiguous because it does not say whether injuries can be directly or directly caused by kicks and it does not say whether it applies to the client's own kicks or only to the kicks of other clients. Fausto will assert that these ambiguities should be read in his favor because Douglas drafted the contract. Rest.

§ 202; Galligan v. Arovitch.

Reply:

9. Unconscionability. If the clause does not cover Fausto's injury, Fausto might argue the exclusion of claims for other injuries is unconscionable. Rest. § 208; Williams v. Walker-Thomas Furniture. He will note that even Douglas's friends are shocked by the result. But Douglas will make two responses. First, he will assert that this clause is not unconscionable because it does not exculpate him from tort liability that he otherwise would have. The facts indicate that Douglas would not be liable for negligence in this case. Second, the unconscionability doctrine would not help Fausto even if the clause were unconscionable. The unconscionability doctrine allows courts to strike unconscionable clauses. But striking this clause in this case would not benefit Fausto because the clause is not what is preventing him from recovering in tort.

Remedy:

10. Expectation damages. Fausto will seek expectation damages equal to his loss in value (his medical costs) plus other loss (none indicated) minus his costs avoided (none indicated). Rest. § 347.

OTHER

11. Other

PROBLEM III.

[4 points for items 1-2 and 6; 3 points for items 3-5 and 7-9]

GENEVIEVE v. HERNAN

Claim:

1. Breach of contract. Genevieve might sue Hernan for breach of contract, claiming that Hernan promised not to compete with Genevieve in the geographic areas of her operations for a period of ten years after leaving her employment and broke that promise by immediately competing in the same city.

Defenses:

2. No basis for enforcement. Hernan might respond that his promise is not enforceable because it lacks consideration. He will assert that he and Genevieve had already formed the employment contract and he had already started working when Genevieve presented him with the document containing the promise not to compete. Accordingly, there was no bargained for exchange. Hernan further will argue that Genevieve cannot prevail under the controversial theory in Lakeland Employment v. Columber that mere forbearance from firing an at-will employee can be consideration for a covenant not to compete because Hernan was not an at-will employee. Hernan also will argue the Genevieve cannot enforce the promise on the basis of promissory estoppel because even if she had relied on the promise, enforcement is not necessary to prevent injustice. He will assert that justice does not require Genevieve to "get something for nothing." If Genevieve had wanted a binding promise

not to compete, she could have offered some consideration for it.

3. Public policy. Hernan also will argue that his promise not to compete for a period of 10 years violates public policy because it unreasonably limits competition. See Lakeland Employment v. Columber (noting that promises not to compete are enforceable only if they contain "reasonable geographical and temporal restrictions"); Rest. § 186.

Remedy:

4. Specific performance. To "shut [Hernan] down for good," Genevieve will seek specific performance of his promise not to compete in her areas of operation for ten years. Rest. § 359. But Hernan might respond that specific performance is not available as a remedy because the bargain was unfair given that he did not receive any consideration for his promise. Rest. § 364; McKinnon v. Benedict; Tuckwiller v. Tuckwiller.

5. Expectation damages. For the injury that she has already suffered, Genevieve also will seek expectation damages equal to her loss in value (the value of Hernan's promise not to compete for four years) plus her other loss (the approximate $100,000 in lost profit) minus her costs avoided (nothing). Rest. § 347. She will argue that she can prove her loss with reasonable certainty because the facts say that her loss is "about the same" as the $100,000 profit Hernan has earned and that is an amount that is certain enough to enforce. Rest. § 352; Fera v. Village Plaza

ISELLE v. HERNAN

Claim:

6. Breach of contract. Iselle might sue Hernan for breach of contract, claiming that Hernan promised to lease an office building from her for two years and broke that promise by seeking to "cancel" the lease before the expiration of two years.

Defenses:

7. Lack of consideration (illusory promise). Hernan will argue that his promise lacks consideration. He will assert that Genevieve's "promise" to lease the building "for a term of two years subject to cancellation by Iselle if she sells the building" is an illusory promise that does not make any commitment because she could sell the building at any time. Strong v. Sheffield; Rest. § 4.

8. Frustration of purpose. In asserting that "something has happened and I have no choice but to cancel my lease," Hernan appears to be arguing that he does not have to keep his promise to lease the building because his purpose has become frustrated by Genevieve's demand that he stop competing. Rest. § 265; Krell v. Henry. But Iselle may respond that this defense lacks merit for several reasons. First, the occurrence of the event (i.e., the lawsuit) was Hernan's fault. Second, Hernan could not reasonably have assumed the non-occurrence of this event when he made the contract. Third, there is no evidence that Iselle also made such an assumption.

Remedy:

9. Expectation damages. Iselle will seek expectation damages equal to her

loss in value (the difference between the total rent that Hernan promised to pay and the rent that she received from him) plus other loss (none indicated) minus her costs avoided (the rent she received after leasing the office building to another tenant). Rest. § 347. Hernan will respond that Iselle could have avoided some of the loss if she has sought another tenant more diligently. Rest. § 350; Parker v. Twentieth Century-Fox.

OTHER

10. Other

Note: Some answers suggested that in Iselle's lawsuit against Hernan for breaking the lease, Hernan might raise the statute of frauds as a defense. But Hernan's letter is a signed writing evidencing the existence of the lease. The lease does not have to be in writing; it merely has to be evidenced by a signed writing.

PROBLEM IV.

[4 points for items 1, 6-7, and 9; 2 points for items 2-5, 8, and 10-11]

JULIO v. KARINA

Claim:

1. Breach of contract. Julio might sue Karina for breach of contract, claiming that Karina promised to procure insurance for his warehouse and broke that promise when she did not procure it.

Defenses:

2. No acceptance. Karina appears to be arguing that she and Julio did not form a bargain because even if she made an offer, she did not receive Julio's email accepting the offer. But Julio may respond that under the mailbox rule, he accepted Karina's offer when he dispatched his acceptance by email even if his email never arrived. Rest. § 63; U.S. Life Ins. v. Wilson.

3. Mirror image rule. Karina also might argue that she and Julio did not form a bargain because of the mirror image rule. Rest. § 59; Minn. & St. L. v. Columbus Rolling-Mill. She will assert that Julio's purported acceptance of her alleged offer was not an acceptance because it contained a term that her offer did not, namely, that coverage would be provided immediately.

4. Indefiniteness. Karina also might argue that even if she and Julio formed a bargain, her alleged promise to procure insurance is too indefinite to enforce. Rest. 33; Varney v. Ditmars. She will assert that she and Julio never discussed essential terms such as the amount of coverage that Julio wanted, the size of the premiums that Julio was willing to pay, when the insurance coverage would begin, and whether the insurance policy would cover losses caused by the property shifting on unstable land.

Remedy:

5. Expectation damages. Julio will seek expectation damages equal to his loss in value (insurance coverage for his $100,000 loss) minus his costs

avoided (Karina's $3000 commission) and minus other loss avoided (the premiums that Julio would have paid to the insurance company).

JULIO v. LOWELL

Claim:

6. Breach of contract. Julio might sue Lowell for breach of contract, claiming that Lowell promised that Julio could "cancel the sale upon paying [Lowell] $500" and that Lowell breached this promise when he refused to allow Julio to cancel the sale.

Defenses:

7. No breach (meaning of terms/whose meaning prevails). Lowell will defend on grounds that he did not breach the contract by denying Julio's request for cancellation because the contract, properly understood, provided "a right to cancel only before the sale was completed" and the sale was completed before Julio requested cancellation. In support of this defense, Lowell will first argue that the court should follow the plain meaning of the cancellation clause. He will assert that "to cancel" means to decide not to do something that is planned for the future, not to undo something that already has occurred. Therefore, the right to cancel cannot occur after the sale is complete. But Julio might respond, "based on his experience with similar contracts," that the plain meaning of the cancellation clause is qualified by a trade usage under which such clauses would allow cancellation even after a sale is complete. Hurst v. W.J. Lake & Co.

   If the court considers parol evidence about how Lowell and Julio subjectively interpreted the clause (either because the court concludes that the clause at issue does not have a plain meaning or because the jurisdiction always allows consideration of parol evidence, see Rest. § 214(c); Pacific Gas v. G.W. Thomas Co., Lowell and Julio will argue about whose meaning controls. As the plaintiff, Julio bears the burden of proving (1) that Lowell knew (or had reason to know) the meaning Julio attached, and (2) that Julio did not know (and had no reason to know) the meaning Lowell attached. Lowell will argue that there is no proof (at least none that the problem reveals) that Julio might use to meet this burden.

Remedy:

8. Declaratory judgment/restitution. Julio will seek a declaratory judgment that he may cancel the contract upon paying $500 to Lowell. Trident Center v. Conn. General (plaintiff sought a declaratory judgment that it could cancel a contract upon paying a sum of money). He will also seek restitution of the contract price after the contract is cancelled.

JULIO v. LOWELL

Claim & Remedy:

9. Rescission. Alternatively, Julio might sue Lowell, seeking to rescind his purchase of the warehouse on grounds that it was induced either (1) by Julio's active concealment of the shifting slab by planting shrubbery to hide the problem, Rest. § 160 cmt. a; or (2) by his unilateral mistake in assuming that there was no problem with the foundation, Rest.

§ 153. If the Court rescinds the contract, Julio will seek restitution of the purchase price that he has paid.

Defenses:

10. Bare non-disclosure. Lowell will argue in defense that this case involves only a bare non-disclosure. Lowell will assert that he did not tell Julio about the problem with the warehouse foundation because Julio did not ask about. He uttered no false statement or half-truth. And although the newly planted shrubbery may have prevented Julio's discovery of the problem, Lowell will argued that Julio cannot prove that Lowell intentionally sought to conceal the problem. Rest. § 160 & cmt. a; Swinton v. Whitinsville Savings Bank.

11. Unilateral mistake not a ground for avoidance. If the case arises in a jurisdiction that recognizes only mutual mistakes as a ground for voiding contacts (as about half of the jurisdictions do), Lowell will argue that the contract is not voidable on the basis of mistake because Lowell was not mistaken. The facts indicate that Lowell knew about the problem at the time the contract was made.

OTHER

12. Other

PROBLEM V.

[4 points for items 1-3 and 5-7; 2 points for items 4, 8, and 9]

NORBERT and THE BANK v. MARIE

Claim:

1. Breach of contract. Norbert and/or the bank might sue Marie for breach of contract, claiming that Marie promised to pay the entire contract price and broke that promise when she only paid 20% of the contract price.

   Notes: (1) Some students received partial credit for suggesting that Marie might sue Norbert for breach of contract, claiming that he promised to build a 10-foot barrier and broke that promise by only building an 8-foot barrier. A lawsuit by Marie against Norbert is possible, but unlikely. Marie realistically would sue Norbert for breach of contract only if she believed that his breach of contract caused her damages over and above the 80% of the contract price that she has already withheld from him. That is doubtful because (1) the facts indicate that even an 8-foot barrier is "very valuable" and (2) the bank (as Norbert's assignee) is threatening to sue Marie, indicating that the bank believes that Marie should have paid more. Put another way, this case is like Jacob & Youngs v. Kent. Even though Jacob & Youngs breached the contract with their defective construction, Kent did not sue Jacob & Youngs. Instead, he withheld 5% of the contract price. Jacob & Youngs then sued him evidently believing that his allowance for damages would be less than that 5%. In this problem, Marie has withheld not just 5%, but 80% of the contract price. (2) Although the bank's argument that it is an assignee of Norbert's rights is weak (see below), the bank's threatening letter suggests that the bank might sue Marie.

Defenses:

2. Non-occurrence of a constructive condition. Marie might argue in defense that she does not have to perform because her performance was constructively conditioned on Norbert's performance and Norbert committed a material breach when he built an 8-foot barrier instead of a 10-foot barrier. Rest. § 237; Walker & Co. v. Harrison; Jacob & Youngs v. Kent; Plante v. Jacobs. Marie will assert that the breach is material because the area has experienced 9-foot floods in the past. Norbert and the Bank will respond that the breach is not material because an 8-foot barrier is still very valuable. They will assert that Marie must perform and that her only remedy is to subtract an allowance for damages.

   Note: Some students received partial credit for suggesting that Norbert and the Bank might argue that the contract was divisible and that they should be paid in full for the divisible portions that they have completed. But the argument that a contract to build a single flood barrier is divisible seems even weaker than the divisibility argument that failed in Kirkland v. Archbold. The barrier is a single project, not logically or practically divisible into separate lots.

3. Lack of privity. If the bank sues Marie, she might assert lack of privity as a defense. Although Norbert "suggested that Marie pay the price directly to his bank to save time," this suggestion was not an assignment of Norbert's contract rights. The suggestion was not a "manifestation of . . . intention to transfer [the right to performance] by virtue of which [Norbert's] right to performance by the obligor is extinguished in whole or in part and the [Bank] acquires the right to such performance." Rest. 317(1); Shiro v. Drew. On the contrary, the facts indicate that Norbert suggested this arrangement merely to save time. Marie further will argue that if Norbert actually did assign his rights, then Norbert (rather than the bank) would lack privity because he would no longer have the right to performance. Herzog v. Irace.

Remedy:

4. Expectation damages. Norbert and/or the bank will seek expectation damages equal to their loss in value (the 80% of the contract price that they did not receive) plus other loss (none indicated) minus their costs avoided (which they may claim is nothing because they completed building the flood barrier, even though their performance was defective). Rest. § 347; Jacob & Youngs v. Kent. Marie will assert that she is entitled to subtract an allowance for damages equal to the cost to complete or remedy the problem. Id. But Norbert and the Bank may respond that she is not entitled to the cost to complete or remedy the problem because that amount would be grossly disproportionate to the probable loss in value to Marie because it would require them to "undo nearly all" of Norbert's work. Rest. 348(2). They will argue that her allowance for damages instead should equal only the difference in market value between a 10-foot barrier and an 8-foot barrier, which may not be very much because "even an eight-foot barrier is very valuable."

NORBERT and THE BANK v. MARIE

Claim & Remedy:

5. Restitution. If Norbert or the Bank cannot recover for breach of contract because the court determines that they have committed a material breach, they alternatively may seek restitution under the theory in Britton v. Turner. They will argue that their recovery should

equal the contract price minus any damages that they caused Marie (an issue discussed above). Rest. § 374(1).

NORBERT v. ODALYS

Claim:

6. Breach of the implied warranty of merchantability. Norbert might sue Odalys for breach of the implied warranty of merchantability, arguing that the paint that she used was not fit for its ordinary purpose because it soon began to peel off. UCC § 2-314; Koken v. Black & Veatch Construction.

   Note: Norbert must rely on the implied warranty of merchantability because the facts say that the contract did not expressly guarantee the quality.

Defense:

7. No implied warranty of merchantability. Odalys might argue in defense that the their contract did not contain an implied warranty of merchantability. The implied warranty of merchantability applies only to contracts for the sale of goods under Art. 2 of the UCC. She will argued that even though the contract involved paint (which is a good because it is movable), the contract also involved services (painting) and was therefore a hybrid contract. She will assert that the UCC does not apply to this hybrid contract because the predominate purpose was the painting of the logo, not the paint. Sally Beauty Co. v. Nexxus Products.

Remedy:

8. Specific performance. Norbert appears to be seeking specific performance as a remedy because the facts say that he "wants his lawyer to compel Odalys to fix the problem." But Odalys will argue that Norbert cannot obtain specific performance for at least two reasons. First, the parties have already stipulated that the remedy for breach of contract is limited to a refund of the price paid. (For this same reason, Norbert also cannot seek expectation damages.) Second, even if they had not stipulated a limitation on the remedy, damages would be an adequate remedy because the facts say that Norbert could pay another $3000 to do the work. Rest. §§ 359, 360(a).

9. Stipulated remedy. If Norbert cannot obtain specific performance, he will seek the stipulated remedy of a refund of the price paid. The facts do not suggest that this remedy is a penalty; on the contrary, it is less than the actual damages of $3000. Rest. 356(1); Dave Gustafson v. State. Note: When a contract contains an enforceable stipulated remedy, the plaintiff cannot recover expectation damages instead.

OTHER

10. Other