

Grading Guides for Past Final Examinations In

CONTRACTS II

(Course No. 6203-11; 3 credits)

Professor Gregory E. Maggs

This document contains grading guides for the following Contracts II exams:

Apr 30, 2019	May 2, 2005
May 2, 2017	Apr 29, 2004
Apr 28, 2014	May 8, 2003
Apr 30, 2013	Apr 30, 2002
May 1, 2012	May 4, 2001
Apr 21, 2011	May 9, 2000
Apr 27, 2010	Apr 28, 1998
Apr 28, 2009	May 9, 1997
Apr 29, 2008	May 2, 1996
Apr 26, 2007	

VERY IMPORTANT NOTES:

- (1) I do not have copies of grading guides for examinations before 1996.
- (2) Each of the problems on these exams presented a fact pattern based on an actual case and asked for identification and discussion of the claims and defenses that the parties might assert, and the remedies that they might seek. In grading answers, I awarded points based on how well the answers identified and discussed the claims, defenses, and remedies.
- (3) The following grading guides are merely checklists that I used in grading answers. THESE CHECKLISTS ARE NOT MODEL ANSWERS! They are not model answers because the instructions require all answers to be written in essay form, using complete sentences and proper paragraphs. ACCORDINGLY, WHEN YOU TAKE THE EXAMINATION, DO NOT ATTEMPT TO REPLICATE THE FORMAT OF THESE CHECKLISTS. Instead, write your answers in essay form!
- (4) These grading guides are not meant to be definitive solutions. Everyone sees things in a slightly different way. I attempt to be as flexible and generous as possible when grading. I usually find ways of awarding points when answers discuss issues not specifically listed on the grading guide or when they characterize issues differently from the grading guide.
- (5) In 2004 and 2005, the grading guides referred to the 2001 revisions of U.C.C. article 1 and the 2003 proposed revision of U.C.C. article 2.
- (6) When you take your examination, read the instructions very carefully because the instructions may change from year to year.

Grading Guide for Final Examination In

CONTRACTS II

(Course No. 203-20; 3 credits)

Professorial Lecturer Gregory E. Maggs

Each of the problems on the final examination presented a fact pattern from an actual case and asked you to write an essay identifying and discussing the claims and defenses that the parties might assert, and the remedies that they might seek. In grading your answers, I awarded points based on how well they identified and discussed the likely claims, defenses, and remedies. I converted raw scores into letter grades in accordance with the Law School's mandatory grade distribution guidelines.

This grading guide provides the checklists that I used in grading your answers. Please note that these checklists are not model answers. They are not model answers because the instructions required all answers to be written in essay form, using complete sentences and proper paragraphs.

This grading guide is also not meant to show definitive solutions to the problems. Everyone sees things in a slightly different way. I attempted to be as flexible and generous as possible when grading. I usually found ways of awarding points when the answers discussed issues not specifically listed on the grading guide or when the answers characterized issues differently from the grading guide.

I deducted points for failure to follow examination instruction 3 (i.e., exceeding 4500 words), examination instruction 5 (not writing answers in essay form or not using complete sentences and proper paragraphs), and in some extreme cases examination instruction 6 (not skipping a line between paragraphs and indenting the first line of each paragraph). A notation appears on the score sheet of anyone who lost points for these reasons.

The problems were based on edited versions of these cases: I. In re Somerset Reg'l Water Res., LLC, 592 B.R. 38 (Bankr. W.D. Pa. 2018); II. Davis v. J&J Concrete, 2019 WL 1601478 (Ohio Ct. Apps.); III. Alcoa Materials Mgt., Inc. v. Niagara Worldwide, L.L.C., 2016 WL 7292934 (Ohio Ct. Apps.); IV. SunOpta Grains & Foods Inc. v. JNK Tech Inc., 2018 WL 6045262 (D. Minn.); V. Sorchaga v. Ride Auto, LLC, 909 N.W.2d 550 (Minn. 2018).

**PROBLEM I.**

[Max points: #1=4; #2=4; #3=4; #4=4; #5=4; #6=4; #7=4; #8=n/a]

STC and MOSTOLLER / BANKRUPTCY TRUSTEE

*Claims:*

1. Restitution. STC and Mostollor might sue the bankruptcy trustee (or bankruptcy estate), claiming that the bankruptcy trustee has been unjustly enriched by receiving Mostoller's tax refund. STC will assert that Mostoller assigned his entire tax refund to it in the loan agreement. Mostoller will assert that he still owned the portion of his

tax refund for taxes paid by SRWR in 2014 because he did not assign that portion to STC.

*Arguments in support of the two claims:*

2. STC's argument. In support of its claim, STC might argue that the court should consider parol evidence regarding the meaning of the term "2015 tax return." Some states always allow parties to use parol evidence to show the meaning of terms. See, e.g., Pacific Gas v. G.W. Thomas Drayage. But even if the plain meaning rule applies, STC will argue that the court should consider extrinsic evidence because the term lacks a plain meaning. As the positions of the parties show, the term can mean either "any refund to be generated on account of the 2015 operating losses" (i.e., the meaning attached by STC) or a "refund of taxes paid in" 2015 (i.e., the meaning attached by Mostoller). STC further will argue that the meaning it has attached should prevail because the testimony of Teitz and Fuchs shows that Mostoller knew or should have known that the term included the entirety of the refund. Rest. § 201(2).
3. Mostoller's argument. Mostoller might argue that the plain meaning rule (if it applies in the jurisdiction in question) prevents consideration of extrinsic evidence because the term "2015 tax return" has a plain meaning, and the plain meaning does not include the refund of 2014 taxes. Accordingly, Mostoller will argue that the testimony of Teitz and Fuchs cannot be considered, and the court should interpret the term according to its plain meaning.

*Defense:*

4. Ineffective assignment. Responding to STC, both Mostoller and the bankruptcy trustee might question whether an effective assignment ever occurred, asserting that Mostoller only promised to make the assignment and did not manifest his intention to assign it, i.e., to transfer his right to the refund and extinguish his right to it. Rest. § 317(1); Shiro v. Drew.

*Remedy:*

5. Restitution. STC will seek restitution in the amount of the full tax refund. Mostoller will seek restitution in an amount equal to the portion of the tax refund for taxes paid in 2014.

STC v. SRWR

*Claim:*

6. Breach of Contract. STC might sue SRWR for breach of contract, claiming that SRWR promised to repay the loan and and evidently did not repay all of it given that the parties are fighting over the tax refund that was to secure repayment.

*Remedy:*

7. Expectation damages. STC will seek expectation damages equal to its loss in value (i.e., the amount of the remaining amount of the loan minus any amount that it can collect from the bankruptcy trustee based on the assigned tax refund). STC does not appear to have avoided any costs because it made the loan.

OTHER

8. Other

**PROBLEM II.**

[Max points: #1=4; #2=4; #3=4; #4=4; #5=4; #6=4; #7=4; #8=n/a]

DAVIS v. J&J

*Claim:*

1. Breach of contract. Davis might sue J&J for breach of contract, claiming that J&J promised to pour a concrete slab having a 16-inch depth, and broke that promise by pouring a foundation that was between 12 and 16 inches in depth.

*Defense:*

2. Failure to Provide Timely Notice. J&J may argue that the UCC applies because concrete is a good (i.e., a thing that was movable at the time of identification to the contract), 2-105(1), and that under 2-607(3)(a), Davis is barred from any remedy because he did not provide notice of the breach within a reasonable time after he should have discovered the breach. Davis first will reply that the UCC does not apply under the predominant purpose test because this contract involves a hybrid contract of goods (i.e., concrete) and services (i.e., the labor to install it), and the goods involved do not predominate over the labor; instead the costs for the concrete and labor were roughly equal. (Each side would have a plausible argument under the gravamen of the complaint test for determining whether the UCC applies.) Alternatively, Davis might argue that he did not lose his rights under 2-607(3)(a) because building owners do not usually inspect the thickness of the building's foundation, and thus he discovered and reported the breach within a reasonable time.

Notes: (1) J&J cannot assert either "substantial performance" or "non-material breach as a defense." As Prof. Mixup explains, a breach is a breach, whether it is material or not. Whether a breach is material only determines whether the other party is excused from performing.

*Remedy:*

3. Expectation Damages. Consistent with his position that the UCC does not apply, Davis might seek expectation damages equal to his loss in value (i.e., the cost to remedy or repair the slab, which would be \$49,118 to \$50,000) minus his costs avoided (i.e., any portion of the price that he had not paid). J&J will respond that Davis cannot measure his loss in value by the cost to replace the slab because that amount is grossly disproportionate to the probable loss in value to Davis. Rest. § 348(2); Jacob & Youngs v. Kent; Plante v. Jacobs. Although the slab is not as thick as it should be, it still has the required strength and there were no problems for three years. J&J will contend that Davis can recover only the loss in market value, which may be nominal. Id.

J&J v. DAVIS

*Claim:*

4. Breach of contract. J&J might sue Davis for breach of contract, claiming that J&J promised to pay \$9500 for the concrete slab, and Davis has not paid the full price.

*Defenses:*

5. Non-occurrence of a constructive condition (a defense also known as failure of the consideration). Davis might argue that he does not have to perform because his performance was constructively conditioned on J&J's performance without a material breach, and J&J committed a material breach because the concrete depth was not 16-inches for the entire slab. Rest. § 237; Walker & Co. v. Harris; Jacob & Youngs v. Kent; Plante v. Jacobs. J&J will respond that the breach is not material because it has the required psi strength and it served its purpose without fault for three years.

Note: (1) Nothing in the problem indicates the existence of an express condition (i.e., there is no term expressly saying "Davis's duty to pay is excused if the criteria for the construction are not met."). Accordingly, the strict compliance standard for express conditions does not apply. (2) Nothing in the problem indicates that J&J's performance was divisible. Rest. § 240; Kirkland v. Archbold.

*Remedy:*

6. Expectation damages. J&J will seek expectation damages equal to his loss in value (i.e., the amount of the price not paid) minus his costs avoided (i.e., nothing because he has completed the work). But Davis will respond that he is entitled to an allowance for his damages as calculated above.

J&J v. Davis

*Claim & Remedy:*

7. Restitution. If J&J cannot enforce Davis's promise to pay because J&J committed a material breach that excuses Davis's performance, then J&J might seek restitution from Davis. J&J could recover the value conferred upon Davis (i.e., the value of the foundation) minus any damages that J&J caused Davis (i.e., the reduced value of the foundation). Rest. § 374; Britton v. Turner.

OTHER

8. Other

**PROBLEM III.**

[Max points: #1=4; #2=3; #3=3; #4=3; #5=3; #6=3; #7=4; #8=3; #9=2; #10=n/a]

ORMET v. ALCOA

*Claim:*

1. Breach of contract. Ormet might sue Alcoa for breach of contract, claiming (1) that Alcoa promised to remove all of the carbon anodes within 120 days, and did not remove all of them, and (2) that Alcoa promised to pay \$4,305,672 for the carbon anodes, and only paid 75% of that price.

*Defenses:*

2. No breach because of waiver, impracticability, and non-delivery. Alcoa may argue in defense that it did not have to keep its promise to remove the anodes within 120 days (1) because Ormet waived the 120-day

requirement by allowing removal after the deadline in June, BMC Industries v. Barth Industries, and (2) because Hannibal's subsequent denial of access to the anodes was an event, the non-occurrence of which was a basic assumption of both parties, that rendered removal the anodes impracticable, Taylor v. Caldwell.

Alcoa also will argue that it did not have to keep its promise to pay the price for the anodes because Ormet's failure to tender and deliver the goods gave Alcoa a right to cancel and withhold payment. 2-711. Ormet may respond that it complied with the contract because (1) it timely tendered the anodes to Alcoa at its facility which was all that was required by the contract, 2-401; and (2) Alcoa accepted the tendered anodes because it failed to make an effective rejection of them, 2-606(b), Bloom & Sons v. Murphy.

Note: Alcoa's defense is based on impracticability not frustration of purpose. See Prof. Mixup's explanation of this point.

*Remedy:*

3. Contract price & incidental damages. Ormet will seek the balance of the full contract price, claiming that Alcoa accepted all of the tendered anodes by failing to reject them. 2-709(1)(a); Bloom & Sons v. Skelly. Ormet also will seek incidental damages for any additional cost of storing the anodes incurred because Alcoa did not remove them from the facility. 2-715(1).

ALCOA v. ORMET

*Claim:*

4. Breach of contract. Alcoa might sue Ormet for breach of contract, claiming that Ormet promised to sell 17,086 tons of carbon anodes and delivered only 7,316 tons.

*Defenses:*

5. No breach. Ormet may argue that it did not breach the contract because the contract only required Ormet to tender the goods for pick-up at its facility for 120 days and Ormet properly tendered the goods for this period. Alcoa will respond with the arguments that it made above concerning waiver and impracticability.

*Remedy:*

6. Buyer's remedies: Alcoa will seek to (a) withhold the remaining payment; (b) recover any amount of overpayment (i.e., Alcoa has paid 75% of the price but received less than half of the anodes); and (c) recover damages equal to the difference between the market price and contract price for the 9,770 tons of anodes not yet delivered). 2-711; 2-713.

ALCOA v. HANNIBAL

*Claim & Remedy:*

7. Restitution. If Alcoa cannot recover from Ormet, Alcoa might sue Hannibal under a theory of restitution, claiming that Hannibal has been unjustly enriched at Alcoa's expense by retaining carbon anodes belonging to Alcoa. Alcoa will argue that the title to the anodes passed from Ormet to Hannibal when Ormet tendered the anodes at its facility. 2-401(1).

ALCOA v. ORIGINAL TRUCKING CONTRACTOR

*Claim:*

8. Breach of contract. Alcoa might sue the original trucking contractor for breach of contract if the "difficulties" mentioned in the problem amounted to broken promises.

*Remedy:*

9. Expectation damages. Alcoa will seek expectation damages equal to its loss in value (i.e., perhaps what it had to pay the new trucking contractor for substitute service) plus other loss (i.e., whatever loss it has suffered and whatever damages it must pay) minus its costs avoided (i.e., what Alcoa promised to pay in the original contract but has not paid).

OTHER

10. Other

**PROBLEM IV.**

[Max points: #1=4; #2=4; #3=4; #4=4; #5=4; #6=4; #7=4; #8=n/a]

SUNOPTA v. KIM

*Claim:*

1. Breach of contract. Sunopta might sue Kim for breach of contract, claiming that Kim promised to pay \$278,451 for the soybeans shipped in mid-July, and failed to pay this amount.

*Defense:*

2. Revocation of acceptance. Kim might assert that he had a right to revoke acceptance of the soybeans and withhold payment. 2-608(a)(2); 2-711. He will assert: (a) a requirement of high germination rates was required by the express terms of the contract (i.e., the "for sprout" language), the parties' course of dealing (i.e., the parties' previous two contracts required high germination rates), and trade usage (i.e., a high germination rate is required as evidenced by the fact that no other buyers would buy the soybeans); (b) the soybeans did not conform to the contract because of their low germination rates; (c) the non-conformity substantially impaired the value of the soybeans to him (i.e., because he could not resell them); (d) he accepted the soybeans without discovery of the non-conformity; and (e) his acceptance was reasonably induced by the difficulty of discovery before acceptance (i.e., germination takes time to test). But SunOpta will respond that the whole point of the modified contract was to sell low germination rate soybeans for the soy meal market.
3. Non-occurrence of an express condition/frustration of purpose. Kim might assert that his purchase was expressly conditioned on his being able to resell the soybeans. Luttinger v. Rosen. Similarly, he might argue that the unexpected low germination rates frustrated his purpose (i.e., buying the soybeans so that he could resell them). Krell v. Henry.

Note: Kim does not have a defense of impracticability because it would not be impracticable for Kim to pay for the soybeans. Kim just does not want to pay for them. See Professor Mixup's principles.

*Remedy:*

4. Contract price. SunOpta will seek the contract price because Kim accepted the goods. 2-709(1)(a).

KIM v. SUNOPTA

*Claim:*

5. Breach of contract. Kim might sue SunOpta for breach of contract, claiming that SunOpta breached the original two contract for the sale of soybeans by failing to ship loads with germination rates of more than 85%.

*Defenses:*

6. No breach. SunOpta may argue that it did not breach the original contract. SunOpta will assert that the best way to interpret the language quoted in the Problem is that the parties modified the contract. Kim agree to accept soybeans with low germination rates in exchange for SunOpta's lowering of the price.

*Remedy:*

7. Buyer's remedies. Having revoked acceptance (see above), Kim will seek to withhold the price, 2-711, and recover market damages for the undelivered installments, 2-708(1). The problem does not indicate that Kim has covered by buying substitute soybeans.

OTHER

8. Other

#### **PROBLEM V.**

[Max points: #1=6; #2=4; #3=4; #4=4; #5=5; #6=5; #7=n/a]

SORCHAGA v. RIDE AUTO

*Claims:*

1. Breach of warranty or contract (in connection with the contract of sale). Sorchaga might sue Ride Auto for breach of warranty or breach of contract depending on whether she wants to keep the truck and recover warranty damages or return the truck and recover market damages. (See Prof. Mixup's explanation of this point.)

(1) If Sorchaga wants to keep the truck, she might sue Ride Auto for breach of warranty, claiming that Ride Auto expressly warranted that the only problem with the truck was a faulty oxygen sensor, that the truck could be driven, and the truck did not conform to these express warranties.

(2) If Sorchaga wants to return the truck, Sorchaga might sue Ride Auto for breach of contract, claiming that the truck did not conform to the express warranties described above. Sorchaga will assert that she can revoke acceptance because (a) she accepted the vehicle on the reasonable

assumption that its non-conformity would be cured given that Ride Auto promised to repair it; and (b) the non-conformity has not been seasonably cured.

2. Breach of Contract (in connection with the ASC repair agreement). In addition, Sorchaga also might sue Ride Auto for breach of contract, claiming that Ride Auto promised orally and in the ASC agreement to inspect and repair the truck for free, and broke this promise when Ride Auto refused to inspect or repair the truck.

*Defenses:*

3. Disclaimer/Parol Evidence Rule. Ride Auto will argue that the alleged warranties were disclaimed or discharged by the written contract. The written contract contained a "disclaimer of warranty" clause that said the vehicle was sold "AS IS" with "NO WARRANTY." Ride Auto further will argue that any alleged contrary oral agreement was discharged by the parol evidence rule because it was not included in the written contract. Cf. Gianni v. R. Russel Co.

*Reply:*

4. Disclaimer unenforceable. Sorchaga may make three replies. First, she will assert that a seller cannot disclaim an express warranty. 2-316(1) Second, she will argue that the written contract should be reformed on the basis of fraud as to content to include the promised warranty. Rest. § 166; cf. Bollinger v. Central Penn. Quarry. (The problem contains no direct statement that Ride Auto lied to Sorchaga about the content of the purchase agreement, but it does indicate that Ride Auto lied to her about the content of the ASC agreement). Third, Sorchaga also will argue that such a disclaimer is unconscionable. 2-302(1); A & M Produce Co. v. FMC Corp. She will assert that the bargain was substantively oppressive because she had to pay \$12,950 for a vehicle that is probably worth about \$6,770 and she still has to make \$20,000 in repairs. She will also assert that formation of the bargain was procedurally unconscionable because Ride Auto misled her throughout the bargaining process.

*Remedy:*

5. Buyer's remedies. For breach of the purchase agreement, Sorchaga has two possible remedies:

(1) If Sorchaga has not revoked acceptance and has sued for breach of warranty, she will seek the difference between the value of the goods as warranted and the goods as delivered. One possible measure of the difference would be \$20,000, which is the cost of repair. At least some courts would award this difference as breach of warranty damages even if it exceeds the contract price. See NCR v. Chatlos Systems. Sorchaga also can recover the \$1415 cost of inspection as incidental damages.

(2) If Sorchaga successfully revokes acceptance, she will seek to recovery any payment that she has made plus the difference between the market price of a truck as it was warranted and the contract price. This recovery may be smaller than the recovery for breach of warranty because the market price might equal the contract price. Sorchago can also recover the \$1415 cost of inspection as incidental damages.

For breach of the repair agreement, she will seek to recover the cost of inspection and the cost of repair (to the extent that these remedies are not covered by her other recovery.)

*Remedy limitations.*

6. Remedy limitations. Ride Auto will argue that damages for the promise to repair should be limited in two ways. First, the ASC policy limits repairs to \$500. Second, the cost to repair the truck would be grossly disproportionate to the probable loss in value. Rest. 348(2); Jacob & Youngs v. Kent; Plante v. Jacobs.

OTHER

7. Other

Grading Guide for Final Examination In

CONTRACTS II

(Course No. 203-13; 3 credits)

Professor Gregory E. Maggs

Each of the problems on the final examination presented a fact pattern from an actual case and asked you to write an essay identifying and discussing the claims and defenses that the parties might assert, and the remedies that they might seek. In grading your answers, I awarded points based on how well they identified and discussed the likely claims, defenses, and remedies. I converted raw scores into letter grades in accordance with the Law School's mandatory grade distribution guidelines.

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The problems were based on edited versions of these cases: I. Maday v. Grathwohl, 805 N.W.2d 285 (Minn. Ct. App. 2011); II. APAC Atl., Inc., Harrison Const. Div. v. State, 2013 WL 5883697 (Tenn. Ct. App.); III. Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C., 635 F.3d 1106 (8th Cir. 2011); IV. Metal Partners Rebar, LLC v. Carson Concrete Corp., 2015 WL 2118665 (E.D. Pa. 2015); V. Liguria Foods, Inc. v. Griffith Labs., Inc., 2017 WL 326308 (N.D. Iowa Jan. 23, 2017).

**PROBLEM I.**

[Max. points: #1=7; #2=7; #3=7; #4=7; #5=2; #6=n/a]

MADAY v. GRATHWOHL BROS.

*Claim:*

1. Breach of contract. Maday might sue Grathwohl Bros. (GB) for breach of contract, claiming that GB promised to supply all of the manure produced in its hog barns to Maday at no cost, and broke that promise by selling some of the manure to third parties.

Although the written contract does not expressly include this promise, Maday has alleged that GB made this promise orally.

Maday alternatively might assert that the term is implied in fact, arguing that the contract only makes sense with the implied promise. Without the promise, Maday would be encumbering his property with an easement with no guarantee of any benefit. Cf. Dalton v. Educational Testing Service.

Or Maday may assert that the promise is a term of the parties' agreement that has been established by the parties' course of performance. Maday will argue that, for a period of seven years, he was given or he took all of GB's manure, even when he did not personally need it. GB never objected to Maday's conduct, and Maday objected when GB sold the manure to someone else. See Nanakuli Paving v. Shell Oil.

*Defenses:*

2. No promise. GB may respond that it did not make the alleged promise to supply all of the manure produced in its hog barns to Maday at no cost. GB's position is that it has "a right, but not a duty, to spread the manure over [Maday's] land." GB may advance four arguments in support of this view. First, the written agreement does not expressly require GB to provide manure. Second, the merger clause says that the written contract contains the entire agreement; therefore, there was no oral promise. Third, a court should not find the promise to be implied in the written contract because the transaction makes sense even if Maday does not receive all of the manure; GB only needs the easement for the manure that it provides, and Maday would receive the benefit of any manure provided even if he did not receive all of it. Fourth, the evidence is factually insufficient to establish a course of performance.
3. Discharge by the Parol Evidence Rule. GB will respond that, if the alleged promise was made orally prior to or contemporaneously with the written contract, it would be discharged by the parol evidence rule. GB will contend that the written agreement is a complete integration because it contains a merger clause. As a complete integration, the written agreement discharges all prior agreements within its scope. Rest. § 213(2). GB will assert that the alleged oral agreement is within the scope of the written agreement because they both deal with manure. Gianni v. R. Russel.

Maday has replied in two ways. First, Maday has argued that the oral promise "is consistent with the easement [agreement]" and that "the circumstances and 'conduct of the parties indicate that the parties did not intend' a complete integration." This argument appears to rest on the rule that a partially integrated agreement discharges only terms that are inconsistent. Rest. § 213(1). In this case, Maday will argue that the oral agreement is consistent with the written contract because nothing in the written agreement says that GB will not supply all of its manure.

Second, Maday has argued that the oral promise "addresses terms that would naturally be contained in a 'separate agreement.'" This argument appears to rest on the rule that a completely integrated agreement only discharges terms that are within its scope. Rest. § 213(2).

4. Statute of Frauds. GB may respond that if the alleged promise to supply all of the manure was made orally, the statute of frauds bars its enforcement. The statute of frauds requires a signed writing because the only possible consideration for the alleged oral promise was an interest in land (i.e., the easement). Rest. § 125(1).

*Remedies:*

5. Damages. Maday may seek expectation damages equal to its loss in value (i.e., the value of the manure sold to others) minus Maday's costs avoided (i.e., nothing because Maday has already granted GB an easement). Rest. § 347.

Note: Several answers suggested that Maday would seek specific performance or an injunction. But this argument is frivolous because manure is certainly not unique; Maday could buy it from someone else.

OTHER

6. Other

**PROBLEM II.**

[Max. points: #1=4; #2=3; #3=3; #4=3; #5=3; #6=3; #7=2; #8=4; #9=3; #10=2; #11=n/a]

APAC v. TDOT

*Claim:*

1. Breach of contract. APAC might sue TDOT for breach of contract, claiming that TDOT promised to pay the contract price for the paving project and broke that promise by improperly withholding \$232,281 of the contract price.

*Defenses:*

2. Non-occurrence of an express condition. TDOT will respond that under SP 411, its duty to pay the contract price for each section of the paving project was expressly conditioned on the section passing the rideability test unless the section was exempt. Because all of the sections failed the rideability test, and only two sections were exempt, TDOT will argue that it only had to pay for two sections and could withhold payment for the remaining sections (i.e., \$232,281). Rest. § 237; Luttinger v. Rosen; Gibson v. Cranage.

*Replies:*

3. The entire road was exempt from the express condition. APAC will contest TDOT's interpretation of SP 411C, arguing that SPC 411C makes the entire road exempt. To substantiate this view, APAC will assert that (1) the meaning of the SP 411C exemption is ambiguous in that it could mean either that the entire road was exempt or that only affected sections were exempt; (2) parol evidence should be admitted to show its meaning; (3) this evidence shows that APAC's agents understood the exemption to mean that the entire road is exempt from the rideability requirements because some sections were either "urbanized areas . . . where there are numerous commercial driveways" or "[r]ural locations where there are constant changes"; (4) TDOT knew or should have known that the exemption had this meaning; and (5) TDOT's meaning therefore should control. Rest. § 201(2); Frigalment v. BNS.
4. More than two road sections were exempt from the express condition. Alternatively, APAC may contest TDOT's interpretation of the SP 411C exemption, arguing that more than two sections were exempt from the express condition. It will assert that, in deciding which sections are exempt, TDOT has misinterpreted the terms "urban," "rural," "numerous,"

and "constant." Again, it will contend that these terms are ambiguous, that parol evidence should be admitted to show their meaning, that APAC thought that they had a meaning that would exempt additional sections, and that APAC's meaning should prevail because TDOT knew or should have known these meanings. Rest. § 201(2); Frigalment v. BNS.

5. Non-Occurrence of a Constructive Condition. APAC will also reply that its performance was constructively conditioned on TDOT's complying with its duty of good faith and fair dealing, and TDOT breached that duty by arbitrarily imposing work limitations that prevented APAC from correctly performing. Cf. Luttinger v. Rosen (argument that an express condition should not apply because buyers did not exercise due diligence).
6. Impracticability. APAC will argue that its performance was rendered impracticable by TDOT's imposing limitations restricting paving to hours between 9:00 a.m. and 3:00 p.m. Rest. § 261; Taylor v. Caldwell.

*Remedy:*

7. Expectation Damages. APAC will seek expectation damages equal to its loss in value (i.e., \$232,281) minus its costs avoided (i.e., nothing). Rest. § 347.

APAC v. TDOT

*Claim & Remedy:*

8. Restitution/Divisibility. APAC might sue TDOT for restitution, claiming that even if its failure to pass the rideability test prevents it from recovering under the contract TDOT would be unjustly enriched if it could retain the benefit of paving without having to pay for it. APAC will seek the benefit conferred minus any damages caused. Rest. § 374(1); Britton v. Turner. Alternatively, APAC might argue that the contract is divisible and that it should be completely paid in full for any portions that it improved, even if it did not improve entire sections. Rest. § 240; Kirkland v. Archbold. TDOT presumably will respond that the work did not provide any net benefit and that by contract the work was already divided into segments and cannot be further divided.

TDOT v. APAC

*Claim & Defenses:*

9. Breach of Contract. If withholding \$232,081 is not enough to compensate TDOT, TDOT might sue APAC for breach of contract, claiming that APAC (1) promised to repave and improve the rideability of Route 336 by 30%, and (2) promised to remove deficient asphalt and repave any sections that did not improve by 15%, and breached these promises. APAC will raise the same defenses as listed in its replies above.

*Remedy:*

10. Damages. TDOT will seek expectation damages equal to its loss in value (i.e., what it will cost to remove the deficient asphalt and repave) minus its costs avoided (i.e., the \$232,281 that it withheld).

OTHER

11. Other

**PROBLEM III.**

[Max. points: #1=5; #2=3; #3=3; #4=4; #5=5; #6=3; #7=3; #8=4; #9=n/a]

DINGXI v. BECWOOD

*Claim:*

1. Breach of Contract. Dingxi might sue Becwood for breach of contract, claiming that Becwood promised to pay for 612 metric tons of inulin to be delivered in four shipments and broke that promise when Becwood only paid for the first installment.

*Defense:*

2. Right to reject the second installment. Becwood will argue that it had a right to reject the second installment because all three of the elements of § 2-612(b)'s rule on rejecting an installment were met. Graulich Caterer v. Hans Holterbosch; Midwest Mobile Diagnostic v. Dynamics. First, the installment was "non-conforming." Becwood will argue the Dingxi made an implied warranty that the goods would be merchantable, and they were not merchantable. Although the inulin itself was not contaminated with mold, it was not merchantable because it was not "adequately . . . packaged." § 2-314(2)(e). Adequate packaging, Becwood will assert, is not contaminated with mold. Second, "the non-conformity substantially impair[ed] the value of that installment." Becwood will argue that the mold required it to remove the installment from its warehouse for fear of contamination. Third, the non-conformity "could not be cured." Given that the installment had to be removed from the warehouse, Becwood had no way to wait for Dingxi to cure the problem. Becwood will also assert that Dingxi waived its right to cure because Dingxi did not "seasonably notify" Becwood of its intention to cure. § 2-508(1).

Note: The facts suggest that the contamination occurred when Dingxi was delivering the inulin to the FOB location and was therefore Dingxi's responsibility. § 2-319(1)(a).

3. Right to withhold payment for the third and fourth insallments. Becwood will further argue that it has a right to withhold payment for the third and fourth shipments because they were not delivered. § 2-711(1)

*Remedy:*

4. Contract Price. Dingxi is seeking "[the full contract price of] \$1,415,086 'together with interest, disbursement costs, expenses and reasonable attorneys' fees.'" But Becwood will argue that Dingxi cannot recover the full purchase price unless the goods have been accepted or they are white elephants. § 2-709(1)(a) & (b); N. Bloom & Son v. Skelly. In this case, the goods were not accepted and are fungible.

Alternatively, Dingxi might seek damages measured by the difference between the market price and contract price (if there is any difference), § 2-708(1); the difference between the contract price and resale price (if Dingxi resold the goods), § 2-706(1); or by Dingxi's lost profit (if Dingxi can show that it was a lost-volume seller), § 2-708(2). Under any of these alternative measures, Dingxi likely could recover "disbursement costs" and "expenses" as incidental damages.

Whether or to what extent Dingxi could recover interest or attorney's fees is a matter of state law outside the UCC.

BEWOOD v. DINGXI

*Claim:*

5. Breach of Contract. Becwood might sue Dingxi, claiming that Dingxi promised to ship four installments of inulin that were merchantable, and broke this promise by shipping a non-conforming second installment (which Becwood rightfully rejected) and by stopping delivery of the third and fourth installments.

*Defenses:*

6. No breach as to second installment. Dingxi will argue that Becwood had no right to reject the second installment either because the installment was not defective (see above) or because the defect could have been cured (see above).
7. No breach as to third and fourth installments. Dingxi also will argue that it did not breach with respect to the third and fourth installments. Although Becwood did not receive these installments, Dingxi appears to believe that it had a right to stop delivery of the second and third shipment because Becwood rejected the first one. But Becwood will respond that Becwood would have a right to stop delivery only if Dingxi had discovered Becwood to be insolvent after shipping the goods, § 2-702(1), and there is no suggestion that Becwood is insolvent.

Note: Because Dingxi has already delivered the third and fourth installments to the F.O.B. location, Dingxi cannot exercise its rights to withhold delivery under § 2-703(a) or to suspend its performance under § 2-609(1).

*Remedy:*

7. Market or Cover Damages. Becwood may cancel, withhold payment, and seek damages equal to the difference between the market price and the contract price (if there is any difference), § 2-713, or the difference between the cover price and contract price (if Becwood covered), § 2-712. Becwood also could recover incidental damages (such as the cost of inspecting, removing, and storing the rejected installment) and consequential damages (if any) from not receiving the inulin.

OTHER

8. Other

**PROBLEM IV.**

[Max. points: #1=3; #2=2; #3=2; #4=2; #5=3; #6=3; #7=2; #8=2; #9=3; #10=3; #11=2; #12=3; #13=n/a]

CARSON CONCRETE v. METAL PARTNERS

*Claims:*

1. Breach of Contract and Breach of Warranty. Carson Concrete might sue Metal Partners for breach of contract, claiming (1) that Metal Partners promised to deliver the installments at certain times, and breached that promise by delivering some installments late (i.e., those "leading to complaints about timeliness"); and (2) that Metal Partners promised to deliver additional installments, and breached that promise by refusing to deliver them (i.e., those installments that it is withholding until it receives payment).

Carson Concrete also might sue Metal Partners for breach of warranty, claiming that Metal Partners warranted that the drawings and fabrications would have a certain level of quality and accuracy, and breached the warranty for the defective installments that Carson Concrete accepted (i.e., those that had to be "re-fabricated correctly"). More facts are needed to ascertain the exact nature of the warranty and the breach. The warranty might be an express warranty, § 2-313(1), Doug Connor Inc. v. Proto-Grind; the implied warranty of merchantability, § 2-314(1), Ambassador Steel v. Ewald Steel; or the implied warranty of fitness for a particular purpose, § 2-315, Tyson v. Ciba-Geigy Corp.

*Defense:*

2. Waiver of lateness. Metal Partners might argue that Carson Concrete waived its right to recover for the defective and late deliveries because it did not cancel its orders. Cf. Wisconsin Knife Works v. Wisconsin Metal Crafters. Carson Concrete will respond that its complaints to Metal Partners showed that it was not waiving objections.
3. Remedy provided. Metal Partners might argue that it already provided a remedy for the defective installments by having them re-fabricated. But Carson concrete still might be entitled to a remedy for the delay.
4. Right to withhold delivery. Metal Partners has argued that it had a right to withhold delivery of future installments because Carson Concrete "fail[ed] to make a payment due" for past installments. Metal Partners could withhold future deliveries if the breach went to the whole contract. § 2-612(2). In this problem, the facts do not suggest that delivering the future installments would result in "material inconvenience," especially as Metal Partners had not complained about late shipments before.

*Remedy:*

5. Damages. For the installments that Carson accepted despite the late delivery (including those that were returned late after being re-fabricated), Carson might seek damages as measured in any reasonable manner plus incidental and consequential damages (e.g., higher labor costs and equipment rental expenses, etc.). § 2-714(1) and (3).

For the installments that Metal Partners failed to deliver, Carson will seek cover damages equal to the difference between the cover price (\$910 per ton paid to Men of Steel) and the contract price (\$860), plus any incidental and consequential damages (see above). § 2-706(1).

For the installments that it accepted despite breaches of warranty, if the problems have not been cured, Carson Concrete will seek damages equal to the difference between the goods as warranted and as accepted, plus incidental and consequential damages (see above). § 2-714(2).

METAL PARTNERS v. CARSON CONCRETE

*Claim:*

6. Breach of Contract. Metal Partners might sue Carson Concrete for breach of contract, claiming that Carson Concrete promised to pay for installments of steel within 30 days of delivery, and breached this promise by (1) making late payments for steel that has already been delivered; (2) withholding \$246,999.38 in payments for steel that has already been delivered; and (3) implicitly repudiating the promise to

pay for future requirements when it bought substitute steel from Men of Steel, § 2-610 cmt. 2.

*Defense:*

7. Waiver. Carson will assert that Metal Partners waived its objection to the lateness of the payments by not complaining about the lateness before April 19. Cf. Wisconsin Knife Works v. Wisconsin Metal Crafters.
8. Right to cancel/withhold payment for future deliveries. Carson Concrete will respond that it had a right to cancel the contract and withhold payment with respect to future requirements because Metal Partners has repudiated the contract by saying that it will not deliver the steel. § 2-711.

Note: Carson Concrete does not appear to have grounds for withholding payment for the steel that it has accepted.

*Remedy:*

9. Damages. Metal Partners will seek damages. For the installments that Carson has accepted, Metal Partners will seek the full contract price. § 2-709(1). For the deliveries that Carson has repudiated, Metal Partners might seek damages measured by the difference between the market price and contract price (if there is any difference), § 2-708(1); the difference between the contract price and resale price (if Metal Products resold the goods), § 2-706(1); or its lost profit (if it can show that it was a lost-volume seller), § 2-708(2).

METAL PARTNERS & CARSON CONCRETE v. VECTOR SHADES

*Claim:*

10. Breach of Warranty. Metal Partners and Carson Concrete might sue Vector Shades for breach of the implied warranty of fitness for a particular purpose, claiming that Vector shade produced shop drawings that were not fit for Carson's projects because they were inaccurate and had other quality problems. § 2-315.

*Defense:*

11. Lack of Privity. Vector Shades might argue in defense that Carson lacks privity to enforce the warranty. Although § 2-318 does not address whether indirect buyers of defective products may recover for breach of warranty, some courts have allowed it. Morrow v. New Moon Homes.

*Remedy:*

12. Warranty Damages. Metal Partners and Carson Concrete will seek warranty damages equal to the difference in value between the shop drawings as warranted and the value as accepted, plus consequential damages from the delay that the problems caused. § 2-714(2).

OTHER

13. Other

#### **PROBLEM V.**

[Max. points: #1=6; #2=4; #3=4; #4=5; #5=5; #6=3; #7=3; #8=n/a]

LIGURIA FOODS v. GRIFFITH LABORATORIES

*Claim:*

1. Breach of Implied Warranties. Liguria Foods (LF) might sue Griffith Laboratories (GL) for breach of three warranties: (1) an express warranty that the "Optimized Pepperoni Seasoning" would have a shelf-life of "up to 180 days" (6 months), § 2-313(1), Doug Connor Inc. v. Proto-Grind; (2) an implied warranty of fitness for LF's particular purpose of producing pepperoni that would have a shelf-life of 270 days (9 months), § 2-315, Tyson v. Ciba-Geigy Corp.; and (3) an implied warranty that the goods would be merchantable, § 2-314(1), Ambassador Steel v. Ewald Steel. LF will argue that GL breached the express warranty and the implied warranty of fitness for a particular purpose because the seasoning caused the pepperoni to turn prematurely green and gray after 140-160 days. LF will claim that GL breached the implied warranty of merchantability because the seasoning was not fit for ordinary purposes because the BHA and BHT preservatives were not evenly distributed and were not in liquid form or dissolved in vegetable oil.

*Defenses:*

2. Puffing. GL may respond that it did not make an express warranty that the seasoning would have a shelf-life of 180 days. Instead, it merely said that it would have a shelf-life of "up to 180 days." Any buyer would have recognized this statement as noncommittal puffery. Cf. Doug Connor Inc. v. Proto-Grind.
3. No breach of warranty. GL also appears to be arguing that low quality pork, not its spice, caused the premature spoilage of the pepperoni. But LF has asserted that the spice must have been the cause because it used the same quality meat in other products without the spice and did not have the same problem.

*Remedy:*

4. Damages. LF will seek warranty damages equal to the difference in value between the seasoning as warranted and as accepted (perhaps nothing, if LF cannot use it), plus incidental and consequential damages. § 2-714(2) & (3). LF will claim that its consequential damages include damages owed to customers and lost business.

CUSTOMERS v. LIGURIA FOODS and GRIFFITH LABORATORIES

*Claim:*

5. Breach of Warranty. The customers who bought the pepperoni might sue LF for breach of an express warranty that the pepperoni would have a shelf-life of 270 days. The customers also might sue GL for breach of implied warranty that seasoning would be merchantable.

*Defense:*

6. Lack of privity. GL will argue that the customers of LF lack privity and therefore cannot recover for breach of the implied warranty of merchantability. Although § 2-318 does not address whether indirect buyers of defective products may recover for breach of warranty, some courts have allowed it. Morrow v. New Moon Homes.

*Damages:*

7. Damages. The customers will seek warranty damages equal to the difference in value between the spice as warranted and as accepted, plus incidental and consequential damages. § 2-714(2) & (3).

OTHER

8. Other

Grading Guide for Final Examination In

CONTRACTS II

(Course No. 203-21; 3 credits)

Professor Gregory E. Maggs

Each of the problems on the final examination presented a fact pattern from an actual case and asked you to write an essay identifying and discussing the claims and defenses that the parties might assert, and the remedies that they might seek. In grading your answers, I awarded points based on how well you identified and discussed the likely claims, defenses, and remedies.

The class as a whole did very well. Most answers showed a thorough understanding of the material, reflecting a great deal of productive study and thought. Grades were awarded based on the Law School's mandatory grading guidelines.

This grading guide provides the checklists that I used in grading answers. Please note that these checklists are not model answers. They are not model answers because the instructions required all answers to be written in essay form, using complete sentences and proper paragraphs.

This grading guide is also not meant to be a definitive solution. Everyone sees things in a slightly different way. I attempted to be as flexible and generous as possible when grading. I usually found ways of awarding points when answers discussed issues not specifically listed on the grading guide or when they characterized issues differently from the grading guide.

Points were deducted for failure to follow examination instruction 3 (i.e., exceeding 4500 words), examination instruction 5 (not writing answers in essay form or not using complete sentences and proper paragraphs), and in some extreme cases examination instruction 6 (not skipping a line between paragraphs and indenting the first line of each paragraph). A notation appears on the score sheet of anyone who lost points for these reasons.

The problems were based on edited versions of these cases: I. JB Pool Mgt. v. Four Seasons at Smithville Homeowners Ass'n, 67 A.3d 702 (N.J. Super. A.D. 2013); II. Podraza v. New Century Physicians of Nebraska, 789 N.W.2d 260 (Neb. 2010); III. Green v. McClendon, 2010 WL 3701333 (S.D.N.Y.); IV. Oakley Fertilizer, Inc. v. Continental Ins. Co., 276 S.W.3d 342 (Mo. App. 2009); and V. Smith-Nedd v. Crystal Manor, 2012 WL 3734426 (N.Y. Sup. App. Term).

**PROBLEM I.**

[Points per item: 1: 4; 2: 4; 3: 4; 4: 2; 5: 4; 6: 4; 7: 2; 8: 4; 9: flexible]

JB POOL v. FOUR SEASONS

*Claim:*

9. Breach of Contract. JB Pool might sue Four Seasons for breach of contract, claiming that Four Seasons promised to pay JB Pool a monthly fee for providing lifeguards and maintenance services, and broke this

promise when it did not pay the fee for the last four months of the term of the contract.

*Defenses:*

10. Non-Occurrence of the Constructive Condition of Prior Performance (i.e., failure of the consideration). Four Seasons has cited Restatement § 237. Four Seasons apparently is arguing that its performance (i.e., paying JB Pool) was constructively conditioned on JB Pool's performance and was excused by the uncured material failure of JB Pool to provide services for the last four months. Whether a constructive condition of prior performance by the other party exists depends on the evident sense and meaning of the contract. Kingston v. Preston. While such a condition ordinarily would exist in a service contract, JB Pool will reply there was no such condition here based on the contract clause, discussed below, requiring Four Seasons to pay even if JB Pool does not perform.
11. Impracticability. Four Seasons also has cited § 261. Four Seasons apparently is arguing that its performance was excused because the performance was "made impracticable without [its] fault by the occurrence of an event the non-occurrence of which was a basic assumption." See, e.g., Taylor v. Caldwell. But JB Pool will reply that Four Seasons' performance was merely paying money and paying money was not rendered impracticable by the closure of the pool. See Prof. Mixup's Principle # 3.
12. Waiver. Four Seasons also has asserted that JB Pool "waived" the unpaid charges because it was not providing services. JB Pool, however, will assert that a waiver is a voluntary relinquishment of a right and it did not voluntarily give up its right to payment. On the contrary, JB Pool insisted on the payments in the contract and again when Four Seasons stopped paying.
13. Frustration of Purpose. Four Seasons also might argue that non-performance was excused based on frustration of purpose, asserting that both parties assumed that the pool would be open when they made the contract and it was in fact shut down. Restatement § 265; Krell v. Henry. JB Pool will assert that the contract clause (described below) precludes this defense.

*Reply:*

14. Contract Clause Concerning Pool Closure. JB Pool will reply to all of Four Seasons' arguments by citing the contract clause quoted in the problem. JB Pool will assert that this clause excuses its non-performance attributable to reasons beyond its control, which it will argue includes having officials shut down the pool. To support this interpretation of the clause, JB Pool will cite the parties' course of performance, during which Four Seasons paid for the first three months when JB Pool was not providing services. Four Seasons will respond that the clause does not apply in this situation. It has cited parol evidence that the parties intended the clause to apply only to short-term closures of the pool. JB Pool will respond that the court should not consider this parol evidence regarding the meaning of the term because it has a plain meaning. Even if the parol evidence is admitted under the modern intent rule, Pacific Gas v. GW Thomas Drayage, JB Pool will argue that the meaning that it has attached to the contract clause should control because it did not know and had no reason to know of the meaning asserted by the Four Seasons. Rest. § 201(2).

*Remedy:*

15. Liquidated Damages. JB Pool will seek \$16,376 as damages, the full amount of the unpaid monthly charges. JB Pool will say that these damages are liquidated, and thus cannot be reduced by the amount of expenses saved, by the clause saying "[t]here will be no reduction in charges of the contract amount for any closing." Four Seasons will contend that this amount is unreasonable in light of actual or anticipated damages because JB Pool could be expected to and did save costs while the pool was closed. Rest. § 356(1).

FOUR SEASONS v. JB POOL

16. Restitution. Four Seasons might sue JB Pool under a theory of restitution, claiming that JB Pool was unjustly enriched by the four payments that Four Seasons made to JB Pool when JB Pool did not do any work. JB Pool will respond that it was entitled to this money under the contract for the reasons given above.

OTHER

17. Other

**PROBLEM II.**

[Points per item: 1: 4; 2: 4; 3: 4; 4: 4; 5: 4; 6: 4; 7: 4; 8: flexible]

PODRAZAS v. NEW CENTURY PHYSICIANS

*Claim:*

1. Tort/Breach of Contract: The Podrazas apparently will sue New Century Physicians based on either a tort claim (perhaps malpractice) or a contract claim (perhaps promising to provide certain medical services and then not providing them), seeking to recover for injuries sustained when New Century Physicians failed to discover herGi appendicitis. More detail is not possible given the limited facts.

*Defense:*

2. Release. New Century Physicians will defend on grounds that they were released from liability by the settlement agreement that the Podrazas made with Alegent Heath. New Century Physicians will assert that they are "others directly or indirectly liable or claimed to be liable" for claims arising out of the care received by Kathryn Podraza.

*Reply:*

3. Meaning of Term. The Podrazas will assert that the release does not apply to New Century Physicians (despite the apparent meaning of its text) based on the testimony that the Podrazas and Alegent did not intend for the release to apply to New Century. They will assert that the meaning that they attached to the terms should prevail because the small size of the settlement indicates that both parties knew or should have known New Century would not be released. Rest. § 201(2); Frigalment v. BNS Int'l Sales. New Century will argue that the court should apply the Plain Meaning Rule and exclude consideration of this testimony about what the parties intended the written clause to mean.
4. Prior Agreement. The Podrazas also will argue that the release does not apply to Alegent because Alegent told Podraza that the contract would

not release New Century. New Century will respond that this alleged prior term is discharged under the parol evidence rule because the release is complete integration (given its merger clause) and because this prior agreement is within the scope of the release (given that it would normally and naturally have been included in the agreement). Gianni v. R. Russel; Rest. § 213(2).

5. Lack of Privity. The Podrazas also will argue that, even if the release is interpreted to cover New Century Physicians, New Century Physicians cannot enforce the release because New Century lacks privity. New Century was not a party to the contract. They will further assert that New Century was not an intended third-party beneficiary of the contract because the testimony shows that recognition of a right to enforce is not "appropriate to effectuate the intentions of the parties." Rest. § 302(1); Bain v. Gillespie. On the contrary, the parties to the contract testified that they did not intend to release New Century.

*Remedies:*

6. Reformation. If the court concludes that the clause covers New Century, the Podrazas might seek reformation of the contract based either on mutual mistake as to content or fraud. Rest. §§ 155, 166; Bollinger v. Central Penn. Quarry. They would base their claim for reformation on Alegent's assertion about the effect of the contract. They would ask for the court to reform the release to say that it does not apply to New Century.
7. Damages. The Podrazas will seek contract or tort damages for their injuries. More detail is not possible given the ambiguous nature of the claim.

OTHER

8. Other

Note: There are two sets of parol evidence rules. One set concerns the discharge of prior agreements. See, e.g., Gianni v. R. Russel. The other set concerns the use of extrinsic evidence to prove meaning. See, e.g., Pacific Gas v. GW Thomas Drayage. Many answers confused or jumbled together these two sets of rules. See Prof. Mixup's Principle # 5.

**PROBLEM III.**

[Points per item: 1: 5; 2: 5; 3: 5; 4: 5; 5: 4; 6: 4; 7: flexible]

GREEN v. McCLENDON

*Claim:*

1. Breach of contract. Green might sue the McClendons for breach of contract, claiming that they promised to buy a painting by Pierre Bonard for \$4.2 million, that they paid only \$500,000 of the price, and that they then refused to pay the remaining \$3.7 million.

*Defenses:*

2. Preliminary negotiations. The McClendons have asserted they did not commit themselves to buying the painting. They will argue that when they said that they "would be 'delighted'" to buy the painting that was only preliminary negotiations and not an offer or an acceptance of an offer. They further will argue that the \$500,000 was only "to hold the

painting for a year." Green will respond that a contract for sale can be made in any reasonable manner, including conduct by both parties which recognizes the existence of a contract. § 2-204(1); Jannusch v. Noffziger. Green will assert that these facts show the existence of a contract: (a) the McClendon's told him that they would be delighted to buy the painting; (b) they made an instalment payment of \$500,000; and (c) they failed to object to his further communications about the sale.

3. Statute of frauds. The McClendons also might assert the statute of frauds as a defense, arguing that their alleged promise to purchase the painting for a price of more than \$500 is not evidenced by a signed writing. § 2-201(1). In reply, Green might raise three exceptions to the writing requirement. First, he might argue that the merchant exception applies because they McClendons did not object to his writing in confirmation. § 2-201(2). The McClendons, however, will argue that they are not merchants because they do not deal in paintings (even if they collect them) and they do not hold themselves out by their occupation as having expertise in business practices (they are merely collectors). § 2-104(1); Urban v. Decatur Coop. Second, Green might assert the part performance exception for goods for which payment has been made. § 2-201(3). The McClendons will respond, as above, that they did not make a "payment" but merely a deposit to hold the goods. Third, Green might assert that he relied on the McClendons' promise when he did not sell the painting to someone else despite the declining market price. Some courts recognize reliance as an exception to the statute of frauds, see Urban v. Decatur Coop, while others do not, see Lige Dickson Co. v. Union Oil.

*Remedies:*

4. Price. Green's first choice of damages might be the contract price on the theory that the goods are "white elephants" because they cannot now be resold for reasonable price after reasonable efforts. § 2-709(1)(b). The facts, however, say only that the price has fallen; it is unclear whether the painting could be sold for a reasonable price.
5. Market Damages/Deposit. Green's second choice of damages might be the difference between the contract price and the now lower market price. § 2-708(1). Given that the market price has been falling, the McClendons will argue that the market price must be measured at the time that Green learned of the breach. See id. Green could also retain \$500 of the deposit in addition to the market damages. § 2-718(2)(b).

McCLENDON v. GREEN

6. Restitution. The McClendons might sue Green under a theory of restitution, seeking a refund of their \$500,000 payment (less \$500 and any damages for which they are liable). § 2-718(2) & (3). But Green might assert that under the McClendon's own theory, that money was paid to keep open an option to purchase the property. Payments made for an option contract cannot be recovered in restitution.

OTHER

7. Other

Note: Some answers improperly mixed together the distinct questions of (a) whether the McClendons promised to buy the painting and (b) whether their promise was evidenced by a signed writing sufficient to satisfy the statute of frauds.

#### PROBLEM IV.

[Points per item: 1: 6; 2: 6; 3: 6; 4: 6; 5: 4; 6: flexible]

AMEROPA NORTH AMERICA (Buyer) v. OAKLEY FERTILIZER (Seller)

*Claim:*

1. Breach of contract. Buyer (Ameropa North American) might sue the Seller (Oakley Fertilizer) for breach of contract, claiming that Oakley promised to deliver fertilizer conforming to the contract, that Oakley broke that promise by delivering damaged (i.e., "crusty wet") fertilizer, and that Oakley properly rejected the damaged goods under § 2-601(a).

Notes: (1) Several answers said that Ameropa would claim that Oakley breached an express or implied warranty regarding the fertilizer. A buyer, however, only has a claim for breach of warranty if the buyer accepts the goods. See Prof. Mixup's Principle # 7. In this case, Ameropa rejected the fertilizer. (2) Several answers said Oakley would sue Ameropa for wrongly rejecting the goods. The facts, however, says that the Ameropa tendered full payment to the Oakley. Unless Oakley returned the money, Oakley would have no reason to sue Ameropa.

*Defense:*

2. Risk of Loss. Oakley will argue in defense that Ameropa had no right to reject the goods because the goods were undamaged when the risk of loss passed from Oakley to Ameropa North American. Oakley will explain that the seller ordinarily bears the risk of loss only to the FOB location. 2-319(1); 2-509(1). Accordingly, Oakley will argue that the risk of loss passed when it placed the goods on board in New Orleans. After that, any damage was Ameropa's problem.

*Reply:*

3. Risk of Loss/Battle of the Forms. Ameropa will reply that the ordinary risk of loss rules do not apply because the form provided by Oakley contained a clause specifying that the risk of loss would not pass until the seller received payment ("good funds") from the buyer. Ameropa will assert the goods were already damaged by the time Ameropa paid Oakley (even though Oakley said that the goods were not damaged).

Oakley may respond that this clause did not become part of the agreement because Ameropa never signed Oakley's form but instead returned a different form. Oakley will assert (a) image rule in § 2-207(1); (b) in Oakley's form, cf. Belden Inc. v. American Elec. Comps.; and (c) that under "gap filler" rules described above, Ameropa assume the risk of loss at the FOB location. Ameropa may contest whether its form really contained a "different term" that would knock out the term in Oakley's form.

*Remedy:*

4. Recovery of Payment and Market Damages. Ameropa will seek recover its payment of the full contract price to Oakley, § 2-711(1), plus market damages equal to the difference between market price for the fertilizer and the contract price for the fertilizer, § 2-713(1), plus incidental damages (e.g., inspection and storage of the damaged fertilizer), § 2-715(1) and consequential damages (e.g., damages from not having the goods, § 2-715(2)).

OAKLEY v. INSURER

*Claim & Remedy:*

5. Breach of contract. If Oakley does not prevail in the lawsuit by Ameropa, it will sue its insurer for breach of contract, claiming that it agreed to insure the cargo and did not pay. It will seek the amount of the insurance. No more detail is possible given the limited facts presented.

OTHER

6. Other

**PROBLEM V.**

[Points per item: 1: 6; 2: 4; 3: 4; 4: 6; 5: 4; 6: 6; 7: flexible]

NICHOLE v. CRYSTAL MANOR

*Claim:*

1. Breach of Contract/Merchantability. Nichole might sue Crystal Manor for: (a) breach of the implied warranty of merchantability, claiming that Crystal Manor implicitly warranted the food provided would be fit for ordinary purposes but some of it was undercooked and inedible; (b) breach of contract, claiming that Crystal Manor promised (at least implicitly) to serve the food in a timely manner but served some of it so late that guests departed before being served; and (c) breach of contract, claiming that Crystal Manor promised to assemble and serve the wedding cake, and broke this promise by not serving some of the guests.

*Defenses:*

2. No breach. Crystal Manor appears to argue that it did not breach the contract at all. Its witnesses contested the inadequacy of the food and services. Crystal Manor also said that it did not receive any complaints about the food.
3. Substantial Performance. Crystal Manor also apparently is arguing that, even if it did breach the contract, it is not liable because of its "substantial performance." Nichole, however, will respond that substantial performance is not a defense to liability. See Prof. Mixup Principle # 2. Substantial performance is enough to satisfy the constructive condition of prior performance by the other party but it does not excuse the defendant from liability for breach. See Rest. § 237; Plants v. Jacobs.
4. No implied warranty of merchantability. Crystal Manor also might argue that there was no implied warranty of merchantability because the parties had not formed a contract for the sale of goods. It will assert that the contract was hybrid of goods (i.e., food and beverage) and services (i.e., providing the hall, serving the food, and assembling the cake), and that, under the predominant purpose test, the services prevail. See BMC Industries v. Barth Industries. The court will look at the value of the food served and other factors. Nichole may argue that the court should apply the gravamen of the complaint test, Advent Systems v. Unisys, or divide the contract into separate components.

5. No notice. Crystal Manor will assert that Nichole cannot recover for the goods accepted because it did not give notice within a reasonable time of breach. § 2-607(3)(a). Crystal Manor did not receive any notice on the night of the wedding, which would have been the reasonable time to present notice because it would be impossible to cure at a later time.

*Remedies:*

6. Damages. Nichole will seek (a) warranty damages for defective food, measured by the difference between what was warranted and what was delivered, § 2-714(2); (b) damages for goods that were delivered late and improperly assembled, but accepted despite the defect in their tender, measured in any reasonable manner, § 2-714(1); and (3) a refund of the money for the goods not delivered plus any difference between the contract price and market price, § 2-711(1) & § 2-713(1).

OTHER

7. Other

Grading Guide for Final Examination In

CONTRACTS II

(Course No. 203-21; 3 credits)

Professor Gregory E. Maggs

Each of the problems on the final examination presented a fact pattern from an actual case and asked you to write an essay identifying and discussing the claims and defenses that the parties might assert, and the remedies that they might seek. In grading answers, I awarded points based on how well the answers identified and discussed the claims, defenses, and remedies.

The class as a whole did very well. Most answers showed a thorough understanding of the material, reflecting a great deal of productive study and thought. Grades were awarded based on the Law School's mandatory grading guidelines.

This grading guide provides the checklists that I used in grading answers. Please note that these checklists are not model answers. They are not model answers because the instructions required all answers to be written in essay form, using complete sentences and proper paragraphs.

This grading guide is also not meant to be a definitive solution. Everyone sees things in a slightly different way. I attempted to be as flexible and generous as possible when grading. I usually found ways of awarding points when answers discussed issues not specifically listed on the grading guide or when they characterized issues differently from the grading guide.

Points were deducted for failure to follow examination instruction 3 (i.e., exceeding 4500 words), examination instruction 5 (not writing answers in essay form or not using complete sentences and proper paragraphs), and in some extreme cases examination instruction 6 (not skipping a line between paragraphs and indenting the first line of each paragraph). A notation appears on the score sheet of anyone who lost points for these reasons.

The problems were based on edited versions of these cases: I. Sisco and Close Properties v. C & E Partnership, 2012 WL 6757939 (Tenn. Ct. App.); II. Hunt v. Lower Harbor Properties, L.L.C., 2012 WL 5233633 (Mich. App.); III. Razorback Concrete Co. v. Dement Const. Co., LLC, 688 F.3d 346 (8th Cir. 2012); IV. Brooks Cotton Co., Inc. v. Williams, 381 S.W.3d 414 (Tenn. Ct. App. 2012); V. Audio Visual Artistry v. Tanzer, 2012 WL 6697600 (Tenn. Ct. App.).

**PROBLEM I.**

[Points per item: 1: 4; 2: 4; 3: 4; 4: 4; 5: 4; 6: 2; 7: 3; 8: 3; 9: flexible]

SISCO & CLOSE PROPERTIES v. C & E

*Claim:*

8. Breach of Contract. Sisco & Close Properties might sue C & E for breach of contract, claiming that C & E promised to pay \$550,000 for a tract of land on October 9 and broke that promise by paying only \$25,000 and then not closing (i.e., not paying the remaining \$525,000).

*First Defense and Reply to this Defense:*

9. Non-Occurrence of a Condition. C & E might argue that its performance was excused by the non-occurrence of a condition, namely that Lamar's offer to buy billboard easements would remain in effect. See Rest. 225(1); Luttinger v. Rosen. Sisco & Close might respond that, although they informed C & E of Lamar's offer, they never made the continuation of this offer a condition.
10. Discharge by the Parol Evidence Rule. Sisco & Close Properties might reply to this defense that any agreement pertaining to Lamar's offer would be discharged by the parol evidence rule. It will assert that the purchase agreement was a complete integration because it contained a merger clause and therefore discharged all prior and contemporaneous terms within its scope. A term conditioning the sale on the continuation of an offer to buy easements would be within the scope of the purchase agreement because terms about easements normally and naturally would have been included in a contract to sell land. Rest. § 213(2); Gianni v. R. Russell.

*Second Defense:*

11. Failure of Consideration (i.e., Non-Occurrence of a Constructive Condition of Performance). C & E has asserted "failure of consideration" as a defense. As discussed in class, failure of consideration is another name for the defense of non-occurrence of the constructive condition of performance, without material breach, by the other party. See Rest. § 237 cmt. a. C & E's argument appears to be that it is excused from paying because Sisco and Close Properties was unable to perform its promise in two respects. First, the corporation did not own the property. Second, the property to be conveyed was smaller by 3/4 of an acre than that which they had agreed to convey. C & E will assert that these material failures excused them from performing. Sisco & Close Properties, however, may assert that these failures were not material and at most should be compensated by an allowance for damages. Rest. §§ 237, 240; Jacob & Youngs v. Kent; Walker & Co. v. Harrison.

Note: The defense of "lack of consideration" is different from the defense of "failure of consideration." Lack of consideration is a defense to enforcement of a promise for which nothing was bargained in exchange. It does not apply here because the land was consideration for the promise to pay money.

*Third Defense:*

12. Frustration of Purpose. C & E also may argue that its purpose was frustrated by the revocation of Lamar's offer because the continuing existence of the offer was a basic assumption on which the contract was made. Rest. § 265; Krell v. Henry.

*Remedy:*

13. Expectation Damages. Sisco and Close Properties might seek expectation damages equal to their loss in value (i.e., the \$550,000 price - the \$25,000 earnest money already received) and their costs avoided (i.e., the \$350,000 value of the property), which is \$175,000. C & E could subtract an allowance for its own damages if the court finds that Sisco and Close Properties also committed a breach.

C & E v. SISCO & CLOSE PROPERTIES

*Claim:*

14. Restitution. C & E might sue Sisco & Close Properties in restitution, claiming that Sisco & Close would be unjustly enriched by retention of their earnest money deposit of \$25,000.

*Defense:*

15. No Unjust Enrichment. If C & E breached the contract, Sisco and Close will argue that a defaulting plaintiff cannot recover in restitution, which is still the rule in some jurisdictions. See Note (2), p. 742. In many other jurisdictions, however, a defaulting plaintiff may recover in restitution if the benefit conferred exceeds the damages caused. See Rest. § 374(1); Britton v. Turner. In this case, the \$25,000 does not exceed the \$175,000 in damages (see calculation above).

OTHER

16. Other

**PROBLEM II.**

[Points per item: 1: 4; 2: 4; 3: 4; 4: 4; 5: 6; 6: 4; 7: 2; 8: flexible]

HUNT & SANTANGELO v. Lower Harbor Properties (LHP)

*Claim:*

1. Negligence. The problem says that Hunt and Santangelo have sued Lower Harbor Properties (LHP) for "negligence" in exposing Hunt to harmful toxic substances. This appears to be a tort claim, although the defenses are all based on contract law.

*Defense:*

2. Release. LHP will argue that it is not liable to Hunt and Santangelo because Hunt and Santangelo released "all other persons, firms or corporations" when they settled their claim against Robert and Amy Armstrong.

*First Reply:*

3. Lack of Privity. Hunt and Santangelo might reply that LHP is not entitled to enforce the release that they gave to the Armstrongs and to Harbor Ridge Townhouse Condominium Association. They will assert that LHP lacks privity and is at most an incidental beneficiary. See Bain v. Gillespie. LHP may respond that it is an intended third-party beneficiary because the release specifically addressed third-parties and these third-parties are the only ones interested in enforcing this aspect of the release. Seaver v. Ransom; Rest. §§ 302, 304.

*Second Reply:*

4. Plain Language of the Release. Hunt and Santangelo might reply that the plain language of the release excludes LHP. Their argument might be that the release extends only to persons who have "sustained liability in consequence of the lease" and LHP was not involved in the "lease"; it merely built the property. But LHP might argue that the plain language actually does cover it because LHP would have had no liability to Hunt (or Santangelo) as the builder or otherwise if Hunt had not leased the property.

*Third Reply:*

5. Release as Understood by Extrinsic Evidence. Hunt and Santangelo further might reply that extrinsic evidence--namely, Hunt's affidavit--shows that the parties did not intend the release to include LHP. But LHP may argue that this extrinsic evidence cannot be considered under the Plain Meaning Rule. LHP will assert that the release has a plain meaning--namely, that everyone, including LHP, would be released (see point 4 above)--and that Hunt and Santangelo therefore cannot introduce parol evidence to clarify the meaning. Hunt and Santangelo might argue that the meaning LHP has asserted is not plain (see also point 4 above) and therefore extrinsic evidence is admissible under the Plain Meaning Rule. Alternatively, they might argue that, under the modern intent rule applied in some jurisdictions, extrinsic evidence always may be considered. Pacific Gas v. G.W. Thomas Drayage Co. If extrinsic evidence about what the parties intended is admitted, the parties will dispute whose meaning of the term should prevail. Hunt and Santangelo will assert the parties to the contract knew or should have known that LHP would not be released because the consideration for the release was so small. Rest. § 201; Frigalment v. BNS International Sales.

*Fourth Reply:*

6. Implied Term. Hunt and Santangelo finally might reply that there is an implied term in the release that LHP is not covered because the \$21,000 settlement was too small for it to make sense for the release to cover anyone other than those directly involved in the lease. Implied terms are not excluded by the Parol Evidence Rule. Cf. Dalton v. Educational Testing Service.

Remedy:

7. Damages. Hunt and Santangelo will seek tort damages for the injuries caused by LHP's negligence (again, apparently a tort claim).

OTHER

8. Other

**PROBLEM III.**

[Points per item: 1: 4; 2: 4; 3: 4; 4: 4; 5: 4; 6: 4; 7: 4; 8: flexible]

DEMENT (buyer) v. RAZORBACK (seller)

*Claim:*

1. Breach of Warranty/Contract. Dement might sue Razorback, claiming (1) that Razorback expressly warranted that the concrete already delivered and accepted would meet a requisite strength level and that Razorback breached this warranty because the concrete failed the strength tests, see § 2-313, Doug Connor Inc. v. Proto-Grind; and (2) that Razorback promised to supply all of the concrete needed for the bridge and broke this promise when it terminated the contract without justification in August.

Note: Based on the wording of the problem, a fair assumption is that the "requisite strength level" of the concrete was expressed in the contract. It is also possible that the strength level was established by implied warranties of merchantability, see § 2-314, or fitness for a particular purpose, see § 2-315.

*Defenses:*

2. No Breach of Warranty & No Improper Termination of the Contract. The facts indicate that Razorback will defend against Dement's breach of warranty claim by arguing that the concrete was not "substandard" but instead that the strength tests were "flawed." Razorback will further argue that it did not breach the contract by terminating the contract, asserting that it had a right to cancel the contract under § 2-703 because Dement repudiated its obligation by failing to provide adequate assurance that it would pay for future deliveries after a written request, see § 2-609(1) & (3), Clem Perrin Marine v. Panama Canal; and because Dement's repeated failure to pay for the concrete rose to the level of a breach of the whole contract, see § 2-612(3), Graulich Caterer v. Hans Holterbosch. The facts, however, do not indicate whether Razorback would suffer a material inconvenience by merely suspending performance instead of canceling the contract.

*Remedy:*

3. Damages. For the concrete that Dement has accepted, Dement would have a right to damages for breach of warranty plus consequential damages. §§ 2-714(2), (3) & 2-715(2). With respect to this concrete, Dement appears to be asking only for consequential damages for the 30 days of delay, which the contract apparently has liquidated with a time charge of \$5000 per day. § 2-718(1). Depending on facts not stated in the problem, Razorback might argue that this amount of damages is unreasonably high and is unenforceable as a penalty. See § 2-718(1).

Dement has suggested that some concrete might need to be removed and replaced. Dement would have a right to revoke its acceptance of this concrete if the defects substantially impaired the value of the concrete (which would be true if the concrete is not safe) and if it was difficult to discover the defects before acceptance (which would be true if the problem could only be detected after the concrete had hardened). § 2-608(1). If Dement revokes acceptance of the defective concrete, Dement also might seek as cover, incidental, and consequential damages for the estimated \$420,000-\$840,000 cost to remove and replace the concrete. See § 2-712(1), § 2-715(2).

For the concrete not delivered after August, Dement might claim either cover or market damages, see § 2-712 and § 2-713, but the facts do not indicate what these damages might be.

RAZORBACK (seller) v. DEMENT (buyer)

*Claim:*

4. Breach/Repudiation of Contract. Razorback might sue Dement for breach of contract, claiming (1) that Dement promised to pay for the concrete delivered in June and August, and withheld the money; (2) Dement stopped making any payments after August; and (3) Dement repudiated the contract by not providing adequate assurance that it would perform (i.e., pay without withholding money) following Razorback's proper request for such assurance, § 2-609(3).

*Defenses:*

5. Right to Withhold/Breach of the Whole/No Promise not to Setoff. Dement will argue that although the buyer ordinarily has a duty to pay the contract price of goods delivered and accepted, it had a right to withhold some of the payments in June and August as damages for breach of warranty. § 2-714(2). Dement also might assert that it was entitled

to withhold all payments after August because Razorback's breaches amounted to a breach of the whole contract. §§ 2-711; 2-612(1).

*Remedy:*

6. Contract Price. Razorback will seek the contract price for any concrete that Dement has accepted. § 2-709(1)(a); Bloom & Sons v. Skelly.
7. Lost Profit. Razorback has said that it will seek \$318,767 for the profit that it would have made on the rest of the contract. § 2-708(2). It will argue that it lost volume because its "high capacity plant" was capable of producing all of the cement needed by Dement and by other jobs. Neri v. Retail Marine Corp. But it is not clear that Razorback had the ability to produce all of the needed concrete all profitably, which is the test in some states. R.E. Davis v. Diasonics.

OTHER

8. Other

#### **PROBLEM IV.**

[Points per item: 1: 4; 2: 4; 3: 4; 4: 3; 5: 3; 6: 3; 7: 3; 8: 4; 9: flexible]

BROOKS COTTON v. WILLIAMS

*Claim:*

1. Breach of Contract. Brooks Cotton might sue Williams for breach of contract, claiming that Williams promised to sell his entire cotton crop for \$ 0.742 per pound but breached this promise because he only delivered 307 of 1206 bales in the crop.

*First Defense:*

2. No Promise to Sell. Williams's first defense, asserted in the facts, is that he never promised to sell the crop. But Brooks Cotton will disagree, asserting that he did make the promise and asserting that the delivery of 307 bales is circumstantial evidence that Williams did promise to sell the crop.

*Second Defense:*

3. Indefiniteness. Williams also may argue that the contract was too indefinite to enforce because Brooks Cotton did not have the "farm numbers" identifying the crop to be sold. Without knowing which crop was discussed, and therefore how large the crop was, the contract might be too indefinite because it might be impossible to determine an appropriate remedy. § 2-204(3).

*Third Defense and Replies to this Defense:*

4. Statute of Frauds. Williams further might raise the statute of frauds as a defense because the contract was for the sale of goods (i.e. growing crops) for a price of more than \$500 and it was not evidenced by a signed writing. § 2-201(1).
5. Merchant Exception. Brooks Cotton may reply that the merchant exception to the statute of frauds applies because Brooks Cotton sent a writing in confirmation to which Williams did not respond. § 2-201(2). But Williams will respond that the requirements for the merchant exception

are not met because (1) Brooks Cotton did not send the writing in confirmation within a reasonable time, and (2) as a farmer, Williams is not a merchant. On the first issue, it does not sound like Brooks Cotton had a good reason for waiting 29 days before sending the writing in confirmation. It seems likely that he could have confirmed the farm numbers or obtained assistance in sending out the confirmation. On the second issue, courts are divided about whether farmers hold themselves out by their profession as having expertise as to business practices. § 2-104(1); Decatur Coop v. Urban.

6. Part-Performance Exception. Brooks Cotton also might reply that the partial performance by Williams is an exception to the statute of frauds defense because he delivered 307 bales. § 2-201(3)(c). But the contract would not be enforceable beyond the amount delivered, see id., and therefore, this exception would only have limited value to Brooks Cotton.
7. Reliance Exception. Brooks Cotton also might argue that the promise is enforceable notwithstanding the statute of frauds because Brooks Cotton relied on the promise when he contracted to resell the cotton to another buyer. Courts have disagreed about whether there can be a common law reliance exception to the statute of frauds in § 2-201 based on promissory estoppel as a supplementary general principle. Compare Decatur Coop with Lige Dickson.

*Remedy:*

8. Market/Cover Damages. Brooks Cotton might seek damages measured by the difference between the market price and contract price or the cover price (if Brooks Cotton covered) and the contract price. §§ 2-712(1); 2-713(1).

OTHER

9. Other

#### **PROBLEM V.**

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

TANZER v. AUDIO VIDEO ARTISTRY ("AVA")

*Claim:*

1. Breach of Contract. Tanzer might sue AVA for breach of contract, claiming that AVA promised to sell and install electronic and entertainment equipment in a 3-month period, but (1) delivered and installed some of the equipment late and improperly; and (2) delivered some equipment (e.g., the music system and phone system) that did not perform properly even after repeated attempts to cure. Tanzer apparently has argued that his claim with respect to the services (i.e., the late and defective installation) should be governed by the common law and that his claim with respect to the defective goods be governed by the UCC. This sounds like the gravamen of the complaint test. Anthony Pools v. Sheehan. Only a few courts follow this standard; most follow the predominant purpose test. Based on the quoted prices, it looks like the contract predominantly involved goods, rather than services.

*Defenses:*

2. Impracticability. AVA may argue that its on-time performance was rendered impracticable by the lightning strike that damaged some of the equipment. Rest. § 261; Taylor v. Caldwell. But it is not clear how much equipment was affected by the lightning. Note: It probably does not matter whether the common law or the UCC applies (see item 1 above) because the UCC incorporates the common law impracticability standard in § 2-615.

*Remedy:*

3. Expectation damages (delayed/defective installation). Arguing that his claim for late and defective installation of the equipment should be governed by the common law (see item 1), Tanzer will seek expectation damages equal to his loss in value (i.e., apparently the \$67,587 to repair the system) plus his other loss (i.e., compensation for the delay) minus his costs avoided (i.e., the \$43,824 outstanding balance). AVA might respond that the UCC rather than the common law should apply (again, see item 1 above). Under § 2-714(1), Tanzer could receive damages measured in any reasonable manner for the delay in installation of the goods. AVA will argue that this is very little and (as indicated below) that most of the contract price is still owed.
4. Cancellation & Cover/Market Damages (telephone and music systems). Arguing he did not accept the music and phone systems (or that he properly revoked acceptance of them), Tanzer may seek cover or market damages. See §§ 2-712(2) and 2-713(1). Tanzer also might be entitled to incidental damages, such as the cost to inspect and remove the systems. § 2-715(1).

AUDIO VIDEO ARTISTRY ("AVA") v. TANZER

*Claim:*

5. Breach of Contract. AVA might sue Tanzer for breach of contract, claiming that he promised to pay \$78,567 and broke this promise by not paying a remaining balance of \$43,824.

*Defenses:*

6. Non-occurrence of a Constructive Condition (installation). Arguing the common law should govern the installation of the equipment (see item 1 above), Tanzer will assert that he does not have to pay the contract price because AVA committed a material breach. See Rest. § 237. At most, he is liable for an allowance of damages. Cf. Jacob & Youngs v. Kent. But AVA will respond that the UCC applies and that under the UCC, Tanzer must pay the contract price for all goods accepted. § 2-607(1).
7. No Acceptance or Revocation of acceptance, cancellation, and withholding of payment (telephone and music systems). Tanzer will further argue that he did not accept the telephone and music systems or that he properly revoked acceptance because they did not work and their failure to work substantially impaired the value of the contract. § 2-608(2).

*Remedies:*

8. Contract Price (goods accepted). AVA will seek the contract price for goods accepted. § 2-709(1). Bloom & Sons v. Skelly. But Tanzer will argue that this does not include the telephone and music systems.
9. Lost Profit (goods wrongfully rejected). AVA will seek lost profit for goods wrongfully rejected. § 2-708(2). The facts do not indicate

whether AVA had the production capacity to justify awarding lost profit.  
R.E. Davis v. Diasonics.

OTHER

10. Other

Grading Guide for Final Examination In

CONTRACTS II

(Course No. 203-21; 3 credits)

Professor Gregory E. Maggs

The edited excerpts in the problems came from the following cases: I. Domino's Pizza LLC v. Deak, 654 F. Supp.2d 336 (W.D. Pa. 2009); II. Hutton Contracting Co. v. City of Coffeyville, 487 F.3d 772 (10th Cir. 2007); III. Billion Tower Intern., LLC v. MDCT Corp., 2010 WL 5536513 (S.D.N.Y.); IV. Kolmar Americas, Inc. v. Koch Supply & Trading, 2012 WL 676354 (S.D.N.Y.); V. Glasstech, Inc. v. Chicago Blower Corp., 675 F. Supp.2d 752 (N.D. Ohio 2009).

**PROBLEM VI.**

Assumptions: I have assumed (1) that the "Addendum to the Area Agreement" extended the Area Agreement from 2001 to 2006; and (2) that when Domino's informed Mr. Deak in 2005 that the Area Agreement would not be renewed in substantially the same form, Domino's was referring to the contract being renewed after the Addendum expired in 2006.

[Points per item: 1:5; 2:5; 3:5; 4:5; 5:5; 6:5; 7:5; 8:0]

DEAK v. DOMINO'S

*Claim:*

1. Breach of contract. Deak might sue Domino's for breach of contract, claiming that Domino's promised to give him the exclusive right to develop Domino's Pizza stores in a specified area for the duration of his ownership of Domino's Pizza stores, and then repudiated this promise when it notified him in 2005 that his "area agreement" would not be renewed at its expiration.

*First Defense:*

2. Alleged Promise Was Not Made. Domino's first will argue that it never made the promise alleged by Deak. Domino's will contend that the promise does not appear in the written agreement and that it "remains unexplained" why Deak would not have sought contractual terms that "would reflect the assurances from Domino's" if these assurances had in fact been made. Domino's will also argue that it "def[ies] business and legal logic" to think that Domino's would give Deak an indefinite right to renew while at the same time stating a five-year term for the agreement. Cf. Gianni v. R. Russell (R. Russell's first argument was that it did not make the promise alleged by Gianni).

*Responses:*

3. Separate Agreement. Deak has argued that the right to renew does not appear in the contract because Domino's made the promise as part of a "separate agreement" (i.e., separate from the area agreement itself) and

that this separate agreement has been in effect since 1980. Deak has supported this argument with Ms. Pagniano's affidavit.

4. Implied Term/Course of Dealing. Deak alternatively might argue that the right to renew for the duration of his ownership was an implied term based on his course of dealing with Domino's since 1980. He would support this argument by pointing out that all previous contracts had been renewed without controversy since 1980, suggesting that there was a standing promise to renew. See Rest. § 2 (on implied terms); Dalton v. Educational Testing Service (same); cf. § 1-303(a) (definition of course of dealing).

*Second Defense:*

5. Parol Evidence Rule (Discharge of Prior Agreements). Domino's will argue that any separate agreement to renew after five years would be discharged by the parol evidence rule. Dominos will assert that the area agreement is a complete integration because it contains a merger clause, see Farnsworth, p. 376, and that the area agreement therefore discharges any prior agreements within its scope. See Rest. § 213(2). Domino's will say that a promise to renew is within the scope of the area agreement because it is something that would normally and naturally be included in the area agreement. See Gianni v. R. Russell. Deak, however, may respond that the parol evidence rule does not discharge implied terms. See Dalton v. Educational Testing Service.

*Remedies:*

6. Reformation of Written Contract For Fraud as to Content. If the parol evidence rule would discharge the oral agreement that Ms. Pagniano has described, Deak might seek to have the contract reformed. The contract cannot be reformed on the basis of mistake because no party has alleged that a term was omitted by mistake or accident. Rest. § 155; cf. Bollinger v. Central Penn. Quarry. Deak, however, has alleged the Domino's committed "civil fraud." Reformation might be possible on this ground if the civil fraud consisted of a misrepresentation by Domino's about the content of the writing. Rest. § 166.
7. Injunction. The letter sent by Deak's attorney suggests that what Deak really wants is the renewal of the alleged contract terms. Accordingly, Deak most likely would seek an injunction preventing Domino's from accepting applications to build stores in any location covered by Deak's area agreements. Rest. § 357. Deak could alternatively seek damages, but it would be difficult to prove them with reasonable certainty because Domino's has not yet given franchises to others.

OTHER

8. Other

**PROBLEM VII.**

[Points per item: 1:4; 2:4; 3:3; 4:3; 5:4; 6:1; 7:4; 8:4; 9:4; 10:4; 11:0]

HUTTON CONTRACTING CO. v. CITY OF COFFEYVILLE

*Claim:*

1. Breach of Contract. Hutton might sue the City of Coffeyville for breach of contract, claiming that the City promised to pay the full contract price and broke this promise by withholding \$110,159.47.

*Defense:*

2. No breach (Right to Withhold Liquidated Damages). The City will respond that it did not breach the contract by withholding the \$110,159.47 because a "valid" liquidated damage clause allowed it to withhold this sum as compensation for Hutton's delay in completing the project. Rest. § 356(1) (liquidated damages).

*Replies:*

3. No Breach/Liquidated Damages Clause Not Applicable. Hutton has argued the City is not entitled to liquidated damages because he did not breach the contract. Hutton has asserted that the time for completion was to be extended for any reasonable delay beyond his control and without his fault and that "the late delivery of the utility poles" caused such a delay. The City of Coffeyville, however, has responded by arguing that the delay was not due exclusively to causes beyond Hutton's control or fault given that Hutton was responsible for choosing the delinquent supplier.
4. Parol Evidence (Meaning of Terms). Hutton has argued that the contract is "ambiguous as to what constituted delay," and apparently seeks to establish the meaning of the contract with testimony that it "understood the delay clause to excuse supplier delay." The City, however, will respond that parol evidence may not be considered because the clause has a plain meaning, namely, that Hutton played no role in the delay regardless of whether others might also have been at fault. This is the usual meaning of "exclusively." Cf. Masterson v. Sine (example of the application of the plain meaning rule). The City's argument, however, would not result in the exclusion of parol evidence of this kind in a jurisdiction, like California, that no longer applies the plain meaning rule. Rest. § 214(c); PG&E v. G.W. Thomas Drayage.
5. Misunderstanding. If parol evidence is admitted, and shows that the parties attached different meanings to the delay clause, each party will assert that its meaning should prevail because it did not know (and should not have known) the meaning the other party attached AND the other party knew (or should have known) the meaning it attached. See Rest. § 201; Frigalment v. BNS International Sales. Hutton appears to be arguing that the City's alleged understanding is unreasonable (and therefore Hutton should not have known it) because it would not make sense to start the time for performance upon commencement if supplier delay did not excuse performance. But the City appears to be arguing that Hutton's alleged understanding is unreasonable (and therefore the City should not have known it) because the City was concerned only with timely performance and because Hutton's view would give contractors a perverse incentive to outsource work because any delay by suppliers would be excused.
6. Construction against the drafter. Hutton also may argue that ambiguities in the delay clause should be interpreted in its favor if the City drafted the clause, which is likely because the government usually drafts the contract. Restatement § 206.
7. Impracticability. Hutton appears to argue that its lateness was excused because performance on time was "impossible." A party may be excused from performance if a supervening event renders the party's performance impracticable. See Rest. § 261; Taylor v. Caldwell. But Hutton may not want to advance this contention in court because the doctrine of impracticability would render the contract entirely unenforceable, and that is not something that Hutton wants. It would leave Hutton to

recover only in restitution, which might be less than the contract price.

*Remedy:*

8. Expectation Damages: Hutton will seek expectation damages equal to its loss in value, namely, the \$110,159.47 that it was promised but did not receive. Rest. § 357. Hutton has completely performed and therefore has not avoided any costs.

HUTTON CONTRACTING CO. v. UTILITY POLE SUPPLIER

*Claim:*

9. Breach of Contract. Hutton also may sue the utility pole supplier for breach of contract, claiming that it promised to deliver the utility poles by October 23 and broke this promise by delivering nonconforming poles.

*Remedies:*

10. Damages. The problem is unclear on what happened when the supplier delivered defective utility poles. One likely possibility is that Hutton rejected the poles, that the supplier replaced the poles but delivered the replacement poles late, and that Hutton ultimately accepted what the supplier delivered. If this is the case, then Hutton could seek compensation for the late delivery as measured in any reasonable manner, § 2-715(1), and consequential damages equal to the amount that it cannot recover from the City of Coffeyville, § 2-714(3); § 2-715(2). Alternatively, if Hutton rejected the defective poles, see § 2-601(a), and covered by buying replacement poles from someone else, Hutton could obtain cover damages, § 2-712(1) & (2), and incidental and consequential damages.

OTHER

11. Other

NOTES

(1) The validity of the liquidated damage clause does not seem to be at issue in this problem because the facts say that the clause is "valid."

(2) The City of Coffeyville would have little incentive to sue Hutton given that it has already withheld the liquidated damages.

(3) Some answers suggested that the City of Coffeyville would argue that it could withhold \$110,159.47 because Hutton's completion of the work was a constructive condition of the City's duty to pay. This analysis is not entirely off-base; it is essentially the argument the homeowner made in Jacob & Youngs v. Kent. But it seems odd to suggest that a constructive condition would address a subject expressly covered by the liquidated damage clause. In addition, the liquidated damage clause would make recovery possible whether or not the breach was material.

#### **PROBLEM VIII.**

[Points per item: 1:6; 2:2; 3:4; 4:3; 5:3; 6:3; 7:3; 8:3; 9:2; 10:2; 11:2; 12:2; 13:0]

BILLION TOWER v. MDCT

*Claim:*

1. Breach of Contract. Billion Tower might sue MDCT for breach of contract, claiming that MDCT (1) promised to produce 115,654 articles of clothing according to a schedule and broke that promise by delivering the first installment late; (2) promised to manufacture the clothing in Vietnam and breached that promise by manufacturing the clothing in China; and (3) promised to deliver pre-production samples but failed to do so.

*Defenses:*

2. No promise (manufacture in Vietnam). MDCT may argue that it did not promise or warrant that the goods would be made in Vietnam rather than China even if this was something that Billion Tower desired. The facts are unclear on this.
3. No breach of the whole. MDCT may argue that it has not committed a breach of the whole. It will assert that the parties' contract is an installment contract because it contemplates delivery of the goods in multiple lots according to a delivery schedule. § 2-612(1). Accordingly, MDCT will contend, Billion Tower is at most entitled to a remedy for not sending pre-production samples and for being late on the first installment; Billion Tower cannot recover for breach of the whole contract because any breach that occur did not substantially impair the value of the whole contract. § 2-612(3); § 2-703. Billion Tower may respond that MDCT's breach substantially impaired the value of the whole contract because any late delivery subjected Billion Tower to substantial markdown allowances and Billion Tower therefore could not risked going forward. § 2-612(3); Graulich Caterer v. Hans Holterbosch.

*Remedies:*

4. Payment to MDCT. Billion Tower has requested damages for "costs relating to" the payment of \$5,410 to MDCT. MDCT, however, will argue that Billion Tower cannot recover this payment because the seller must pay for goods that the seller accepts at the contract rate. § 2-607(1).
5. Hangers and Price Tags. Billion Tower also has requested damages for the \$14,566 it spent on hangers and price tags. MDCT, however, will argue that Billion Tower cannot recover these costs because they did not result from the breach. Billion Tower would have incurred these costs even if MDCT had not breached. See § 2-715(1) & (2) (defining incidental and consequential damages). Cf. Jay V. Zimmerman v. General Mills.
6. Mark-Down Allowance. Billion Tower has requested damages for the \$111,507 in markdown allowances that Billion Tower had to pay its retail customers. Billion Tower will assert that it can recover this amount as consequential damages. § 2-715(2). They were foreseeable because Billion Tower told MDCT about them at the time of contracting. MDCT, however, may argue that they could have been avoided by cover or otherwise. The facts are also unclear about this.
7. Lost profits. Billion Tower has requested lost profits in the amount of \$770,188. It is unclear what Billion Tower means by this request. Article 2 provides sellers with lost profits under § 2-708(2), but does not provide buyers with lost profits. In this contract claim against MDCT, Billion Tower is a buyer and therefore does not appear to be entitled lost profits. (Billion Tower was a seller with respect to the retail purchasers.) MDCT also will argue that the claimed amount of lost profits are implausible because they exceed the contract price.

8. Market or Cover Damages. Instead of attempting to recover its payment to MDCT or the cost of its hangers or its alleged lost profits, Billion Tower could seek market damages equal to the difference between the market price and the contract price for the clothing, § 2-713(1) or, if Billion Tower made a reasonable purchase in substitution, Billion Tower could seek cover damages equal to the cover price minus the contract price, § 2-712(1) & (2).

MDCT v. BILLION TOWER

*Claim:*

9. Breach of Contract. MDCT might sue Billion Tower for breach of contract, claiming that Billion Tower repudiated the contract by wrongfully terminating it. § 2-610.

*Defense:*

10. Right to Cancel. Billion Tower will present the same arguments described above for why there was a breach of the whole giving it a right to cancel. § 2-612. MDCT will argue that Billion Tower did not have a right to terminate, also for the reasons described above.

*Remedies*

11. Market or resale damages. MDCT might seek market or resale damages from Billion Tower with respect to the remaining goods. § 2-706(1), § 2-708(1). The facts, however, do not suggest what these might be.
12. Lost profit. MDCT alternatively might seek lost profit. § 2-708(2). But MDCT will have to show that it lost volume. R.E. Davis v. Diasonics.

OTHER

13. Other

NOTE:

Although the promise to deliver pre-production samples was not in the original contract, no consideration would be necessary to support this modification. § 2-209(1).

#### **PROBLEM IX.**

[Points per item: 1:5; 2:4; 3:4; 4:1; 5:3; 6:3; 7:5; 8:4; 9:3; 10:3; 11:0]

KOLMAR (buyer) v. KOCH (seller)

*Claim:*

1. Breach of Contract. Kolmar might sue Koch for breach of contract, claiming (1) that Koch promised to deliver 5050 metric tons of xylene at Houston and delivered only 4748.25 metric tons, and (2) that Koch wrongfully canceled the delivery of 5050 metric tons at Corpus Christi.

*Defense:*

2. Right to Cure Installment (Houston). Koch has argued that even though it breached with respect to the Houston installment by delivering less than the full 5050 that it offered to replace the shortfall at the

contract price at the next shipment (i.e., presumably, at Corpus Christi) leaving Kolmar with no loss. Presumably Kolmar was not going to do anything with the Xylene while the Formosa Ten was sailing from Houston to Corpus Christi. But Kolmar will respond that the right to cure arises only in cases where the buyer rejects the goods (either after an early delivery or as a surprise), § 2-508(1) & (2), and in this case Kolmar did not reject the goods.

3. Right to Cancel (Corpus Christi). Koch also will argue that it had a right to cancel the second shipment because Kolmar breached its obligation to take delivery at Corpus Christi either by the original deadline (the date of which is unspecified, but it might have been the end of September) or by the modified deadline of October 2 (at which Kolmar would have to pay an additional 6 cents). § 2-703 (seller's right to cancel); § 2-301 ("The obligation . . . of the buyer is to accept . . . in accordance with the contract."); § 2-503(1)(b) ("unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods").

*Reply:*

4. Reservation of Rights. Kolmar will reply that even though it agreed to take delivery by October 2, it "reserved its rights." Cf. § 1-207(1). It is unclear whether Kolmar was attempting to reserve a right to pay the original contract price or whether it was attempting to reserve a right to argue that it was excused from not taking delivery earlier.

*Remedy:*

5. Cover Damages. Kolmar may seek cover damages from Koch, claiming that it partially covered Koch's failure to deliver 5,050 metric tons of xylene at Corpus Christi by buying 4987.57 metric tons of xylene from Flint Hills. § 2-712(1). Kolmar will seek damages equal to the difference between the cover price (\$2.95) paid to Flint Hills and the contract price (\$2.50) for 4987.57 metric tons. § 2-712(2). Kolmar will also seek as incidental damages the \$11,539 that it paid for a letter of credit and for broker fees. § 2-715(1).
6. Market Damages. Kolmar is seeking the difference between the market price (\$2.95) and the contract price (\$2.50) damages for the Houston shortfall (5050 - 4758.25 = 291.75 metric tons). § 2-708(1). Kolmar also might seek market damages for the difference between the Corpus Christi delivery and the amount of xylene purchased from Flint Hills (5050-4987.75=62.5 metric tons). Koch has argued that Kolmar should not be able to recover market damages for the Houston shortfall because it offered to make up the missing quantity at the contract price (see above).

KOCH (seller) v. KOLMAR (buyer)

*Claim:*

7. Breach of Contract. Koch may sue Kolmar for breach of contract, claiming that Kolmar promised to accept delivery of and pay for 5050 metric tons of xylene at Corpus Christi by October 2 and then failed to accept and pay for it. If Kolmar did not pay for the xylene it accepted at Houston, Koch might include that as an additional breach of contract. § 2-301 (obligation of buyer is to accept and pay in accordance with the contract).

*Defense:*

8. No Breach. Kolmar might argue that it did not have a duty to take delivery by October 2 because it reserved its rights. This argument may or may not be valid, depending on when Kolmar was originally supposed to take delivery. Kolmar also might argue that it paid for delivery at Houston (the facts don't specify whether he paid or not).

*Remedy:*

9. Price. Koch will seek the contract price for the xylene delivered and accepted at Houston. § 2-709(1).
10. Incidental Damages. Koch is unlikely to recover any damages as market damages, resale damages, or lost profit. The market price is higher than the contract price, the facts do not say Koch resold, and Koch had to pay its supplier more for the xylene than the contract price. But Koch may be able to recover incidental damages equal to the cost of procuring the contingency barges. § 2-715(2).

OTHER

10. Other

### **PROBLEM X.**

[Points per item: 1:4; 2:3; 3:3; 4:3; 5:3; 6:3; 7:3; 8:3; 9:4; 10:3; 11:3; 12:0]

GLASSTECH v. CHICAGO BLOWER

*Claim:*

1. Breach of Implied Warranty of FFPP. Glasstech might sue Chicago Blower for breach of the implied warranty of fitness for a particular purpose, claiming that at the time of contracting Chicago Blower had reason to know of Glasstech's particular purpose for quench fans, that Glasstech was relying on Chicago Blower's skill and judgment to furnish suitable fans, that Chicago Blower selected the fans to be used based on Glasstech's Request for Quote (RFQ), and that the quench fans that Chicago Blower provided were inadequate because they cracked. § 2-315; Tyson v. Ciba-Geigy Corp.

*Defense:*

2. No Implied Warranty of FFPP. Chicago Blower has defended on grounds that it was unaware of the purpose for which the quench fans would be used. But Glasstech will respond that this argument is not credible because Chicago Blower sent a salesman to tour the Glasstech facilities and that Chicago Blower represented that he could provide fans that would be custom-designed for the Glasstech application.

*Claim:*

3. Breach of Express Warranty. Glasstech also might sue Chicago Blower for breach of express warranty. § 2-313(1). The facts indicate that Chicago Blower represented that it could provide quench fans that would be custom-designed for Glasstech's application. Glasstech will argue that these representations constituted warranties, Doug Connor Inc. v. Proto-Grind, and that Chicago Blower breached these express warranties by supplying quench fans that cracked. (Additional express warranties

may appear in Glasstech's terms and conditions (T&C's), but the facts do not say what they are.)

*Defenses:*

4. No Breach of Express Warranty. Chicago Blower has argued that its express Warranty Terms do not cover the failures. This defense raises the question whether Chicago Blower's Warranty Terms or Glasstech's T&Cs control. Chicago Blower will argue that the terms in the T&Cs do not control because Chicago Blower's acceptance of the purchase order was expressly conditioned on Glasstech's acceptance of Chicago Blower's Warranty Terms. § 2-207(1)'s proviso. Chicago Blower will assert that Glasstech either subsequently assented to Chicago Blower's terms or, if a contract was formed only by conduct, no warranty in the T&Cs became part of the contract unless they were also in the Warranty Terms. § 2-207(3); Belden Inc. v. American Elec. Comps.

*Claim:*

5. Breach of Implied Warranty of Merchantability. Glasstech also might sue Chicago Blower for breach of the implied warranty of merchantability, claiming that Chicago Blower's quench fans were not fit for ordinary purposes because quench fans ordinarily last for 10 years but Chicago Blower's quench fans failed shortly after they were installed. § 2-314(1) & (2)(c); Ambassador Steel v. Ewald Steel.
6. No breach of the Implied Warranty of Merchantability. Chicago Blower will respond that its quench fans are fit for ordinary purposes, and thus were merchantable, but that Glasstech was not using the quench fans in an ordinary way, and that the rapidly cycling quench dampers increased pressure beyond what was ordinarily expected.

*Remedies:*

7. Revocation of acceptance/cover damages. Glasstech is claiming as damages the cost of replacing 14 fan rotors. Glasstech may recover this amount only if it can revoke acceptance and then obtain cover damages under § 2-712(1) & (2). Glasstech might argue that it can revoke acceptance because of the difficulty of discovering the problem with the blowers. § 2-608(1)(b); Jorgensen v. Pressnall.
8. Warranty Damages. Alternatively, if Glasstech does not revoke acceptance, Glasstech will seek warranty damages equal to the difference between the value of the blowers as delivered and the value the blowers would've had if they had been as warranted. § 2-714(2); Chatlos Systems v. Nat'l Cash Register. Glasstech will also seek incidental and consequential damages including freight charges, travel expenses, salary expenses, and credit expenses. § 2-715(1) & (2).

CUSTOMERS IN INDIA, HUNGARY, TURKEY, AND CHINA v. GLASSTECH & CHICAGO BLOWER

*Claims:*

9. Breach of Implied Warranties. Any of Glasstech's customers who have not already settled might sue Glasstech and Chicago Blower for breach of the implied warranty of merchantability, arguing that the glass bending system was not fit for ordinary purpose because the quench fans cracked. § 2-314(1) & (2)(c); Ambassador Steel v. Ewald Steel. Glasstech customers also might sue Chicago Blower, claiming that they are third-party beneficiaries of any warranties that Chicago Blower made to Glasstech. § 2-318.

*Defense:*

10. Lack of Privity. Chicago Blower may argue that it is not liable for breach of warranty to the customers because of a lack of privity. Most courts hold, however, that end consumers of a product may sue the manufacturer for breach of warranty because they are intended third-party beneficiaries. Morrow v. New Moon Homes.
11. Warranty Damages. The customers may seek warranty damages equal to the difference in value of glass bending systems with defective quench fans and glass bending systems without defective glass bending systems. § 2-714(1). They also may recover incidental and consequential damages. § 2-715(1) & (2).

OTHER

10. Other

Grading Guide for Final Examination In

CONTRACTS II

(Course No. 203-11; 3 credits)

Professor Gregory E. Maggs

**PROBLEM I.**

[Points for #1=5, #2=8, #3=6, #4=5, #5=4, #6=2]

ARECHIGA v. DOLORES PRESS, INC.

*Claim:*

1. Breach of contract. Arechiga might sue Dolores Press for breach of contract, claiming that Dolores Press promised to pay him for 66 hours of work per week and broke this when, for three years, it only paid him for only 40 hours per week. Arechiga has said that "his salary of \$880 compensated him only for a regular 40-hour work week ... and did not include his regularly scheduled 26 hours of overtime." Arechiga will further claim that his pay for the additional 26 hours should have been 1.5 times his base pay based on the labor law cited in the problem. Arechiga has asserted that his base pay of \$880 gives "an imputed base pay of \$22 per hour," which would yield an overtime pay of \$33 per hour.

*Defenses:*

2. No breach. Dolores Press will respond that it did not breach the contract because it has already paid him in full. Dolores Press has said that "Arechiga's fixed salary of \$880 compensated him for both his regular and overtime work." Dolores Press has cited four sources of evidence in support of this position:
  - (a) the written contract showing "his salary/wage [is] \$880," which Dolores Press might argue represents Arechiga's total compensation given that no additional compensation is mentioned;
  - (b) testimony by witnesses that "Arechiga's hiring supervisor told him his hourly rate was \$11.14 per hour," which negates Arechiga's theory that he was to be paid \$22 per hour plus additional overtime compensation;
  - (c) testimony that Arechiga failed to complain that he was not compensated for overtime, which suggests that Arechiga did not understand the agreement to requirement payment of \$22 per hour plus additional overtime compensation; and
  - (d) testimony that the average wage for janitors was \$7.90, which casts doubt on Arechiga's claim that he was to be paid \$22 per hour.

*Replies:*

3. Plain Meaning Rule. Arechiga will contend that the contract has a plain meaning, namely, that his "salary/wage of \$880" is his base pay, and that the Plain Meaning Rule prohibits Dolores Press from using extrinsic evidence -- including all of the testimony above -- to attempt to show that the phrase "salary/wage of \$880" refers to both his base pay and his overtime pay.

Dolores Press may respond that the term does not have a plain meaning that it is ambiguous whether \$880 refers to Arechiga's base pay or his base pay plus overtime pay. Accordingly, Dolores Press will argue that the Plain Meaning Rule does not bar using extrinsic evidence to clarify this ambiguity. Masterson v. Sine (same consideration issue).

Dolores Press also might contend that the extrinsic evidence should be admitted based on the modern intent rule if the case arose in jurisdiction that applies this minority rule. Pacific Gas v. G.W. Thomas Drayage; Rest. § 214(c).

4. Whose Meaning Controls. Arechiga will further argue that, even if extrinsic evidence is admitted to show the meaning of written contract, his meaning should prevail under the rules in Rest. § 201(2). He will argue that Dolores Press had reason to know that he had attached a different meaning to the contract because of his "poor grasp on English." Dolores Press, however, may respond that Arechiga should have known that janitors are not paid \$22 per hour. It will also say that he in fact did understand that he would not be paid \$22 plus overtime because he did not complain about his wages. Cf. Frigalment v. BNS Int'l Sales.
5. Parol Evidence Rule (Prior Agreements). Arechiga also may contend that, under the parol evidence rule that relates to prior agreements, his written contract discharges the alleged prior agreement that he would be paid \$11.14 per hour and an overtime wage of \$16.71 an hour. He will explain that the written contract is a complete integration because it contains a merger clause and that any prior agreement about how much he would be paid per hour is within the scope of the written agreement. Gianni v. R. Russell Co.; Rest. 213(2).

Remedy:

6. Expectation Damages. Arechiga will seek expectation damages equal to his loss in value, which is pay for 26 hours per week for three years at a rate of 1.5 x \$22 per hours. He has not suffered any other loss and had not avoided any costs or other loss.

OTHER

7. Other

Note: It seems unlikely that Dolores Press will argue that extrinsic evidence should be excluded based on the plain meaning rule or the merger clause given that Dolores Press has attempted to use extrinsic evidence (the testimony described above) to prove that \$880 includes both his base pay and overtime. Note also that the fact that this contract is a complete integration would not bar using extrinsic evidence to show the meaning of terms. See Prof. Mixup's Principle #5.

## **PROBLEM II.**

[Points for ## 1,6,9=5; for ## 2,3,4,7=3; for ## 5,8,10=2]

STONINGTON v. NATIONAL FIRE

*Claim:*

1. Breach of Contract. Stonington may sue National Fire for breach of contract, claiming that National Fire made a promise in the performance bond to "assume responsibility to complete the project" if Hodess defaulted, and that National Fire broke that promise when it denied relief after Hodess ceased work on the project.

*Defenses:*

2. Non-Occurrence of an Express Condition (requisite steps). National Fire has asserted that its performance was excused by the non-occurrence of an express condition. The condition appears to be that Stonington would comply with the requisite step of requesting a conference with the contractor within 15 days after notifying the contractor that it is considering a default. Stonington sent notice on March 13 but did not hold the meeting until March 31, more than 15 days later. Under the rule of strict compliance, the condition was not met. Luttinger v. Rosen. Stonington, however, may respond that the rule of strict compliance is subject to an exception for cases where excusing performance would cause a disproportionate forfeiture. Rest. § 229. Stonington will argue that losing \$667,150 for scheduling a meeting 2 days late would be a disproportionate forfeiture.
3. Non-Occurrence of an Express Condition (default by Hodess). National Fire also has argued that it does not have to perform because "the contract was substantially completed." National Fire's theory appears to be that its performance was conditioned on Hodess's "default," and the term "default" means a failure to substantially complete the project. But Stonington might respond that even if Hodess substantially performed, Hodess's breach is still a "default" under the plain meaning of that term. The facts do not suggest that either side has extrinsic evidence that might strengthen their interpretation of the term "default."
4. Waiver. National Fire also might argue that Stonington waived (i.e., voluntarily relinquished) its rights to declare a default when Stonington "recognized the need to terminate Hodess but opted, against National Fire's advice, to keep Hodess on the project so as not to disrupt the already-delayed job."

*Remedy:*

5. Expectation Damages. Stonington will seek expectation damages equal to its loss in value (\$667,150), which is the amount necessary to complete the promised work.

STONINGTON v. HODESS

*Claim:*

6. Breach of Contract. Stonington might sue Hodess for breach of contract, claiming that Hodess promised to build a condominium complex and broke that promise by ceasing work on the project before it was complete.

*Defense:*

7. Impracticability. Hodess might argue that its performance was excused because three supervening events rendered completion of the construction impracticable: the fire, the defective windows, and the burst sprinkler.

Taylor v. Caldwell; Rest. § 261. But Stonington might reply that the fire was Hodess's fault and therefore its occurrence cannot excuse Hodess. It is unclear whether the use of defective windows or the burst sprinkler were Hodess's fault.

*Remedy:*

8. Expectation Damages. Stonington will seek expectation equal to its loss in value (\$667,150), which is the amount necessary to complete the work.

HODESS v. STONINGTON

*Claim:*

9. Breach of Contract. Hodess might sue Stonington for breach of contract, claiming that it broke its promise to pay the full \$20,095,100 contract price when it "withheld some money." (The parties do not appear to dispute that Hodess has substantially performed. If he had not substantially performed, then Hodess might seek restitution for the value of the work performed over what he had been paid. See Britton v. Turner.)

*Remedy:*

10. Expectation Damages (Minus an Allowance for Damages). Because Hodess "substantially completed" its performance, it will claim that it is entitled to full payment minus an allowance for damages. Jacob & Yongs v. Kent. The damages appear to be \$667,150. It is not clear whether Stonington withheld more than that.

OTHER

11. Other

Note: Hodess does not have a defense that it substantially performed. Even if its breach was not material, it still has to pay damages. "The courts never say that one who makes a contract fill the measure of his duty by less than full performance." Jacob & Youngs v. Kent. See Prof. Mixup's Principle #2.

### **PROBLEM III.**

[Points for ## 1,2,8=4; for ## 3-7,9=3]

DOORENBOS POULTRY v. MIDWEST HATCHERY

*Claim:*

1. Breach of Contract (late delivery). Doorenbos Poultry might sue Midwest Hatchery for breach of contract, claiming that Midwest Hatchery promised to deliver 112,000 pullets on December 28 and broke that promise when Midwest did not deliver the birds until January 16-18.
2. Breach of Warranty (pullets less than 18 weeks old). Doorenbos Poultry also will claim that Midwest Poultry breached an express warranty that the birds would be started pullets -- i.e., hens that are 18-weeks old -- when in fact 80% were three weeks younger and 20% were four weeks younger.

*Defenses:*

3. Waiver/Modification. Midwest Hatchery may argue that Doorenbos Poultry waived its claim for late delivery, or agreed to modify the contract to permit delivery on January 16-18, when it "agreed to the delay." This waiver/modification required no consideration. UCC § 2-209(1). Doorenbos will reply that its acceptance of the goods did not constitute a waiver/modification because Doorenbos had a right to accept the goods despite the nonconformity of their tender under § 2-601(2) and still seek damages under § 2-714(1).
4. Failure to Provide Notice. Midwest Hatchery will further argue that Doorenbos is barred from any remedy with respect to the birds it accepted because it did not notify Midwest Hatchery of the breach within a reasonable time. UCC § 2-607(3). The facts do not say when notice was given, but it might have been as late as August 19.

*Remedy:*

5. Liquidated Damages (Refund of Payment). Doorenbos Poultry might ask for return of its payment pursuant to the clause obligating Midwest Hatchery to "refund . . . the price paid by Customer." But Midwest Hatchery will respond that this clause contains an implied condition that Doorenbos Poultry return the chickens if it wants a refund. Otherwise, the clause makes little sense. Cf. Dalton v. Educational Testing Service. Because Midwest Hatchery did not return the chickens, it cannot obtain the return of the refund.
6. Damages for Accepted Goods (for late delivery). Doorenbos Poultry will seek damages for the lateness of the goods as measured in any reasonable manner. UCC § 2-714(1). One reasonable manner would be the lost of profits caused by the delay from December 28 to January 16-18. The amount of these damages is not stated. Midwest Hatchery might argue that the only remedy for breach under the terms of the contract is a refund but that Doorenbos cannot obtain a refund unless it returns the chickens.
7. Warranty Damages (for young birds). Doorenbos Poultry will seek breach of warranty damages to compensate it for receiving hens that were to young. Under 2-714(2) & (3), these damages would equal the difference in value to Doorenbos Poultry of the goods as warranted (18-week-old pullets) and the goods as accepted (14-and 15-week-old pullets), plus consequential damages (lost profits). The facts suggest that these damages are \$115,147. Midwest Hatchery might argue that the only remedy for breach is a refund but that Doorenbos cannot obtain a refund under the terms of the contract unless it returns the chickens.

MIDWEST HATCHERY v. DOORENBOS POULTRY

*Claim:*

8. Breach of Contract. Midwest Hatchery might sue Doorenbos Poultry for breach of contract, claiming that Doorenbos Poultry promised to pay Midwest Hatchery \$267,916.76 for 112,000 pullets, and broke that promise when it only paid \$184,135.18.

*Remedy:*

9. Contract Price. Midwest Hatchery will seek damages measured by the contract price (less the amount already paid) on grounds that Doorenbos Poultry has accepted the goods. 2-709(a)(1). Midwest Hatchery's recovery, of course, will be subject to Doorenbos's counterclaim for damages for goods accepted.

OTHER

10. Other

Notes: (a) Chickens of any age are movable goods. There is no need to analogize them to the unborn young of animals. (b) Because the goods were accepted, only the remedies applicable to accepted goods apply. There is no need to discuss warranty damages, etc. (c) Doorenbos will not attempt to revoke acceptance because the facts say "Doorenbos Poultry was not interested in returning the birds."

**PROBLEM IV.**

[Points for ## 1,7=4; for ## 2-4,6,9,10=3; for #9= 2]

PANIKE v. FOUR RIVERS

*Claim:*

1. Breach of Contract. Panike might sue Four Rivers for breach of contract, claiming that Four Rivers promised to buy 25,000 cwt. of onions from him at a price of \$4.75 per cwt. and Four Rivers refused to accept and pay for the onions when Panike tendered them.

*Defense:*

2. Perfect Tender Rule. Four Rivers will contend that it properly rejected the tendered onions because they did not conform to the contract in every way. UCC § 2-601(2). Four Rivers will contend that the contract provided that the buyer would specify the field, that Four Rivers did specify the field, in accordance with trade usage, in late summer, and that Panike did not deliver onions from the specified field.

*Replies:*

3. Improper Specification of Particulars of Performance. Panike has argued that the field specified by Four Rivers is improper because the field contained onions that "were a different variety and larger than those specified in the contract." Although a contract may allow one party to specify the particulars of performance, the specifications cannot exceed what is left to a party to specify. UCC § 2-311(1). The facts do not provide enough information about the fields to know whether Panike's argument is correct.
4. Lack of Good Faith. Panike may argue that even though a party may reject goods that fail to conform in any way to the contract, the rejection must be made in good faith. UCC § 2-601(a) & cmt. 1. Panike will assert that Four Rivers did not act in good faith because the onions "conformed to the contract in kind, quality, condition, and amount, and therefore exceeded every essential element of the contract." Good faith requires honesty in fact and the observance of reasonable commercial standards of fair dealing. UCC § 1-201(b)(20). Panike will argue that Four Rivers did not act in good faith because there was no commercial reason to reject the onions. Four Rivers will argue that there was a commercial reason: even if there are other onions that are satisfactory, the onions it wants are more valuable, and the contract allows Four Rivers to specify which onions it wants.
5. No Substantial Nonconformity. Panike also may reply that, contrary to what UCC § 2-601 says, a few jurisdictions (such as Connecticut) do not follow the perfect tender rule when there is no substantial

nonconformity. See, e.g., DP Technology v. Sherwood Tool. If this a case arose in such a jurisdiction, a court might conclude that Four Rivers could not reject the onions that Panike delivered because they satisfy the essential elements of the contract.

*Remedy:*

6. Market (or Resale damages). Panike will seek damages measured by the difference in the contract price of the onions and the difference in the market price (or resale price if Panike has resold them in a commercial reasonable manner). UCC § 2-708(1) (market damages); § 2-706(1) (resale damages).

FOUR RIVERS v. PANIKE

*Claim:*

7. Breach of Contract. Four Rivers might sue Panike for breach of contract, claiming that Panike promised to deliver 25,000 cwt. of onions from a specified field and that he failed to do so.

*Defense:*

8. No Breach. Panike will argue that he did not breach the contract for the reasons stated above: Four Rivers did not properly specify the field from which the onions were to come; Four Rivers did not reject the onions in good faith; and there was no substantial nonconformity to the contract.

*Remedy:*

9. Specific Performance/Replevin. If Four Rivers insists that the onions must come from a specific field -- and that other comparable onions are not satisfactory -- Four Rivers might seek specific performance or replevin of the onions arguing that it could not cover by purchasing other onions because they would come from a different field. UCC § 2-716(1) & (3); Sedmak v. Charlie's Chevrolet.
10. Market/Cover Damages. If Four Rivers does not obtain cover damages, it might seek damages measured by the difference between the market price (or cover price, if Four Rivers covers) and the contract price. UCC § 2-713(1) (market damages); 2-712(1) (cover damages).

OTHER

11. Other

Note: Given that Four Rivers has rejected the goods, it cannot seek warranty damages. See UCC § 2-714(2); Prof. Mixup's Principle #7.

## **PROBLEM V.**

[Points for ##1-6=5.]

RIVERS v. BEAUTY QUEEN and MANUFACTURER OF CERAMIC ELEPHANT

*Claim:*

1. Breach of Implied Warranty of Merchantability. Rivers might sue Beauty Queen and the manufacturer of the ceramic elephant for breach of implied warranty of merchantability claiming that the ceramic elephant was not

merchantable for two reasons. First, she will claim that the ceramic elephant was not fit for its ordinary purpose as a ceramic oil burner because it allowed the oil to explode in her face when the candle was blown out. UCC § 2-314(2)(c). Second, she will also contend that the ceramic elephant was not properly packaged and labeled because the elephant did not contain instructions for use which are necessary for such a dangerous object. UCC § 2-314(2)(f).

2. Breach of Express Warranty (or Implied Warranty of Fitness for a Particular Purpose). Rivers also will sue Beauty Queen for breach of an express warranty that the ceramic elephant could be used for heating scented oil. She will contend that Beauty Queen made this warranty in describing the product. UCC 2-313(1)(a)&(b). She will further contend that the warranty was broken because the product could only be used as a decorative object. Alternatively, Rivers might sue Beauty Queen for breach of the implied warranty of fitness for a particular purpose, claiming that Beauty Queen at the time of contracting had reason to know any particular purpose for which the goods are required -- i.e., to heat scented oil -- and that she was relying on the seller's skill or judgment to select or furnish suitable goods. UCC § 2-315.

*Defenses:*

3. No Breach of Implied Warranty of Merchantability (decorative object). The facts in one place suggest that the elephant may have been designed only to be "a ceramic decorative item," and not a device for heating scented oil. If that is the case, then the manufacturer might argue that elephant was fit for its ordinary purposes and that it was properly labeled. But the facts in another place indicate that the manufacturer marketed the elephant as a device for heating scented oil; if that is true, then this defense would not apply. The elephant would have to be judged as the kind of product it was described as being.
4. No Breach of Warranty (improper use). The facts also suggest that Beauty Queen and the manufacturer might argue that Rivers has failed to prove that the elephant was unfit for the purpose of heating scented oil. The only proof is "the mere existence of her injury." They may contend her injury arose, not because the device was defective, but because she used the item in an improper manner when she allowed the flame to contact the oil.
5. Lack of Privity. The manufacturer might claim that it is not liable to Ms. Rivers because of a lack of privity. It made the contract with Beauty Queen, and did not make the contract with her. UCC § 2-318 addresses only horizontal privity (i.e., the rights of non-buyers). But most (if not all) courts as a matter of common law would extend the warranties at issue here to remote buyers. Morrow v. New Moon Homes.

*Remedies:*

6. Warranty Damages. Rivers will seek the difference in value between the goods she accepted (a decorative ceramic elephant) and the goods as warranted (a ceramic elephant fit for heating scented oil), plus consequential damages (compensation for her injuries). UCC § 2-714(2) & (3).

OTHER

7. Other

Grading Guide for Final Examination In

CONTRACTS II

(Course No. 203-11; 3 credits)

Professor Gregory E. Maggs

**PROBLEM I.**

ARCHER v. QHG

*Claims:*

1. Breach of Contract. The facts of the problem expressly identify two claims that Dr. Archer has made against QHG and also suggest a third claim. Dr. Archer's "chief complaint" is that QHG "failed to provide rotating call coverage" despite having promised to do so. Dr. Archer's other expressly identified claim is that QHG "terminated the employment relationship without cause," violating the terms of the agreement. In addition, the problem also suggests that Dr. Archer might claim that QHG promised in paragraph 3.2 of the employment agreement that it would give him 180 days' notice before terminating him. Dr. Archer will argue that QHG broke this promise when it terminated him in May 2004 because QHG first gave him notice of his termination in January 2004, less than 180 days earlier.

*Defense to Dr. Archer's Rotating Call Claim:*

2. No Promise/Breach. QHG expressly argues in defense that "the agreement imposed no obligation to provide rotating call." QHG presumably will support this argument by pointing out that the agreement said only that Dr. Archer "shall be on call as shall be determined from time to time" by QHG and Dr. Archer. There was no agreed limit on the total amount of time on call.

*Replies:*

3. Separate Agreement/Implied Term (Policy #201). Dr. Archer might reply that the terms of his employment at QHG implicitly include QHG's Policy #201, which says that no physician will be on call 24 hours a day, 7 days a week. Dalton v. Educational Testing Service. QHG will respond first that this policy should not be viewed as an implied term but at most should be viewed as a term of a separate prior agreement. As such, QHG will argue that the policy was discharged under the parol evidence rule because it was not included in the written employment agreement. If the employment agreement is a complete integration -- which it might be because it is "detailed -- then it would discharge the terms of any prior agreements that are within its scope. Rest. 213(2). A limitation on when a physician can be placed on call is within the scope of the employment agreement because it is something that would normally be included in such an agreement. Gianni v. R. Russell Co. If the employment agreement is not a complete integration, then the policy would only be discharged if it is inconsistent with the employment agreement. Rest. 213(1). Dr. Archer will argue that it is not inconsistent because, while the employment agreement directs the parties

to agree upon the on-call schedule, it does not say that their agreement can include a 24-7 schedule.

*Defenses to Dr. Archer's Termination without Cause and 180 Days' Notice Claims:*

4. No promise/Breach. QHG also might argue that it did not breach paragraph 3.2 by failing to give Dr. Archer 180 days' notice before terminating Dr. Archer's employment because only the first 2 years of the contract were guaranteed and Dr. Archer's employment was terminated after he had been employed for more than two years. In reply, Dr. Archer has contended that paragraph 3.2 was "meant to run consecutively" based on a pre-contract letter from a QHG administrator. By this statement, Dr. Archer appears to be arguing that he was to receive 2 years under the contract plus an additional 180 days after receiving notice that the contract will be terminated. QHG, however, will reply that any prior agreement was discharged by the parole evidence rule. This would be true if the employment agreement was completely integrated because an agreement that the 180-day period runs consecutively would be within its scope. Rest. § 213(2); Gianna v. R. Russell.
5. Non-Occurrence of a Constructive Condition. QHG has argued that "Dr. Archer could not accept the benefits of the contract and then refuse to perform." By this statement, QHC appears to be raising the defense of a non-occurrence of a constructive condition. QHC will assert that, even if QHC did promise to give 180 days' notice before terminating the agreement, its performance of this promise was constructively conditioned on Dr. Archer's continued performance. Rest. § 237(1); Kingston v. Preston. QHC will argue that Dr. Archer did not continue to perform because of problems with his hand.

*Remedy*

6. Expectation Damages. Dr. Archer will seek expectation damages. His loss in value will include the loss of not having rotating on-call time and the loss of salary caused by improper or early termination. QHC might contend that Dr. Archer cannot prove the value of the loss of rotating on-call time with reasonable certainty and that he could have avoided some of the loss in salary by finding other work.

*OHG v. ARCHER*

7. Breach of Contract. QHG might sue Dr. Archer for breach of contract, claiming that he broke his promise to serve for 5 years or to provide 180 days' notice before terminating the contract, and that he broke these promises when he announced that he could not work because of his hands.

*Defenses:*

8. Impracticability. Dr. Archer will argue that the problem with his hands rendered his performance impracticable. Rest. § 261; Taylor v. Caldwell.

*Remedy:*

9. Expectation Damages. QHG will seek expectation damages. Its loss in value is the loss of Dr. Archer's services, which QHC might argue equal to the amount that it must pay Dr. Archer's replacement over the period in question. Its costs avoided will equal the amount the QHC would have paid Dr. Archer. Dr. Archer respond that QHG can only collect for a

total of 180 days following his termination because either party could terminate with 180 days' notice.

OTHER

10. Other

**PROBLEM II.**

OLYMPIC and ARCO v. ARCO'S INSURER

*Claim:*

1. Breach of Contract. Olympic might sue ARCO's insurer for breach of contract, claiming that the insurer promised to cover Olympic's liability as a "subsidiary" of ARCO but refused to provide the coverage. ARCO also might sue the insurer for breach of contract, given that ARCO shares in Olympic's fortune. (Note: ARCO does not appear to have promised to insure Olympic.)

*Defense:*

2. Lack of Privity. ARCO's insurer might argue that, even if it did promise to provide coverage, Olympic is not entitled to enforce that promise because the insurer made the promise to ARCO, not to Olympic. Bain v. Gillispie.

*Reply:*

3. Intended Third-Party Beneficiary. Olympic may reply that it is an intended third-party beneficiary of the insurer's promise to ARCO. Rest. §§ 302, 304; Seaver v. Ransom. It will contend that the parties clearly intended for it to benefit from the promise. But the insurer may respond that it is not appropriate to recognize a right of Olympic to enforce the promise because ARCO has an ample incentive to enforce the promise given that any money given to a subsidiary of ARCO would benefit ARCO because of ARCO's ownership of the subsidiary.

*Defense:*

4. No Breach. ARCO's insurer also might argue that it did not breach any promise when it refused to cover claims against Olympic because Olympic is not a subsidiary of ARCO. Although the contract does not define the term "subsidiary," the insurer will say that the plain meaning of the term -- based on Webster's Third New International Dictionary -- is a company controlled by another company that owns more than half of its stock. Because ARCO owns only 37% of Olympic, Olympic is not a subsidiary.
5. Parol Evidence Rule. ARCO's insurer further might argue that, because the term subsidiary has a plain meaning, the plain meaning rule should preclude consideration of the contrary meaning suggested by Barbara Bartoletti and Mark Friedman. Cf. Masterson v. Sine (applying the traditional plain meaning rule). But Olympic might argue that the court should apply the modern intent rule. Pacific Gas v. G.W. Thomas Drayage.
6. Meaning of Terms. ARCO's insurer also will argue that, even if parol evidence is admitted and even if it shows that ARCO believed that

Olympic was a subsidiary, the term "subsidiary" should be interpreted in accordance with the insurer's understanding of the term. Rest. § 201(2). It will assert that the term had a plain meaning and ARCO executive Robert Merrill and Paul Roche knew of the plain meaning that the insurer attached to the term. Cf. Frigalment v. BNS.

*Remedy:*

7. Expectation Damages. ARCO and Olympic will seek expectation damages equal to the amount of coverage provided in the insurance policies.

OTHER

8. Other

### **PROBLEM III.**

KHITERER v. DR. BELL

Note: Many answers discussed the issue of whether Article 2 or the common law would apply before considering the parties' claims and defenses. This approach was often problematic because it is impossible to know the position that the parties will take on the issue of scope before knowing what their claims and defenses are. (See Prof. Mixup's second principle).

*Claims:*

1. Breach of Contract/Warranty. Khiterer might sue Dr. Bell, claiming that Dr. Bell expressly promised or warranted that he would provide crowns of porcelain on gold, and he broke that promise or warranty by providing crowns made totally of porcelain. To show the promise, she will rely on (a) her recollection of the agreement, (b) the course of dealing / usage of trade based on her past fitting with porcelain on gold crowns and the agreement with Sergei Leontev to provide porcelain on gold crowns; and (c) the summary of treatment indicating that the crowns would be of porcelain fused metal.

*Defenses:*

2. No promise/express warranty. Dr. Bell might argue that she did not promise or warrant that she would provide porcelain on gold crowns. Dr. Bell will rely on the Ms. Khiterer's chart, which said the crowns will be metal free.

*Remedy choice #1:*

3. Rejection. Khiterer's first choice in seeking a remedy would be to reject the crowns under the perfect tender rule because they failed to conform to the contract. § 2-601. If she can reject the crowns, then she would not have to pay the balance of the contract price and she could recover all of the money that she had already paid. § 2-711(1). In addition, she also could claim market damages, if there were any difference between the contract and the market price. § 2-711(1)(b); 2-713. True, in theory Khiterer would have to hold the rejected crowns "with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them." § 2-602(2)(b). But it seems highly unlikely that a Dr. Bell, a dentist, will want to used porcelain crowns out of someone's mouth. She would thus likely keep the crowns for free.

*Remedy Limitations:*

4. Perfect Tender Rule Does not Apply. Dr. Bell might respond that the perfect tender rule does not apply. The perfect tender rule applies only to contracts for the sale of goods under the U.C.C. 2-601. Dr. Bell will contend that this U.C.C. does not apply to this hybrid contract because it was predominantly about the services (the root canals and fitting of the crowns), not goods (the crowns). If the U.C.C. does not apply, the question will be whether Dr. Bell materially breached the contract. She will argue that she did not materially breach because the facts show that crowns made only from porcelain are functionally suitable, they have not physically harmed Khiterer, and Khiterer is satisfied with them from an aesthetic perspective. Rest. § 237; Jacob & Youngs v. Kent. Therefore, Khiterer has to pay for the crowns, but can subtract an allowance for damages. Khiterer, however, may urge the court to apply the gravamen of the complaint test to determine whether article 2 applies. Anthony Pools v. Sheehan. If this test were to apply, she would argue that article 2 applies because she is complaining about the crowns rather than the services.
5. Too late to reject. Dr. Bell also will argue that it is too late for Khiterer to reject the goods because rejection of goods must be within a reasonable time after their delivery. § 2-602(1). Here, Khiterer waited until the following summer to complain about the problem. But Khiterer may argue that it was reasonable to wait until she saw another dentist who told her about the problem because no one other than a dentist could inspect the crowns.

*Remedy Choice #2*

6. Revocation of Acceptance. If Khiterer cannot reject the goods because she has already accepted them, she will alternatively argue that she can now revoke acceptance of the goods because of the difficulty of discovering the problem. § 2-608(1)(b). But Dr. Bell will argue that the defect has not substantially impaired the value of the goods. As noted, the facts show that all porcelain crowns are functionally suitable, they have not physically harmed Khiterer, and Khiterer is satisfied with them from an aesthetic perspective.

*Remedy Choice #3*

7. Warranty Damages. Khiterer's very distant third choice of remedy would be to acknowledge acceptance of the goods and to seek warranty damages, or the difference between the value of the goods actually delivered and the value they would have if they were as warranted. § 2-714(2); Chatlos Systems v. NCR. But this measure of damages is likely to be small given that the two types of crowns are similar. But perhaps the gold makes the one type more valuable than the other.

DR. BELL v. KHITERER

*Claim*

8. Breach of Contract. Dr. Bell might sue Khiterer for breach of contract, claiming that she promised to pay for the crowns and other dental work and to date she has paid only part of the price. Whether she will prevail will depend on whether Khiterer is able to reject the goods or revoke acceptance based on the arguments above.

*Remedy*

9. Expectation Damages. Dr. Bell (who is arguing that this contract is governed by the common law and not the U.C.C.) will seek expectation damages. She will contend that her loss in value is the difference between the total contract price and the price that Khiterer has paid. If there is a breach of contract, then Khiterer can subtract an allowance for damages.

OTHER

10. Other

**PROBLEM IV.**

seller = Greenwich, represented by Peter Appleby  
buyer = Schlumberger, represented by Debby Roberts

This problem involved the following communications/shipments:

- (a) May 10: Greenwich called Schlumberger
- (b) May 26: Greenwich sent Schlumberger a confirmation letter
- (c) May 26: Greenwich sent Schlumberger three sales contracts, which Schlumberger never signed
- (d) June 5: Schlumberger forwarded three purchase orders to Greenwich
- (e) unstated: Greenwich acknowledges, but says that the delivery dates may be too ambitious
- (f) July 25: Greenwich makes first shipment
- (g) August 10: Schlumberger repudiates the contract
- (h) unstated: Greenwich reclaims most of the lead and resells it

GREENWICH v. SCHLUMBERGER

*Claim*

1. Breach of Contract. Greenwich might sue Schlumberger for breach of contract, claiming that Schlumberger promised to buy 1200 metric tons of copper bearing lead in three installments, and broke that promise when it repudiated the contract on August 10.

*Defenses*

2. No Formation. Schlumberger might argue in defense that the parties never properly formed a contract because neither side ever signed the other side's forms. But Greenwich will respond that a contract might have been formed in any of the following ways:
- by their oral agreement, communication (a), under § 2-204(1);
  - by their exchange of almost verbatim forms, (b) & (c), under § 2-207(1);

- by Schlumberger's form (b) and Greenwich's response (e), also under § 2-207(1); or
  - by Greenwich's shipment (f), which Schlumberger accepted, under § 2-207(3) and § 2-204(1).
3. Statute of Frauds. Schlumberger also might argue in defense that the statute of frauds precludes enforcement of all or some of the alleged promise because it did not sign the contracts that Greenwich sent. § 2-201(1). But Greenwich might respond that the statute of frauds is satisfied:
- by Greenwich's confirmation (b), which Schlumberger did not object to 2-201(2);
  - by Schlumberger's purchase orders (d), which may be a writing sufficient to show a contract was made; or
  - shipment and acceptance of the goods (f), as to the goods accepted under 2-201(3)(c)
4. Frustration of purpose. Schlumberger also might contend that its performance was excused because its purpose for purchasing the lead was frustrated when it encountered problems in its manufacturing business. Krell v. Henry; Rest. § 265. The defense is applicable as a supplemental general principle. § 1-103.

*Remedy*

4. Price for goods accepted. Greenwich may seek the price of the lead that Schlumberger accepted and did not return. § 2-709(1). The price is \$690,000 minus the incidental damages.
5. Incidental Damages. Greenwich also could recover incidental damages for storage, trucking, and financing costs arising out of the breach. § 2-710. These incidental damages equal \$690,000 minus the price of goods accepted and not paid for.
6. Additional \$130,000. The facts say that Greenwich claims it could have received \$130,000 more if it had resold at the increased market price. But both the resale price and the market price are higher than the contract price. As a result, Greenwich cannot recover the difference between either of these prices and the contract price under the formulas in § 2-706 or § 2-708. Thus it would not seem to matter that Greenwich could have made more money if it resold at the market price.

OTHER

7. Other

**PROBLEM V.**

CVS v. DATA CAPTURE

*Claim*

1. Breach of Contract. CVS might sue Data Capture for breach of contract, claiming that it promised to pay \$5 million for the 12,500 PDT units that it ordered, and did not pay. Data Capture does not appear to want to raise any defenses. (It has accepted the goods and wants warranty damages.)

*Remedy*

2. Contract Price. CVS may ask for the full \$5 million price on grounds that all of the goods have been accepted. § 2-709(1). Data Capture does not appear to deny that it has accepted the goods. Instead, Data Capture contends only that it can offset its claim for warranty damages. The amount of the offset is discussed below.

DATA CAPTURE v. CVS

*Claim*

3. Breach of Warranty. Data Capture might sue CVS for breach of warranty, claiming that CVS expressly warranted that all of the PDT would be 6846WW models but 11,000 of them were model 6846US models. 2-313(1)

*Defense*

4. No Such Warranty. CVS has contended that it did not make the express warranty because it did not even know the difference between the two models. It is not clear that CVS made any statement of fact, description of the goods, or exhibition of any sample that would create an express warranty. 2-313(1)(a)-(c).
5. No timely notice of breach. CVS will assert Data Capture is barred from any remedy because it did not notify CVS of the breach within a reasonable time after it should have discovered any breach. § 2-607(3)(a).

*Remedy*

6. Warranty Damages. Data Capture will seek warranty damages equal to the difference in value of the goods as warranted and the goods accepted. § 2-714(2). It appears that the 6846WW models are worth \$700 ( $\$1,050,000 / 1500 = \$700$ ), while the 6846US models are worth \$600 ( $\$6,600,000 / 11,000 = \$600$ ). Thus, the difference in value is \$100 per unit; the total is  $\$100 * 11,000 = \$1,100,000$ .

*Other*

7. Other

PROBLEM I.

MAYS v. TRU-BUILT

*Claim:*

1. Breach of Contract. Mays might sue Tru-Built for breach of contract, claiming that Tru-Built promised (1) to build the garage so that it would be suitable for storage; (2) to build the garage with trusses instead of rafters; and (3) to build the garage with 9-foot walls; and that Tru-Built breached all of these promises.

*Defenses:*

2. No enforceable promise (garage suitable for storage). As a partial defense, Tru-Built will argue that it did not breach an enforceable promise to make the garage suitable for storage because (1) none of the documents specifically notes an intent to use the garage for storage purposes; (2) the promise is not implied because trusses provide only minimal room for storage, Dalton v. Educational Testing Service; and (3) any promise that might have been made concerning storage was discharged by the parol evidence rule. Gianni v. R. Russell.

Whether the parol evidence rule would discharge a promise to make the garage suitable for storage would depend on whether the final written contract is a complete integration. If it is a complete integration, a promise to make the garage suitable for storage would be discharged because it would fall within the scope of the contract to build the garage. Gianni v. R. Russell. If the contract is not a complete integration, a promise to make the garage suitable for storage arguably would not be discharged because it would not be inconsistent with any term in the contract. Masterson v. Sine.

3. Waiver (trusses instead of rafters). Tru-Built also will argue that Mays waived the right to complain about the lack of trusses because he allowed the construction to continue after a standard rafter roof was delivered.

*Remedy:*

4. Expectation Damages. Mays might seek expectation damages, equal to his loss in value plus other loss, less his costs avoided. His loss in value is the value of having storage use, trusses, and 9-foot walls. His other loss would include the incidental damages incurred by taking time off of work to inspect the defective work. His costs avoided would be the amount that he has not paid (at least \$3,394, and maybe an additional \$425 + \$650 if these figures are not included in the overall price quoted). The loss in value of a truss roof arguably is \$2000 because Tru-Built offered that price to replace the rafters with trusses.

*Remedy Limitation:*

5. Avoidability. Tru-Built also might argue that some of the damages could have been avoided, perhaps by additional work, but that Mays refused to allow Tru-Built's representative, McGowan, onto the property to inspect the garage property. Mays will respond that Tru-Built waived this defense when McGowan failed to show up for the initial meeting.

TRU-BUILT v. MAYS

*Claim:*

6. Breach of Contract. Tru-Built might sue Mays for breach of contract, claiming that he promised to pay \$11,284 for the garage, and that he broke this promise when he only paid \$7,890.

*Defense:*

7. Non-Occurrence of a Constructive Condition. Mays will respond that his performance was excused because Tru-Built's prior performance was a constructive condition of his duty to pay. Kingston v. Preston. Rest. § 237. As noted in point (1) above, Mays will contend that Tru-Built promised to make the garage suitable for storage, to build the 9-foot walls, and to use trusses, and that he breached those promises. (This same defense possibly could be characterized as one of frustration of purpose.)

*Reply:*

8. No enforceable promise (storage): As discussed in point (2) above, Tru-Built will argue that it did not make an enforceable promise to make the garage suitable for storage.
9. Independent Covenants (walls and trusses). Tru-Built will further argue that the promises with respect to the 9-foot walls and the trusses were independent. He will argue that they were provided for in a separate addendum at a separate price. Thus, the evidence sense and meaning of the contract is that the breach of those promises does not excuse Mays from paying for the rest of the garage. Kingston v. Preston; Syllabus Appendix A.
10. No Material Breach. Tru-Built also might argue that he satisfied the constructive condition by substantial performance; in other words, his breaches were not material. Even though the garage had defects, it was still a working garage. Jacob & Youngs v. Kent; Plante v. Jacobs. (Alternatively, True-Built might argue that the various parts of the project are divisible and that he should be fully compensated for the parts that he completed. See Rest. § 240; Kirkland v. Archbold.)

*Remedy:*

11. Expectation Damages. Tru-Built will seek expectation damages equal to \$3,394, the amount due under the contract. It will claim that this figure is its loss in value and that it has not saved any costs because it built the entire garage.

TRU-BUILT v. MAYS

12. Restitution. If the court concludes that Tru-Built cannot recover for breach of contract because Tru-Built committed a material breach, Tru-Built might ask Mays for restitution. It would claim that Mays would be unjustly enriched by keeping the entire garage but paying only \$7,890. It would seek the value to Mays over the amount paid and any damages suffered. Some jurisdictions allow a defaulting plaintiff to recover in restitution. See Britton v. Turner; Rest. § 374. Mays will argue that some courts do not allow plaintiffs who have breached a contract to recover in restitution.

OTHER

13. Other

Common errors: (1) A number of students suggested that when Mays sues Tru-Bilt for breach of contract, Tru-Built will argue in defense that its breach is not a material breach and that it therefore does not have any liability. This is wrong. A breach is a breach whether it is material or not. Review Prof. Mixup's Principle #2. (2) A number of students also spent time discussing whether this was a contract for goods. There is no need to discuss the issue in the abstract. See Prof. Mixup's Principle # 4. (3) This problem does not involve any express conditions.

PROBLEM II.

LEATHA FARRELL and VALENTINA TEDESCHI v. TIAA

*Claim:*

1. Breach of Contract. Leatha Farrell and Valentina Tedeschi separately might sue TIAA, each claiming that TIAA promised in the insurance policy to pay the proceeds to the designated beneficiary, and breached this promise when it made no payment to her.

Note: The decedent's estate also could bring this claim against TIAA, but it would have no incentive to do so. Cf. Seaver v. Ransom.

*Defenses:*

2. No Breach (Nonpayment to Farrell). TIAA may argue that it did not breach any promise by not paying Leatha Farrell because she was not designated as a beneficiary when the decedent (James Tedeschi) died.

Farrell might argue that the decedent had no right to change the beneficiary contrary to the terms of the settlement agreement. But TIAA will respond that the settlement agreement was between Farrell and the decedent. If she believes that the settlement agreement was breached, she should sue the estate (see below).

But the problem suggests that Farrell will respond that she is "an assignee" of the insurance policy. Perhaps her argument is that the decedent assigned his rights under policy to her and therefore had no right to designate a different beneficiary. But TIAA will argue that the separation agreement was not an assignment because the decedent retained power over the life insurance contract. Herzog v. Drew. Indeed, he exercised that power when he designated Farrell and Valentina Tedeschi as 50% beneficiaries.

3. No Privity of Contract. TIAA also may argue that neither Leatha Farrell nor Valentina Tedeschi may enforce the life insurance policy because they have no privity of contract. They each will respond that they are intended third-party beneficiaries. Each of them can show that it is appropriate to recognize in them a right to enforce because the decedent's estate will have little incentive to sue. Restatement § 302; Seaver v. Ransom. Tedeschi will argue that decedent and TIAA intended only for her to have the benefit of the promise because she is the only one currently designated as a beneficiary. Farrell will argue that the decedent was contractually bound not to change her designation as a beneficiary. But TIAA will contend that is a matter between decedent and her.

*Remedy:*

4. Expectation Damages. Farrell will seek expectation damages equal to 50% of the life insurance policy. Tedeschi will seek expectation damages equal to 100% of the insurance policy.

LEATHA FARRELL v. JAMES TEDESCHI'S ESTATE

*Claim:*

5. Breach of Contract. Farrell also might sue the James Tedeschi's estate, claiming that decedent promised to name her (i.e., "the wife") as the 50% beneficiary of his life insurance policy.

*Defense:*

6. No Breach ("wife" not Farrell): The decedent's estate will argue the term "wife" refers to the wife whom decedent has remarried, that is, Valentina Tedeschi, rather than Leatha Farrell, and that the estate therefore did not breach a promise.

But as the problem says, the separation agreement has an ambiguity in the provision addressing the apportionment of insurance benefits after remarriage. The ambiguity (which is not identified in the problem but is instead left to be identified as a very important part of your answer) is whether the term "wife" refers to decedent's wife at the time of the separation agreement or decedent's new wife after he remarries.

To counter decedent's argument about the meaning of the term "the wife," the problem says that Farrell will ask the court to consider extrinsic evidence (i.e., "documents in which decedent referred to the disputed provision") and course of performance evidence (i.e., decedent's negotiations with her, after his remarriage") regarding the meaning of the term "wife."

7. Plain Meaning Rule. The decedent's estate may argue that its interpretation of the term "wife" is the plain meaning of the term. It will seek to block Farrell from using extrinsic evidence to show a different meaning. Farrell will respond in two ways. First, she will deny that the term has a plain meaning; she will say that it is ambiguous because it could refer either to his wife at the time of the separation agreement or at the time of the remarriage. Second, she will argue that the Court should not follow the plain meaning rule. Pacific Gas v. G.W. Thomas.
8. Misunderstanding. If parol evidence is admitted and shows that the parties attached different meanings to the term "wife," the estate will argue either that Farrell is responsible for the misunderstanding (i.e., she should have known that after decedent remarried, his "wife" would be the new wife and not her). Rest. § 201(2). Alternatively, the estate will argue that there was no agreement on the point, in which case Farrell has no claim to the proceeds.

*Remedy:*

9. Expectation Damages. Farrell will seek expectation damages equal to 50% of the life insurance policy.

OTHER

10. Other

Common problem: Many answers contained lengthy discussions of the rules concerning the meaning of ambiguous terms without specifying what the ambiguity was in this case.

### PROBLEM III.

#### MINI-CIRCUITS v. ISIS

##### *Claim:*

1. Breach of Contract. Mini-Circuits will sue ISIS for breach of contract, claiming that ISIS made promises to buy various electronic components and then repudiated some of those promises by cancelling all open orders.

##### *Defense:*

2. No Acceptance. ISIS first may argue that its promises to buy the cancelled components are not enforceable because the parties never reached agreement on them. ISIS will argue that its purchase orders were offers, but that Mini-Circuits never accepted them. Mini-Circuits acknowledgment forms expressly made its acceptance of the purchase orders conditional on ISIS's assent. ISIS will say that it did not assent. So under the proviso in 2-207(1)'s second clause, no contract was formed. Mini-Circuits, however, might reply that the parties formed a contract by conduct when they proceeded with the purchased orders. 2-207(3); C. Itoh v. Jordan Int'l. But this "contract by conduct" argument would be weak with respect to purchase orders for which ISIS has cancelled because ISIS does not appear to have paid any money and Mini-Circuits does not appear to have shipped any goods.
3. No Breach (Contractual Right to Cancel). Alternatively, if a contract was formed, ISIS appears to argue that it did not commit any breach because its purchase orders gave ISIS the right to "change" the orders within 30 days "with no liability." This "right to change" clause, in other words, gave ISIS a contractual right to terminate the contract. Cf. Zapatha v. Dairy Mart. Mini-Circuits might respond that "right to change" clause is not part of the contract for the two reasons below.

Mini-Circuits, however, will respond that the "right to change" term would not become part of the contract if the contract was formed by conduct because the writings of both parties do not agree on this term. 2-207(3). On the contrary, Mini-Circuit's form specifically said that the "[p]urchaser shall not have the right to cancel."

Note: Mini-Circuits also might argue that, if the parties' forms created a contract under 2-207(1)'s first clause, the "knock out rule" should apply and cancel out ISIS's "right to change clause." But it is difficult to see how a contract could be formed by the purchase order and acknowledgement given the express limitation on Mini-Circuits' acceptance.

4. Frustration of Purpose. In addition, even if a contract has been formed and the "no change clause" does not apply, ISIS appears to argue that its purpose for entering the contract has been frustrated. ISIS says: "[Our customer] Western Multiplex has cancelled with us so we have no requirements." Rest. § 265; Taylor v. Caldwell. But Mini-Circuits will respond that ISIS's continuing work for Western Multiplex was not a basic assumption of both parties on which the contract was made. Whether the defense or response is valid would depend on factors such as

whether Mini-Circuits knew of ISIS's purpose for entering the contract and whether the circumstances indicated that ISIS would have to pay for the parts regardless of its contract with Western Multiplex.

*Remedies:*

5. Contract Price/Market Price. The facts indicate that Mini-Circuits did not resell all of the goods. Mini-Circuits will ask for the full contract price of the items that it could not resell for a reasonable price after a reasonable effort. 2-709(1). If any of these items could be resold after reasonable efforts, but just have not been resold, then Mini-Circuits could seek the difference between the market price and the contract price. 2-708(1).
6. Lost profits. The problem indicates that Mini-Circuits also will ask for lost profit. It would be entitled to lost profit if it had a reduced volume of sales because of ISIS's breach. 2-708(2); Neri v. Retail Marine Corp. The facts indicate that Mini-Circuits had additional sales; it possibly could have had a total greater volume of sales if ISIS had not breached. Isis might argue that the court should use a profitability test, rather than a capacity test, to determine whether Mini-Circuits really lost volume, because this test is harder to satisfy. See Davis v. Disonics.

But ISIS will argue that Mini-Circuits did not lose volume to the extent that (1) the items that were resold were used on the same Western Multiplex project that ISIS would have used them on; and (2) Mini-Circuits would not have the capacity to produce additional items given the "long lead times" required. Cf. R.E. Davis v. Disonics.

7. Resale Difference. If Mini-Circuits cannot show that it lost volume, it could always seek the difference between the contract price and the resale price for the items that it resold. But if Mini-Circuits resold the goods at the same price--which is likely because they are standard catalogue items--then there would be no damages.

ISIS v. WESTERN MULTIPLEX

8. Breach of Contract. ISIS might sue Western Multiplex for breach of contract, claiming that Western Multiplex repudiated a contract by improperly cancelling. The problem does not contain enough facts to discuss this claim further.

OTHER

9. Other

PROBLEM IV.

TACOMA FIXTURE COMPANY (TFC) v. RUDD COMPANY

*Claim:*

1. Breach of Warranty. If TFC does not revoke acceptance (see below), TFC might sue Rudd for breach of the implied warranty of merchantability, claiming that the varnish products were not fit for ordinary purposes because they became discolored and cracked. 2-314; A&M Produce v. FMC Corp. (Note: Customers of TFC also might have claims as third party beneficiaries if they received goods covered with defective varnish.)

*Defenses:*

2. Disclaimer of Warranty. Rudd will argue that it disclaimed the implied warranty of merchantability when it said: "Seller makes no warranty extending beyond the description of the goods on the face hereof."
3. Waiver. Rudd also will argue that TFC waived its claims by failing to bring them within 10 days of delivery as required by the contract.

*Replies:*

4. Inadequacy of the Disclaimer. TFC will respond that the disclaimer is inadequate to disclaim the implied warranty of merchantability because it does not mention "merchantability." 2-316(2). But Rudd may respond that the words used "in common understanding call the buyer's attention to the exclusion of warranties and make[] plain there is no implied warranty." 3-316(3)(a). There is no rigid formula for deciding when a disclaimer is conspicuous; using all capital letters may not be enough. Sierra Diesel v. Borroughs Corp. (Note: This disclaimer would be adequate to eliminate the implied warranty of fitness for a particular purpose. 2-316(2).)
5. No Agreement on Disclaimer/Waiver (Terms in the Box). TFC also will argue that it did not agree on the disclaimer and waiver provision. TFC will liken this case to Klocek v. Gateway, arguing that a contract was formed over the telephone and any additional terms supplied later are merely proposals for changing the contract. 2-209(1); 2-207(2). But Rudd will liken this case to Hill v. Gateway 2000, arguing that no contract was made until after the goods had been shipped, received, and retained beyond the 10-day time period for making complaints. This is especially true, it will say, because no price was agreed on until the invoice was sent. At that point, according to Rudd, the disclaimer and waiver became part of the contract.
6. Unconscionability. TFC also will argue that the disclaimer and waiver are unconscionable. They will argue that the product is defective and there was no way to detect the defect until after the 10-day period elapsed. A&M Produce v. FMC Corp.

*Remedies:*

7. Warranty Damages. TFC will seek warranty damages equal to the difference in the value of the varnish products as accepted (arguably nothing) and as warranted (whatever merchantable varnish product cost), plus consequential damages (probably close to the \$1.5 million claimed).

*Remedy Limitation:*

8. Contractual Limitation of Remedy. TFC will argue that the invoice limits the remedies to the "replacement of materials." It therefore will supply replacement varnish products, but will not pay damages. TFC will respond that this term did not become part of the contract or was unconscionable for the same reasons that the waiver and disclaimer do not apply.

TACOMA FIXTURE COMPANY (TFC) v. RUDD

*Claim:*

9. Breach of Contract. If TFC revokes acceptance, TFC might sue Rudd for breach of contract, claiming that Rudd made an implied promise to deliver merchantable goods, and breached this contract when it delivered goods that were not merchantable.

*Defense:*

10. No Right to Revoke Acceptance. Rudd will argue that TFC had no right to revoke acceptance and therefore no right to sue for breach of contract for failing to deliver conforming goods. It will contend that it disclaimed the implied warranty of merchantability, and that therefore the goods were conforming to the contract.

TFC will only prevail if the disclaimer is invalid (see above). If the disclaimer is invalid, TFC would argue that it is revoking acceptance because non-conformity (i.e., the breach of the implied warranty of merchantability) substantially impairs the value of the varnish products and could not be discovered before acceptance. 2-608(1)(b).

*Remedy:*

11. Price Paid and Market Damages. TFC seek to recover the price paid, 2-711(1), and market damages, 2-713(1). But it could not recover consequential damages under 2-715(2)(b) because it would not be suing for breach of warranty. TFC's recovery would be much lower than if it could include consequential damages.

OTHER

12. Other

Notes: (1) TFC conceivably could claim a breach of the implied warranty of fitness for a particular purpose. But the facts do not indicate whether Rudd had reason to know what TFC was using the goods for and that TFC was relying on Rudd's skill and judgment to furnish suitable goods. (2) As Prof. Mixup's 7th principle makes clear, a plaintiff cannot both revoke acceptance and claim a breach of warranty. Many answers mixed this up. (3) Rudd is unlikely to raise the statute of frauds as a defense, even though the call was made orally. The exception for goods accepted or paid for would clearly apply. 2-201. (4) If there is no implied warranty of merchantability because it has been disclaimed, then TFC cannot seek warranty damages or revoke acceptance.

PROBLEM V.

MILLIGAN v. CIC

*Claim:*

1. Breach of Contract. Milligan might sue CIC for breach of contract, claiming that Milligan promised to deliver concrete under Sales Orders 1347 and 1348, and delivered only some of the concrete covered by 1347 and none of the concrete covered by 1348, and repudiated the remaining obligations under these promises.

*Defense:*

2. Right to Cancel. CIC will argue in response that it had a right to cancel because Milligan failed to make a payment when the payment was due. 2-703(f)

*Replies:*

3. Usage of Trade. Milligan will argue that it did not pay late because the term "10 days net" allowed it to send the check on the 10th day under usage of the trade. 1-205(2), (4). It will point to its "dealings

with other asphalt suppliers" to show this usage of trade. See Nanakuli Paving v. Shell Oil.

4. No Breach of the Whole. Milligan also will argue that, even if it paid for the initial installments one day late, its breach did not "substantially impair the value of the whole contract" and thus did not constitute a breach of the whole. As a result, CIC did not have a right to cancel the balance of Sales Order 1347 or the entire Sales Order 1348. 2-612(3), 2-703. Cf. Graulich Caterer v. Hans Holterbosch.

Remedy:

5. Cover Damages (Gray County/Order 1347). Milligan will seek to recover damages for Order 1347. These damages will equal the difference in the cover price (\$497 that it paid Valero) and the contract price (\$375), plus any additional shipping costs as incidental damages.
6. Market Damages (Armstrong County/Order 1348). Milligan will argue that because it has not purchased substitute goods for the goods involved in Order 1348, it has not yet covered, and it is entitled to market damages. 2-713. These damages will equal the difference between the contract price (\$375) and the market price at the time Milligan learned of the breach (i.e., on July 11 when CIC repudiated). The market price at this time is not specified, but it is probably greater than \$375; CIC otherwise would not have wanted to repudiate the contract.

But CIC may argue that Milligan cannot recover market damages because Milligan has elected to cover by entering into a contract with Valero. Graulich Caterer v. Hans Holterbosch. CIC will also argue that Milligan cannot recover cover damages at this time because it has not yet covered for Order 1348. 2-706(2)

OTHER

7. Other

Notes: (1) There is no need to get into constructive conditions under the common law because § 2-703 expressly provides the seller a remedy when the buyer fails to pay. (2) Some answers suggested the CIC might sue Milligan for making a late payment, but it is difficult to see CIC's motivation for bringing such a lawsuit.

PROBLEM I.

MAPLEWOOD MALL v. ADVANCED WIRELESS

*Claim:*

1. Breach of Contract. Maplewood Mall might sue Advanced Wireless for breach of contract, claiming that Advanced Wireless promised to pay rent but then stopped paying the rent.

*First Defense:*

2. Non-Occurrence of a Constructive Condition. Advanced Wireless will argue that its duty to pay rent was constructively conditioned on the performance of an oral promise by Maplewood Mall not to lease space to competitors during the remainder of the lease and that Maplewood Mall breached this promise.

Maplewood Mall will respond in two ways. First, it will deny that it made the oral promise. (The facts specifically say that Maplewood disputes the assertion that it made a promise to Advanced Wireless not to lease to competitors.)

Second, Maplewood Mall also will argue that there is no constructive condition because the parol evidence rule would discharge any oral agreement not to lease space to competitors. The alleged promise was not included in the lease and the lease contained a merger clause. Therefore, all terms within the scope of the lease were discharged.

*Second Defense:*

3. Rental Reduction. Advanced Wireless also will argue that § 8.1 provides for a 25% reduction in rent if Maplewood Mall leases to a competitor. Because Maplewood Mall leased space to more than 4 new competitors to enter the store, Advanced Wireless will argue that it is entitled to reduction of 100% of the rent under section 8.1.

Maplewood Mall will respond in two ways. First, it will argue that Advanced Wireless cannot claim a reduction because it did not comply with the requirement in Section 24.7 that notice must be sent by certified mail. But Advanced Wireless might respond that section 24.7 is not an express condition because it does not specify what will happen if notice is sent by another means. Therefore, strict compliance is not required and its delivery of the notice by another means should suffice.

Maplewood Mall will also argue that Advanced Wireless is entitled to only one reduction of 25% reduction under the contract. If the court concludes that the contract is ambiguous, the court will have to admit extrinsic evidence to show the meaning of this term.

*Remedy:*

4. Expectation Damages. Maplewood Mall will seek the full rent under the contract. Alternatively, it will request 75% of the rent. Advance Wireless will at least request an allowance for damages equal to the amount that it lost by virtue of the competition.

ADVANCED WIRELESS v. MAPLEWOOD MALL

*Claim:*

5. Breach of Contract. Advanced Wireless may sue Maplewood Mall for breach of contract, claiming that Maplewood Mall made an oral promise not to lease space to competitors during the remainder of the lease and that Maplewood Mall broke this promise by leasing to multiple competitors.

*Defenses:*

6. No promise/promise discharged. Maplewood Mall will raise as defenses the responses listed above: (1) there was no promise; (2) the promise would have been discharged by the parol evidence rule.

*Remedy:*

7. Expectation Damages. Advanced Wireless may seek expectation damages equal to the loss in profits caused by the competitors, less the rent that it has withheld. Maplewood Mall will argue that it is only entitled to a reduction of 25% of the rent (see above) because the rent reduction clause is a form of liquidated damages.

OTHER

8. Other

PROBLEM II.

FACILITIES v. ROGERS-USRY

*Claim:*

1. Breach of Contract. Facilities might sue Rogers-Usry for breach of contract, claiming that Rogers-Usry promised in § 3(c) to pay bonus rent for each vehicle over 100 that it sells each month, regardless of the location of the sale, and that Roger-Usry repudiated that promise when it said that it would not pay the bonus for cars sold on the new land.

*Defense:*

2. No Breach. Rogers-Usry will respond that it has not breached the contract because § 3(c) requires it to pay bonus rent only for vehicles sales that occur on the leased land. Rogers Usry will argue that the term "rent," as defined in Black's Law Dictionary and as commonly understood, is tied to the use of property. Thus, the rent would not come from activities at other locations.

Facilities will reply with four arguments: (1) The language of § 3(c) contains no geographic limitation. (2) The lease would not make sense unless Facilities were to receive additional compensation because Rogers-Usry was getting a below market rental. (3) Rogers-Usry is an integrated operation and thus it is not possible to identify "the" location at which sales are made. (4) Even if the lease contained implied geographic limitations, the limitations logically would include the entire area of responsibility assigned to Rogers-Usry by Chevrolet.

3. Plain Meaning Rule (Meaning of Terms). Rogers-Usry further will argue that, under the plain meaning rule, the court should not consider facilities' arguments. It will contend that because § 3(c) has a plain meaning, a court should not consider extrinsic evidence, such as evidence from the parties' negotiations, the integrated nature of Rogers-Usry's operations, or the area of responsibility assigned by Chevrolet.

Rogers-Usry further will argue that, even if extrinsic evidence is considered (for example, in a jurisdiction that does not follow the plain meaning rule), its interpretation of the contract should control because it is supported by the ordinary usage of the term rent.

*Remedy:*

4. Expectation Damages. Facilities will seek expectation damages equal to \$100 for every car over 100 that Rogers-Usry has sold.

FACILITIES v. ROGERS-USRY

*First Claim:*

5. Breach of Contract. Alternatively, Facilities might sue Rogers-Usry for breach of contract, claiming that Rogers-Usry made an implied promise to continue selling new vehicles from the leased land, and broke that promise when it moved its new car sales to the nearby property. See Dickie v. Philadelphia Minit-Man (plaintiff's actual claim). It will explain that the court should find the promise to be implied so that the bonus rent provision will not be undermined.

*Defense:*

6. No implied promise. Rogers-Usry may argue that it did not make an implied promise to continue selling vehicles from the leased property. It will contend that, that Facilities is guaranteed to receive a minimum rental and a court should not get involved in business decisions like how many sales to make at a particular location. See Dickie v. Philadelphia Minit-Man (defendant's defense).

*Remedy:*

7. Expectation Damages. Facilities will seek expectation damages equal to the amount of bonus rent that it would have earned if Rogers-Usry had continued to sell cars exclusively from the leased property

OTHER

8. Otherw

PROBLEM III.

HIGHWAY SALES v. SHOREWOOD RV

*Claim:*

1. Breach of Contract/Warranty. Highway Sales might sue Shorewood RV presenting alternative claims for breach of contract and breach of implied warranty of merchantability. Its ultimate claim will depend on

whether it can successfully revoke acceptance of the RV (see below). Either way, Highway Sales will assert that Shorewood RV, as a dealer in RVs, made an implied warranty that the M380 RV would be merchantable, 2-314(1), and that the M380 RV was not merchantable because its numerous defects made it unfit for the ordinary purposes of an RV, 2-314(c)(2).

*First Choice Remedy:*

2. Refund of Purchase Price and Market Damages. If Highway Sales can revoke acceptance, it will seek a refund of the \$340,000 purchase price plus market damages. 2-711(1), 2-713. Shorewood RV would receive credit for any amount that Parliament paid Highway Sales.

*Remedy Limitation:*

3. Remedies Not Available for Accepted Goods. Shorewood RV may respond that these remedies are not available to Highway Sales because Highway Sales accepted the goods. 2-711(1). But Highway Sales will respond that it properly revoked acceptance under § 2-608(1)(a). Highway Sales will argue (1) that the nonconformity substantially impairs the value of the goods, (2) that he accepted the goods under the assumption the nonconformity would be cured, and (3) that he provided notice of his revocation of acceptance when he returned the RV to Shorewood RV's lot.

Note: Shorewood RV may reply that it is inconsistent for Highway Sales to claim that it revoked acceptance but then sold the R380 to Parliament coach. But Highway Sales may contend that it retained a security interest in the goods and had a right to resell them to collect on that security interest. 2-711(3).

*Second Choice Remedy:*

4. Warranty Damages: If Highway Sales cannot revoke acceptance, Highway Sales may seek warranty damages equal to the difference in value between RV as warranted (which presumably is at least as much as the \$340,000 purchase price) and as delivered (which is presumably something close to the resale price).

HIGHWAY SALES/SHOREWOOD RV v. BLUE BIRD

*Claim:*

5. Breach of Warranty. Highway Sales and Shorewood RV might sue Blue Bird for breach of warranty, claiming that Blue Bird made an implied warranty that the M380 RV would be merchantable when it sold the vehicle to Shorewood RV, and that the RV was not merchantable because its numerous defects made it unfit for the ordinary purposes of an RV. (Highway Sales would bring the claim as a third-party beneficiary of this warranty. See 2-318).

*Remedies:*

6. Warranty Damages. Highway Sales and Shorewood RV might seek warranty damages equal to the difference in value between coach as warranted (at least as much as the \$340,000 purchase price) and as delivered (possibly the resale price).

*Unrealistic Remedy:*

7. Refund. The facts specify that Highway Sales wants a refund from Blue Bird. Answers therefore should discuss this remedy. But this remedy is

not possible because Highway Sales did not have a contract with Blue Bird.

Other

8. Other

PROBLEM IV.

COORSTEK v. EMSCO

*Claim:*

1. Breach of Warranty (FFPP). CoorsTek, which accepted the coil, might sue EMSCO for breach of an implied warranty of fitness for a particular purpose or might revoke acceptance of the goods and sue EMSCO for breach of contract. Either way, CoorsTek will claim that EMSCO made an implied warranty of fitness for a particular purpose because (1) EMSCO at the time of contracting had reason to know that CoorsTek needed the goods for the particular purpose of using the goods with CoorsTek's existing furnace and water cables because its purchase order said it was for this use; and (2) EMSCO knew that CoorsTek was relying on EMSCO's skill to select or furnish a suitable coil. 2-315. CoorsTek will assert that the coil did not conform to this implied warranty because it overheated and caused a fire which rendered the furnace inoperable.

Note: This warranty is implied by law unless disclaimed. Accordingly, CoorsTek will not have to alleged that EMSCO expressly agreed to any term in CoorsTek's purchase order.

*Defenses:*

2. Non-Occurrence of a Condition. EMSCO also will argue that it does not have to pay because CoorsTek did not provide the amount of water required by EMSCO's water diagram. It will argue that compliance with the diagram was an implied condition to any warranty of fitness for a particular purpose. Coorstek will respond that this condition is contrary to the requirement that the coil work with its existing equipment, which did not provide for a greater water supply. In other words, even if the coil would have been fit for furnaces that had a better water supply, its was not fit for CoorsTek's particular purpose of use with it actual furnace.

*Remedy:*

3. Warranty Damages. If CoorsTek does not revoke acceptance, it will seek warranty damages equal to the difference between the value of the coil as accepted and the value that the coil would have had if it had been as warranted, plus any incidental damages and consequential damages. 2-714(2) & (3). The value of the coil accepted is arguably \$0 because it did not work. The value of the coil as warranted is arguably at least \$66,632, since that is what it cost, and maybe more if a working coil would cost more. Consequential damages would include the cost of replacing the destroyed furnace. (The damages would not differ materially if CoorsTek did revoke acceptance.)

*Remedy Limitations:*

4. Damage Limitations in Invoice. EMSCO will argue that CoorsTek cannot recover consequential damages or damages for property covered by insurance based on the limitation of remedy stated in its invoice (which was the same as in its quotation). But CoorsTek might respond that this limitation did not become part of the contract.

CoorsTek will argue that its purchase order was an offer and EMSCO's invoice was the acceptance. 2-206(1)(b). The terms in the invoice were "additional terms" because they were not included in the purchase order.

CoorsTek may argue that the additional terms did not automatically become part of the contract under the merchant rule in 2-207(2) because these additional terms would materially alter the contract. Instead, under the first sentence of 2-207(2), the additional terms were only a proposal to modify the offer. CoorsTek will argue that it never accepted this proposal, and thus the terms did not become part of the contract.

Alternatively, CoorsTek may argue that the clause limiting the purchase order to its terms put the purchase order within the proviso of 2-207(1), thus preventing the formation of a contract by the exchange of forms. CoorsTek will argue that a contract was then formed by conduct under 2-207(3). This contract included only the terms on which the forms agreed, of which the remedy limitation was not one.

5. Damage Limitation by Tacit Agreement. CoorsTek alternatively will argue (as the facts specifically say) that the parties made a tacit agreement that no consequential damages would be recovered. The facts do not provide much basis for analyzing this argument.

EMSCO v. COORSTEK

*Claim:*

6. Breach of Contract. EMSCO might sue CoorsTek for breach of contract, claiming that it promised to pay for the coil and did not do it.

*Defense:*

7. Revocation of Acceptance. CoorsTek may argue that it is entitled to revoke its acceptance of the coil because (1) the coil's non-conformity with the implied warranty of fitness for a particular purpose substantially impairs its value to him (see above) and (2) CoorsTek accepted the coil without discovery of this non-conformity because it was difficult to detect it other than by testing it in the furnace. 2-608(10)(b).

*Remedy:*

8. Contract Price. EMSCO will argue that it is entitled to the full contract price, \$66,632.00, because CoorsTek accepted the goods. 2-709(1)(a). But of course EMSCO's recovery will be diminished by any damages to which CoorsTek can recover for breach of warranty. See 2-717.

OTHER

9. Other

PROBLEM V.

PANNING FARMS v. FARM SERVICE

*Claim:*

1. Breach of Contract. Panning Farms will sue Farm Service for breach of contract, claiming that Farm Service promised to spray his alfalfa field with Velpar, and that Farm Service broke this promise when it did not properly spray the field either because (1) "Farm Service had not purged other chemicals already in the [the spraying rig]" before spraying the Velpar or (2) "Farm Service had otherwise misapplied" the Velpar.

Note: The facts of the problem specify that Panning Farms has these two very specific objections to Farm Service's performance. The facts also indicate that Panning Farms, Farm Service, and DuPont already have settled Panning Farms' breach of warranty claims. Thus, Panning Farms seems likely to sue Farm Service for breach of contract based on these perceived problems and seems unlikely to sue it for breach of warranty.

*Defenses:*

2. No breach. The facts specifically indicate that Farm Service's defense is that it did not misapply the Velpar and that any problem must have arisen from the chemical itself. Because Panning Farms has already been compensated in the settlement with DuPont for the chemical, Farm Service will argue that Panning Farm has not claim.

Note: The facts say that the parties did not have a written contract. But the statute of frauds would not seem to be a problem. Even if this contract is governed by the U.C.C., the goods have been delivered and accepted.

*Remedy:*

3. Expectation Damages: Panning Farms will seek expectation damages. Expectation damages equal loss in value plus other loss minus costs and other losses avoided.

Panning Farms' loss in value would have been the cost of the chemicals (\$8000) but Panning Farms has already been compensated for that loss in the settlement with DuPont. Panning Farms therefore has no loss in value.

The facts indicates that Panning Farms will claim that its loss in value includes \$15,937.50 for lost income, \$900 for manure, \$400 for labor to replant, \$374 to apply lime to replant, and \$1,360 for alfalfa seeds to replant. But Farm Service will argue that the replanting costs cannot be recovered because Panning Farms would have incurred them even if it had harvested a successful crop and earned the income it claims to have loss.

Panning Farms' costs avoided are \$11,982.29, the amount left on the account that Panning Farm's has not paid.

FARM SERVICE v. PANNING FARMS

*Claim:*

4. Breach of Contract. Farm Service may sue Panning Farms for breach of contract, claiming that Panning Farms promised to pay a total of \$19,982 (i.e., \$8,000 paid by DuPont + \$11,982 not yet paid), and did not pay \$11,982 of this amount.

*Defense:*

5. Non-Occurrence of a Constructive Condition. Panning Farms may argue that its promise to pay was constructively conditioned on Farm Service's performance, and this condition was not satisfied because of Farm Service's material breach.

Farm Service may argue that there is no constructive condition. It will assert that this is a contract for the sale of goods (i.e., Velpar). Under the U.C.C., a buyer must pay for goods accepted but may withhold damages. 2-717. The buyer may not refuse to pay altogether unless the buyer rejects the goods or revokes acceptance. 2-711.

But Panning Farms will argue that the contract is for a hybrid of goods and services (i.e., spraying), that the common law should apply because the cost of spraying predominates over the costs of goods (i.e., \$11,982 for spraying and \$8000 for the chemicals).

*Remedy:*

6. Contract Price. Farm Service will seek \$11,982, the balance of the purchase price, as a remedy. Panning Farms will seek to offset Farm Services' recovery by the amount of damages that it suffered under either U.C.C or the common law. § 2-717; Jacob & Youngs v. Kent.

PANNING FARMS v. FARM SERVICE & DUPONT; FARM SERVICE v. DUPONT

7. Claim & Settlement: Panning Farms and Farm Services may have had breach of warranty claims against DuPont for supplying defective chemicals. But the facts say that "DuPoint paid Farm Service \$8800 towards Panning's outstanding debt on his account [as a settlement for the cost of the chemicals that allegedly were defective]." The settlement would appear to satisfy any claims that they might have.

OTHER

8. Other

PROBLEM I.

The edited excerpt in this problem comes from Cooper v. Norris, 2001 WL 173209 (Tenn. Ct. App.).

COOPER v. BOARD OF EDUCATION

*Claim:*

9. Breach of Contract. Cooper might sue the Board of Education for breach of contract, claiming that the Board promised on May 14 to employ her as a teacher and coach and repudiated that promise on June 11 when it rescinded the employment contract.

*Defense:*

10. Non-Occurrence of an Express Condition. The Board of Education will defend on grounds that its promise to employ Cooper was qualified by the words "pending teacher certification." From the facts, it appears that the Board will assert that the term "pending" means something like "contingent on" and that the term "teacher certification" means "passing the National Teachers Examination." The Board accordingly will contend that its performance under the contract (i.e., employing Cooper) was expressly conditioned on her passing the National Teachers Examination, that she did not pass the examination, and therefore that the non-occurrence of this event excused the Board from performing. Luttinger v. Rosen.

*Replies*

11. Express Condition Satisfied ("Teacher Certification"). Cooper will reply that even if there was an express condition that she obtain teacher certification, this condition was satisfied. She will assert that the term "teacher certification" may include an "interim probationary teacher license," which she in fact obtained.
12. Express Condition Satisfied ("Pending"). If the foregoing argument fails, and the court concludes that Cooper did not obtain teacher certification, Cooper alternatively might reply that the term "pending" does not mean "contingent on" but instead means "while awaiting; until" (as the dictionary says). Under this interpretation, Cooper will assert, the Board had a duty to employ her until she passed the National Teachers Examination. Because she has not passed the examination, the board breached its duty to employ her. [Yes, this is a strange argument; but the facts of the problem indicate that Cooper actually made it.]
13. Construction against Drafter. Cooper further will argue that if the court believes that the terms "teacher certification" and "pending" are ambiguous, the court should construe them against the School Board, which drafted the contract. Rest. § 206.
14. Exclusion of Parol Evidence. If the court finds that the terms "pending" and "teacher certification" are not ambiguous, Cooper will argue that the plain meaning rule bars the court from considering Williams's testimony regarding their meaning. Gianni v. R. Russell.

15. Substantial Performance. Cooper also may argue that, even if her obtaining actual teacher certification by passing the NTE was somehow a constructive condition to the Board's performance, she satisfied the condition because obtaining an interim license was substantial performance. Rest. §§ 237, 241; Plante v. Jacobs, Walker & Co. v. Harrison, Jacob & Youngs v. Kent.

*Responses:*

16. No Plain Meaning. The Board might respond that the court may consider Williams's testimony because the terms "teacher certification" and "pending" do not have a plain meaning. The Board will argue that "teacher certification" does not have a universal meaning. On the contrary, it could mean one thing in some school districts and another in other school districts. So extrinsic evidence must establish its meaning in their contract. And the Board will assert that "pending" might mean "contingent on" in a particular context.
17. Usage of Trade. The Board also might respond that the court may consider the testimony even if "teacher certification" has a plain meaning in ordinary English because it has a special meaning in the trade. The special meaning, according to Williams (whom the Board will say is an expert given his service on the school board), is passing the National Teachers Examination. Hurst v. Lake.
18. Intent Rule. The Board also might argue that the evidence should be admissible if the court follows the modern intent rule under which evidence of the meaning of terms is always admissible. Pacific Gas v. G.W. Thomas Drayage.
19. Misunderstanding. The Board further may argue that, once the parol evidence is admitted, the meaning that the Board attached to the term "pending teacher certification" should control because Cooper admitted that she knew that the Board attached a different meaning. Rest. § 201(2).

*Remedy:*

20. Expectation Damages: Cooper might seek expectation damages, equal to her loss in value (her promised salary) minus costs avoided (time available for other work).

Cooper conceivably also might seek specific performance (i.e., employment), but she would have difficulty explaining why damages would not be an adequate remedy.

OTHER

21. Other

Note: This problem did not raise the issue of whether the contract was a complete or partial integration. That issue arises when the parties dispute whether the parol evidence rule has discharged a prior agreement, not when they dispute whether extrinsic evidence can be used to show the meaning of terms. See Prof. Mixup's Principle #5.

PROBLEM II.

The edited excerpt in this problem comes from Maslow v. Vanquri, 896 A.2d 408 (Md. App. 2006).

MASLOW v. VANGURI

*Claim:*

1. Breach of Contract. Maslow might sue Dr. Vanguri, claiming that he promised to pay her \$250,000 in the high-low settlement agreement -- even if the jury returned a verdict against Maslow -- and that Dr. Vanguri did not pay the money.

*Defense:*

2. Non-Occurrence of a Constructive Condition. Assuming that the agreement on forfeiture language is discharged by the parol evidence rule, Dr. Vanguri will still argue that even though the contract contained no forfeiture language (i.e., no express term saying that Maslow would forfeit her recovery of \$250,000 if she appeal), his performance of paying the money was nonetheless constructively conditioned on Maslow's not appealing the verdict based on the evidence sense and meaning of the agreement. Kingston v. Preston. He will say that this constructive condition was not satisfied and that this performance was excused when she in fact filed an appeal. Rest. § 237; Walker & Co. v. Harrison, Jacob & Youngs v. Kent, Plante v. Jacobs.

*Replies:*

3. No Constructive Condition (Independent Covenant). Maslow might argue that the promise to pay \$250,000 was not constructively conditioned on the promise not to appeal, but was instead an independent covenant in the contract. Rest. § 232 & Syl. App. No. 2. She will argue (1) that the promise to pay money dealt with liability, while the promise not to appeal dealt with finality, and (2) that the parties could not have intended so great a forfeiture merely because an appeal was filed.
4. No Material Breach (Substantial Performance). Maslow alternatively will argue that, even though filing the appeal was a breach of the settlement agreement, it was not a material breach. Given that the appeal was wholly unsuccessful, it did not increase Dr. Vanguri's liability. Dr. Vanguri, however, will respond that the breach was a material breach for two reasons. First, it was willful. Second, the breach caused serious harm because it eliminated one of the major purposes of settling, namely, obtaining finality.

*Remedy:*

5. Expectation Damages. Maslow will seek expectation damages equal to \$250,000.

*Remedy Limitation:*

6. Allowance for Damages. Dr. Vanguri will contend that even if the breach is not a material breach, and does not excuse him from paying altogether, he is still entitled to an allowance for damages. Walker & Co. v. Harrison, Jacob & Youngs v. Kent, Plante v. Jacobs. These damages might include his cost of defending the appeal and compensation for having to endure the extension of the lawsuit. (Alternatively, Dr. Vanguri might sue Maslow for this amount, see below.)

MASLOW v. VANGURI

*Claim & Remedy:*

7. Restitution. If a court concludes that Maslow committed a material breach and cannot recover for breach of contract, Maslow might seek to recover in restitution. She would argue that Dr. Vanguri would be unjustly enriched by retaining the entire \$250,000. She would seek to recover the portion of the \$250,000 payment that exceeds the damages that he has suffered. Rest. § 374(1); Britton v. Turner

VANGURI v. MASLOW

*Claim:*

8. Breach of Contract & Remedies. Dr. Vanguri might sue Maslow for breach of contract, claiming that she promised not to appeal and that she broke that promise by filing an appeal.

*Remedy:*

9. Expectation Damages. Dr. Vanguri will seek expectation damages equal to his cost of defending the appeal (attorney's fees, etc.) and compensation for having to endure the extension of the lawsuit and not getting the benefit of finality. Maslow may argue that the value of finality cannot be measured with reasonable certainty, although Dr. Vanguri may respond that their settlement indicates that it was worth up to \$250,000 to him.

WEBER v. VANGURI

*Claim:*

10. Breach of Contract & Remedies. Weber might sue Dr. Vanguri, claiming that he promised to pay Maslow \$250,000 in the settlement agreement, and did not do it. Weber will make the same argument and seek the same remedies as described for Maslow above.

*Defense:*

11. Lack of Privity. In addition to the defense of non-occurrence of a constructive condition (described above), Dr. Vanguri may argue that Weber cannot enforce the settlement agreement because there is no privity of contract. Dr. Vanguri made the contract with Maslow, not Weber. Bain v. Gillispie.

*Reply:*

12. Intended Third Party Beneficiary. Weber will argue that he is an intended third-party beneficiary of the contract. Enforcement is appropriate to effectuate the intent of Maslow and Dr. Vanguri because they intended that Weber would be paid his fee with money from the settlement (as evidenced by the attorney's lien) and because performance of the promise will satisfy an obligation of Maslow to pay Weber. Rest. §§ 302, 304; Seaver v. Ransom.

WEBER v. MASLOW

*Claim:*

13. Breach of Contract & Remedies. Weber will sue Maslow, claiming that she promised to pay his fee and did not do it. He will seek the amount of the fee. Maslow does not appear to have any defense. (She probably

also does not have any money, given that she has not received payment from Dr. Vanguri.)

OTHER

14. Other

Note: Sometimes one condition in a contract is subject to another condition. See Luttinger v. Rosen (the Rosens' promise to buy Luttinger's house was conditioned on obtaining a particular kind of loan, but this condition was itself condition on the Rosens' exercise of due diligence). If the condition of Maslow's not appealing was conditioned on Vanguri's tendering of \$250,000, that additional condition was satisfied because insurance company's offered to pay Maslow the money.

PROBLEM III.

The edited excerpt in this problem comes from Momax, LLC v. The Rockland Corp., 2005 WL 839402 (N.D. Tex. 2005).

MOMAX v. ROCKLAND

*Claim:*

1. Breach of Contract/Warranty. Momax may sue Rockland for breach of contract and/or breach of warranty depending on the extent to which Momax can rescind acceptance of the goods (see remedies below). Momax will claim that the tender and goods were defective in the following ways:
  - (a) Rockland promised to deliver 2,344 bottles of Body Beautiful by August 20, and broke this promise when it delivered the bottles late.
  - (b) Rockland made an express warranty to make the product match the competitor's product, and breached this warranty because it contained less protein. See 2-313(1).
  - (c) Rockland made an implied warranty that the goods delivered would be merchantable and broke this warranty because (i) the goods were not adequately packaged given that they leaked, bulged, and exploded, see 2-314(e); (ii) the contamination of the goods by bacteria made them unfit for ordinary purposes, see 2-314(2)(c), and (iii) the amount of protein did not conform to the affirmations of fact on the bottle label, see 2-314(2)(f)

*Defenses:*

2. No Late Delivery. Rockland will argue that the parties never agreed on a delivery date. Although Momax insisted on August 20th, Rockland said that date was impossible. As a result, Rockland will argue that the contract required delivery in a reasonable time, and Rockland will argue that it met this deadline given the difficulty of producing the goods. UCC 2-309(1).
3. Waiver. Rockland will argue that Momax waived any claims regarding the formulation of the product because Momax knew Rockland did not have time

for adequate testing and the formulation met Momax's approval. See 2-209(3), 1-301; Wisconsin Knife v. Nat'l Metal. (Note that Rockland would have difficulty claiming that there was a disclaimer under 2-316(3)(b) because Momax did not inspect the goods before the contract was made.)

*1st Choice Remedies:*

4. Revocation of Acceptance, Etc.: The facts make clear that Momax does not want to keep any of the goods. So Momax would prefer to seek the following remedies:
  - (a) revocation of acceptance of all of the goods on grounds that the bacterial contamination, deficient protein content, and bulging of the bottles could not be detected at the time of acceptance without opening the product (which was meant for resale), see 2-608(1)(b);
  - (b) cancellation of future installments on grounds that the shipments were part of an installment contract and the breaches are so extensive that they constitute the breach of the whole, see 2-711(1), 2-612(3);
  - (c) return of any money paid; see 2-711(1); and
  - (d) market damages, which equal the difference between the market price of goods that Rockland promised and the contract price (neither of these prices is specified); see 2-711(1)(b), 2-713(1)
  - (e) incidental damages, which would include the costs of the recall and destroying the contaminated product, see 2-713(1), 2-715(1); and
  - (f) consequential damages, which would include any damages owed to Momax's customers, see 2-713(1), 2-715(2)(a).

*2d Choice Remedies:*

5. Damages for goods accepted: If Momax cannot revoke acceptance with respect to some or all of the goods (perhaps on grounds that the defects could be detected earlier), Momax will seek the following remedies with respect to those accepted goods:
  - (a) warranty damages for breach of warranty, equal to the difference in value between the goods as warranted and as delivered, see 2-714(2);
  - (b) damages measured in any reasonable manner for other accepted goods, which presumably would include any extra price for the goods given that Momax wanted to have them delivered quickly, see 2-714(1);
  - (c) incidental damages, which would include the costs of the recall and destroying the contaminated product, see 2-714(3), 2-715(1); and
  - (d) consequential damages, which would include any liability to Momax's customers, see 2-714(3), 2-715(2)(a).

RETAILERS AND CONSUMERS v. MOMAX and ROCKLAND

6. Breach of Warranty. Any consumers and retailers who purchased the product (and who have not been compensated adequately during the recall) might sue Momax and Rockland for breach of the same express and implied warranties discussed above.
7. Damages. The consumers and retailers' damages would resemble those available to Momax.

OTHER

8. Other

NOTE: This problem has an error in the second paragraph. It identifies a Rockland employee as "Wright" without explaining his position. Most people assumed that Wright was the same as Dust.

PROBLEM IV.

The edited excerpt in this problem comes from MacSteel, Inc. v. Eramet North America, 2006 WL 3334019 (E.D. Mich.)

MacSTEEL v. ERAMET [Jackson Facility]

*Claim:*

1. Breach of Contract. MacSteel will sue Eramet for breach of contract in connection with its Jackson Facility. It will claim that Eramet promised to sell and deliver to the Jackson facility 1500 tons of SiMn plus MacSteel's requirements of SiMn for the second half of the year. Although Eramet apparently delivered 1500 tons of SiMn on January 12, Eramet repudiated its obligation to deliver anything to the Jackson facility for the second half of the year when it said that the pertinent clause in MacSteel's purchase order was "null and void." [Note: This is an alleged requirements contract, see 2-306(1), not an unaccepted firm offer made without consideration, see 2-205.]

*Defenses:*

2. No Promise with Respect to Second Half of the Year. Eramet will argue that it did not promise to sell MacSteel its requirements for the second half of the year. Eramet will explain that it offered in its email to sell 1500 tons of SiMn and that MacSteel accepted the order by sending Purchase Order 47129. True, MacSteel's acceptance contained an additional term regarding the second half of the year. But Eramet will contend that this additional term did not prevent formation of the contract under the exception to the mirror image rule in § 2-207(1). But Eramet will say the additional term also did not become part of the contract because the term would have materially altered the bargain. § 2-207(2)(a).

*Reply:*

3. Promise Made by Accepting Purchase Order. MacSteel will argue in response that Eramet's email was merely part of the parties' preliminary negotiations. MacSteel will assert that its purchase order should be construed as an offer and that Eramet accepted this offer -- and all of its terms, including the requirements clause -- by shipping the 1500 tons of SiMn on January 12. See 2-206(1)(b) (purchase order construed as an offer that can be accepted by shipment of the goods).

*Response:*

4. Statute of Frauds. Eramet may reply that, if a contract were formed in the manner that MacSteel contends, the statute of frauds would bar enforcement of any promise in the contract to ship goods for the second half of the year. Although Eramet's acceptance of payment from MacSteel would place the 1500 tons of SiMn in an exception to the statute of frauds, § 2-201(3)(c), this exception cannot apply to goods to be delivered in the second half of the year and not yet paid for. (This argument assumes that Eramet did not sign any writing indicating that it was accepting the purchase order; in reality, it seems likely that Eramet would have included an signed invoice or something referring to the purchase order.)

*Remedies:*

5. Cover Damages. MacSteel will seek \$364,542.54 in cover damages for the SiMn to be delivered to the Jackson Facility. See 2-712(1) & (2).

MacSTEEL v. ERAMET [Fort Smith Facility]

6. Breach of Contract (Fort Smith Facility). MacSteel also will sue Eramet for breach of contract in connection with its Fort Smith facility. MacSteel will claim that Eramet promised to sell and deliver 1500 tons of SiMn to the MacSteel's Fort Smith facility for \$0.3175 per pound and also promised to finalize an "Additional Material Option," and that Eramet then repudiated both of these promises.

*Defenses:*

7. No Acceptance of Purchase Order. Eramet will argue that the parties never reached an agreement because Eramet rejected MacSteel's purchase order for the Fort Smith facility.

*Reply:*

8. Purchase Order was Acceptance of Email. MacSteel cannot advance the same arguments that it used with respect to the Jackson facility because Eramet did not ship goods to Fort Smith. So (inconsistently with its argument in #3 above) MacSteel might argue that Eramet's email was an offer and that MacSteel accepted the offer by sending Purchase Order 47129. True, this purchase order contained both additional and different terms. But MacSteel will argue that the presence of these terms did not prevent formation of the contract under the exception to the mirror image rule. § 2-207(1).

Eramet will dispute that its email was an offer. But even if the email was an offer, and a contract was formed by MacSteel's purchase order, Eramet will assert that the additional terms do not become part of the contract because they would materially alter it. See 2-207(2)(1). This response would excuse Eramet from having to deliver goods for the second half of the year, but Eramet still would have to deliver 1500 tons of SiMn.

*Remedy:*

9. Cover Damages. MacSteel will claim \$300,221.17 in cover damages. 2-712(1) & (2).

*Remedy Limitations:*

10. Calculation of Cover Damages. Eramet may argue that \$0.3175 cannot be used as the contract price for calculating cover damages. Even if a

contract was formed under 2-207(1), Eramet will argue the price of \$0.3175 is a "different" term because Eramet's email quoted a price of \$.32. Some courts treat different terms like additional terms, and this term arguably would materially alter the contract. See 2-207(2)(a) Other courts say that they cancel out contrary terms in offer and a gap filler (like a reasonable price) would control. See 2-305(1).

Other

11. Other

PROBLEM V.

The edited excerpt in this problem comes from Jewish Federation of Greater Des Moines v. Cedar Forest Products Co., 2003 WL 23008855 (Iowa App. 2003)

FEDERATION v. CEDAR FOREST

*Claim:*

1. Restitution. Federation may sue Cedar Forest for restitution of some or all of the remaining portion of its payment which is still held by Cedar Forest. Federation could argue that Cedar Forest would be unjustly enriched by retaining any of this money if the parties never had a contract (see below). Alternatively, even if there was a contract and Federation breached it, Federation would argue that Cedar Forest would be unjustly enriched by retaining any portion of this money that exceeds its damages. See 2-718(1), (3).

*Defenses:*

2. Right to Withhold Damages (Lost Profits). Cedar Forest will contend that it has a right to withhold a portion of Federation's payment equal to its damages. See 2-718(3)(a). The problem indicates that it will ask for these damages to be measured by its lost profit. See § 2-708(2). Cedar Forest will assert that § 2-708(2) gives it a right to recover its lost profit on the sale (unspecified on these facts) and its reasonable costs incurred (\$13,470 in expenses). Cedar Forest will argue that it is entitled to claim lost profits because the facts say that it could have manufactured another structure, showing that it is a lost volume seller. See Neri v. Retail Marine Corp.

*Replies:*

3. No Formation. Federation will argue that the parties never formed a contract, but were merely engaged in preliminary negotiations, given the subsequent discussions about redesigns and order changes. Cf. 2-104(1).
4. Cancellation. Federation alternatively may argue that even if a contract was once formed, the parties mutually agreed to cancel the contract when they entered into subsequent discussions.
5. Insufficient Proof of Lost Volume. Federation also will argue that Cedar Forest cannot claim damages under § 2-708(2) because it has not sufficiently shown that it lost volume. Federation should have to show not only that it could produce an additional structure but that it could do so profitably. R.E. Davis v. Diasonics. Federation will argue that Cedar Forest Products is entitled to recover only its expenses.

6. No Recovery for Lost Profits. Federation further will argue that Cedar Forest cannot recover under § 2-708(2), even if it is a lost volume seller, because this is not a contract for the sale of goods, but instead a contract for the construction of an outdoor structure. See 2-102. As a result, the common law would apply, and the applicable state common law may not allow a similar measure of recovery. But Federation may argue that the prefabricated materials, which are goods, predominate over the services, so § 2-708 (2) would apply . Cf. Anthony Pools v. Sheehan (discussing different approaches to hybrid contracts).

OTHER

7. Other

Notes: (1) Cedar Forest is unlikely to sue Federation because Federation already has paid Cedar Forest and Cedar Forest has retained all the money that it thinks it is owed. (2) Questions about whether article 2 applies to this hybrid contract might arise with respect to issues other than § 2-708(2). In some cases, points were awarded under #6 for discussion of these questions. (3) Answers should not discuss questions of scope in the abstract, but should indicate which party wants article 2 to apply and which does not. See Prof. Mixup's Principle # 4.

Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Professor Gregory E. Maggs

PROBLEM I.

The edited excerpt in this problem comes from *IKO Monroe v. Royal & Sun Alliance Insurance Co.*, 2001 WL 1568674 (D.Del.).

IKO v. ROYAL SUN

*Claim:*

8. Breach of Contract. IKO might claim that Royal Sun promised in the insurance policy both that it would defend IKO in lawsuits and that it would indemnify IKO against tort liability, and that Royal Sun broke and repudiated these promises when Royal Sun refused to defend IKO in the lawsuits brought by the city and the neighbors.

*First Defense & Reply:*

9. Pollution Exclusion Clause (No Promise). Royal Sun might respond that it did not promise to defend IKO in these lawsuits. These lawsuits raise claims based on noxious odors. The insurance policy excludes coverage for claims based on pollution and it defines pollution to include "odors."
10. Inapplicability of Pollution Exclusion Clause. As the problem indicates, IKO will argue the pollution exclusion does not apply because (1) the parties only intended the term "odor" to mean toxic odor; and (2) they intended the term "pollution" to mean only "true pollution."

IKO might support this interpretation of the word "odor" in two ways. First, IKO might point out that the pollution exclusion only applies to an "irritant" or "contaminant," suggesting a toxic pollutant. Second, IKO might offer testimony or other extrinsic evidence about what the parties subjectively intended. (The problem does not specify what this evidence is, but does indicate that IKO will argue about the parties' intent.)

*Second Defense and Replies:*

11. Exclusion of Extrinsic Evidence (Plain Meaning Rule). Royal Sun might argue that the court may not consider extrinsic evidence of what parties subjectively intended the term "odor" to mean because the term has a plain meaning, namely, anything that affects the sense of smell.
12. Non-Exclusion of Extrinsic Evidence (no plain meaning). IKO might reply that the plain meaning rule should not exclude consideration of extrinsic evidence of what the parties subjectively intended because

"odor" does not have a plain meaning. It could mean anything that affects the sense of smell or only a certain type of disagreeable odor.

13. Non-Exclusion of Extrinsic Evidence (Modern Intent Rule). IKO also might reply that the court should adopt the modern intent rule and always allow extrinsic evidence of the parties' subjective intent. Pacific Gas; Trident Center. It will argue that the parol evidence rule rests on the arguably false premise that words have constant referents.

*Third Defense:*

14. Misunderstanding. Royal Sun will argue that, even if extrinsic evidence shows that the parties had different subjective intentions about the meaning of the term "odor," IKO was at fault for this misunderstanding. Royal Sun will contend that IKO knew or should have known that meaning attached by Royal Sun because Royal Sun adopted the objective meaning of the term "odor." Royal Sun will cite the dictionary definition and the reported case mentioned in the problem to demonstrate the objective meaning. Rest. § 201(2); Frigaliment.

*Remedy:*

15. Expectation Damages. IKO will seek expectation damages equal to its loss in value (i.e., the cost of defending and indemnifying it against the claims brought by the city and the neighbors) minus any costs avoided (i.e., saved premiums if it stopped paying the policy, etc.).

OTHER

16. Other

PROBLEM II.

The edited excerpt in this problem comes from *Stonegate Constructions, Inc. v. Nti*, 2004 WL 944397 (Conn. Super.).

STONEGATE v. NTI

*Claim:*

1. Breach of Contract (Non-Payment). Stonegate might sue Nti for breach of contract, claiming that Nti promised to pay for the house and did not make the interim payments.

*Defense:*

2. Non-Occurrence of a Constructive Condition. Nti might defend on grounds of non-occurrence of a constructive condition, asserting that Stonegate used Peachtree windows instead of Anderson windows as required by the contract.

*Reply:*

3. Substantial Performance. Stonegate might reply by saying that the failure to use Anderson windows was not a material breach because Peachtree windows are actually better suited.

*Remedies:*

4. Expectation Damages: Stonegate might seek expectation damages equal to the loss in value (price of \$313,950 minus any payments already made) plus other loss (costs of collection and service charge) minus costs avoided (expected cost of construction minus \$176,693 spent so far).

*Remedy Limitations:*

5. Allowance for Damages. Nti might contend that Stonegate's recovery should be reduced by the difference in value (if any) between the two windows. Jacob & Youngs v. Kent.

STONEGATE v. NTI

*Claim:*

6. Unjust Enrichment. If a court concludes that Stonegate did not substantially perform and therefore cannot recover for breach of contract, Stonegate might sue Nti claiming that Nti was unjustly enriched by the construction that was done. Britton v. Turner. (Note that some jurisdictions do not allow a defaulting plaintiff to obtain restitution.)

*Remedy:*

7. Restitution. Stonegate will seek restitution equal to the benefit conferred on Nti (the value of the construction so far) minus any damages caused (the amount by which the total cost for completing construction will exceed the contract price of \$313,950.)

NTI v. STONEGATE

*Claim:*

8. Breach of Contract. Nti might sue Stonegate for breach of contract, claiming that he did not complete the construction of the house as he had promised and the he did not use Anderson windows as he promised.

*Defense:*

9. Non-Occurrence of a Constructive Condition. Stonegate might defend against the claim that he did not complete the construction by asserting the non-occurrence of a constructive condition, saying that Nti did not make the interim payments and did not cooperate as required by the contract.

Notes: (1) This defense is valid only if Nti was not justified in withholding payment based on the use of the wrong kind of windows, see above. (2) Stonegate has no defense to Nti's claim that he did not use Anderson windows. Although his breach may have been sufficiently material to excuse Nti's performance (as discussed above), it is still a breach.

*Remedy:*

10. Expectation Damages. Nti will seek expectation damages equal to the loss in value (value of completed home with Anderson windows minus value of partially built home with Peachtree windows) minus costs avoided (purchase price of \$313,950 minus what Nti already has paid).

OTHER

11. Other

PROBLEM III.

The edited excerpt in this problem comes from *Thomas & Betts Corp. v. A & A Mechanical*, 2004 WL 2675899 (Ky. App.).

	§§		§§	
TARC	---->	A & A	----->	Thomas &
	<----		<-----	Betts
	make		air	
	improvements		units	

Note: The statement of facts does not make clear whether the amount of the \$181,346 invoice that Thomas & Betts sent to A & A was for the price of the goods plus the amount of an additional handling charge or instead whether it was just for the additional handling charge. Either interpretation is possible.

TARC v. A & A and THOMAS & BETTS

*Claim:*

1. reach of Warranty/Breach of Contract (Delay). TARC might sue A & A either for breach of warranty or breach of contract, depending on whether article 2 applies. (The recovery probably would be similar either way.)

The contract between TARC and A & A is a hybrid because it involves both goods (i.e., the air units) and services (i.e., the installation of the air units). Article 2 will apply if the goods predominate or if the jurisdiction applies the gravamen of the complaint test.

If article 2 applies, then TARC might claim A & A made an implied warranty of merchantability and fitness for a particular purpose under § 2-314 and § 2-315 when it sold the air units and that A & A breached those warranties when it delivered air units that leaked.

If article 2 does not apply, TARC might claim simply that A&A promised to make improvements to its bus facility by a certain date, and broke this promise because of the delay in getting the air units to work.

2. Breach of Warranty. TARC also might sue for Thomas & Betts, claiming (1) that Thomas & Betts made an implied warranty of merchantability and fitness for a particular purpose under § 2-314 and § 2-315 when it sold the air units to A & A; (2) that TARC is beneficiary of those warranties under § 2-318 and New Moon Homes; and (3) that A & A breached those warranties when it delivered air units that leaked.

Note: TARC cannot recover twice for the same injury, but might want to pursue both defendants because one might not have the funds to pay the entire judgment.

*Remedy:*

3. Damages. The facts suggest that A & A has repaired the air units. If they are now working, then TARC is still injured only because of the

delay. TARC might seek damages for the delay in the amount of \$134,878. TARC could recover these damages as consequential damages flowing from the breach of warranty under § 2-714(3) and 2-715(2). (If article 2 does not govern the contract between TARC and A & A, then TARC could recover these damages as either "other loss" in the expectation damage formula.)

THOMAS & BETTS v. A & A

*Claim:*

4. Breach of Contract (Non-Payment). Thomas & Betts might sue A & A, claiming that they promised to pay for the air units and have not paid for them.

*Remedy:*

5. Damages (Price + Handling Charge). Thomas & Betts might seek the full purchase price of the goods, including the handling charge. (This amount would be either \$181,346 or the price of the air units plus \$181,346, depending on the interpretation of the facts). To justify this recovery, Thomas & Betts might argue the seller is entitled to recover the purchase price when the buyer accepts goods, § 2-709(1)(a), and that A & A accepted the goods when A & A failed to reject them and made repairs on them, § 2-606(1).

Note: A & A may have a counterclaim for breach of warranty, but this counterclaim does not excuse A & A's duty to pay for the goods after accepting them.

*Remedy Limitations:*

6. Exclusion from Damages (Handling Charge). A & A might argue Thomas & Betts have not right to recover the "handling charge" in connection with the return of the units that Thomas & Betts first delivered. After A & A rejected the goods, A & A had a duty "to hold them with reasonable care at the seller's disposition" but had "no further obligations." UCC § 2-609(2)(b)&(c). Although A & A permitted Thomas & Betts to cure, A & A did not have to pay the costs of curing.

A & A v. THOMAS & BETTS

*Claim:*

7. Breach of Warranty. A & A might sue Thomas & Betts, claiming that Thomas & Betts made an implied warranty of merchantability and implied warranty of fitness for a particular purpose when it sold the air units, and violated these warranties. A & A will say that leakage problems made the air units unfit for either ordinary purposes or the particular purposes of the transaction.

*Remedy:*

8. Warranty Damages. A & A might seek \$231,467 in damages, arguing that this cost repair the units reflects the difference in value between the goods as accepted and as warranted under § 2-714(2)
9. Consequential Damages. A & A also will seek the \$181,346 that it owes TARC for the delay as consequential damages under § 2-214(2) and § 2-715(2)(a).

*Remedy Limitations:*

10. Limitation of Damages: Thomas & Betts might respond by arguing that the damages sought (\$231,467 + \$181,346 = \$412,813), are excessive if they grossly exceed the purchase price of the goods (which appears is less than \$181,346, according to at least one interpretation of the facts). But A & A might contend that some courts have allowed warranty damages to exceed the price of the goods. See Chatlos Systems v. Nat'l Cash Register.

OTHER

11. Other

PROBLEM IV.

The edited excerpt in the problem comes from *RDO Financial Services Company v. Richardson*, 2004 WL 1823151 (Neb. App.).

GUIFFRE BROTHERS v. CMR (Reassembly)

*Claim:*

1. Breach of Contract. Guiffre Brothers might sue CMR, claiming that CMR orally promised to pay for reassembling the truck crane and did not do it.

*Defense:*

2. Indefiniteness/No Agreement. CMR might defend on grounds that the contract is too indefinite because the parties never agreed on a final price. Guiffre only estimated the price (\$8005).
3. Statute of Frauds. CMR also might defend on grounds that he never signed a writing evidencing the contract as required by a statute of frauds.

But Guiffre Brothers will respond that the reassembly of the crane is not a sale of goods, so § 2-201(1) does not apply.

Even if § 2-201 did apply, the merchant exception in § 2-201(2) would govern in any event because CMR did not object to the confirmation sent by Guiffre Brothers. But CMR might contend that it is not a merchant because it does not deal in cranes or hold itself out by occupation (cleaner of railroad cars) to have knowledge or skill with respect to business practices. § 2-104(a)

*Remedy:*

4. Expectation Damages. Guiffre Brothers will seek expectation damages equal to its loss in value (\$10,128) minus its costs avoided (\$0).

CMR v. GIUFFRE BROTHERS [Breach of warranty]

*Claim:*

5. Breach of Warranty. CMR might claim that Richardson made an implied warranty of merchantability when it sold the crane, and the crane was not merchantable because it broke down twice.

*Defense:*

6. No Breach. CMR may argue that the implied warranty of merchantability was not violated. The facts do not reveal why the bolts sheared (maybe the crane was overloaded) or why it subsequently broke down. It is thus not clear that the crane was unfit for ordinary purposes.

*Remedy:*

7. Warranty Damages. CMR might seek damages for breach of warranty, equal to the difference in value between the goods as warranted minus the value as delivered.

The facts suggest two ways to measure value of the goods as warranted. One is the purchase price (\$79,895). The other is the cost to obtain a substitute (the present value of \$4400 per month in rent).

The facts also suggest two ways to measure the value of the goods as delivered. One is the value of the goods after they were sold at auction (\$46,000). The other is the difference between the value of the goods as warranted (see above) and the cost to repair them (\$21,427+\$10,128).

CMR might also seek incidental damages (\$1,300 costs to ship the goods) and consequential damages (lost profit from not being able to use the crane).

RDO v. CMR (Cost of Repair)

*Claim:*

8. Breach of Contract. RDO might sue CMR for breach of contract, claiming that one or the other promised to pay \$21,427 for disassembly of the crane and the replacement boom, and that CMR did not pay it.

The facts do not specify what CMR said to RDO when it took the crane for repairs. But RDO may argue that a customer implicitly promises to pay for repairs made to goods that are left for repair. § 2-204(1).

*Remedy:*

9. Expectation Damages. This is a hybrid contract because it involves both the provision of services (disassembly of the crane) and goods (the new boom). But whether the contract is governed by the U.C.C. or the common law, CMR might seek the full contract price (\$21,427). It has completely performed and not saved any costs. Cf. § 2-709(1)(a).

CMR and RDO v. GUIFFRE BROTHERS [Promise to pay for repairs]

*Claim:*

10. Breach of Contract. If CMR for some reason cannot recover for breach of warranty, CMR alternatively might claim that Guiffre Brothers made an implied promise to reimburse CMR for the cost of the repairs when it told CMR to take the crane to RDO for repairs. RDO may seek to enforce this same implied promise against CMR as a third-party beneficiary.

*Defense:*

11. No promise. Guiffre Brothers may argue that it never promised to pay for the repairs but was just telling RDO where to take it for repairs.

12. No basis for enforcement. Guiffre Brothers alternatively may argue that there was no consideration for any implied promise to repair the crane. And even though CMR may have relied on the promise, justice does not require its enforcement because CMR received the benefit of the repairs.

Remedy:

13. Expectation/Reliance Damages. CMR will seek the cost of the repairs as expectation or reliance damages.

OTHER

14. Other

PROBLEM V.

The edited excerpt in the problem comes from *Sinco, Inc. v. Metro-North Commuter R. Co.*, 2001 WL 1609388 (S.D.N.Y.).

METRO-NORTH v. SINCO

Claim:

1. Breach of Contract. Metro-North might sue Sinco for breach of contract, claiming that Sinco promised to install a safety system and that it delivered a defective system.

First Choice Remedy:

2. Rejection, Cancellation, and Cover Damages. Metro-North might argue that it rejected Sinco's fall protection system, canceled the contract, and then covered by making a reasonable purchase in substitution from Surety Manufacturing & Testing. It will seek the difference between the cover price (\$294,085 plus \$24,211 for the additional protection and \$13,270 for maintenance) minus the contract price (\$197,325). Metro-North also will seek \$29,600 to remove Sinco's previously-installed system as incidental damages.

Second Choice Remedy:

3. Rejection, Cancellation, and Market Damages. Metro-North alternatively might seek the difference between the market price (not shown on these facts, but possibly lower than the cover price) and the contract price.

Remedy Limitations:

4. No right to Reject and Cancel without Cure. Sinco might respond that Metro North had no right to reject the fall protection system the day after the training session. Sinco will argue that Metro-North did not give it the opportunity to cure.
5. No Right to Cover Damages. Sinco also might argue that Metro-North has no right to cover damages because the common law rather than the UCC should govern this hybrid contract. The facts do not indicate whether the goods (such as the anchors and safety sleeve) or the service of installing them predominates.
6. Not a Reasonable Purchase. Sinco will argue that Metro-North did not properly cover because it did not make a reasonable purchase in substitution. It was not reasonable because it included (a) inflated

costs for lodging and carfare, (b) additional protection from falling objects, (c) a two-year maintenance cost, and (d) the need to install only 80 anchors because 172 could be reused.

SINCO v. METRO-NORTH/

*Claim:*

7. Breach of Contract. Sinco might sue Metro-North for breach of contract, claiming that Metro-North promised to pay for the fall protection system, accepted part of it (at least 172 anchors), and repudiated the rest of the contract when it improperly canceled the contract without allowing Sinco to cure. (Metro-North presumably has not paid.)
8. Unjust Enrichment. Alternatively, Sinco might claim that Metro-North would be unjustly enriched if it were allowed to keep some of the work Sinco did (such as the 172 anchors), and did not pay for it.

*Remedy:*

9. Price/Restitution. Sinco will seek the price of the work accepted by Metro-North under 2-709(1)(a) or the value of the work in restitution. It will also seek market damages for the portion of the contract that Metro-North repudiated.

OTHER

10. Other

Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Professor Gregory E. Maggs

Note: The edited excerpts in the problems came from the following cases: (1) Lodge Corp. v. Assurance Co. of America, 775 N.E.2d 1250 (Mass. App. Ct. 2002); (2) Favre Property Management, LLC v. Cinque Bambini, 863 So.2d 1037 (Miss. App. 2004); (3) Stamtec, Inc. v. Anson Stamping Co., 346 F.3d 651 (6th Cir. 2003); (4) Keller v. Inland Metals All Weather Conditioning, Inc., 139 Idaho 233 (Idaho 2003); (5) Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775 (2003).

PROBLEM I.

LODGE v. ASSURANCE

*Claim:*

1. Breach of Contract. Lodge might sue Assurance for breach of contract, claiming that Assurance promised to provide insurance coverage (i.e., pay) for the fire damage at the construction site and did not do it.

*First Defense (Non-Occurrence of an Express Condition)*

2. Non-Occurrence of an Express Condition. The problem indicates that Assurance is defending on grounds of non-occurrence of an express condition. It is asserting that the insurance coverage was conditioned upon Lodge's reporting the starting date of the construction in October, and Lodge did not report the starting date until November. Because this is an express condition, strict compliance is required. Luttinger v. Rosen.

*Reply*

3. Satisfaction of Express Condition. Lodge will reply that the condition was satisfied because the "starting date" was November rather than October. As the problem indicates, Lodge will assert that the term "building materials" means lumber and other flammable building components, and does not include the foundation of a building. These building materials, Lodge will assert, were delivered in November.

*Second Defense (Extrinsic evidence cannot be considered.)*

4. Plain Meaning Rule. Assurance will reply that the court may not consider the extrinsic evidence offered by Lodge to show that the meaning of the "building materials"; Assurance will assert that

"building materials" has a plain meaning and that the plain meaning includes a building's foundation.

*Replies*

5. Inapplicability of Plain Meaning Rule. Lodge, however, will argue that the plain meaning rule does not or should not apply for three reasons. First, the term does not have a plain meaning because the term may or may not include a foundation. Second, the court should abandon the plain meaning rule (if it still follows it) as the court did in Pacific Gas v. G.W. Thomas Drayage. Third, the plain meaning rules does not exclude evidence of usage of trade such as the practice under other policies. Hurst v. Lake.

*Third Defense (In any event, the extrinsic evidence does not help Lodge.)*

6. Meaning Shown (Dictionary). If extrinsic evidence is considered, Assurance will argue that the dictionary definition supports its view that because the dictionary says that the term refers to the basic of matter of building which surely includes its foundation.
7. Meaning Shown (Usage of trade). Assurance will argue that the usage of trade shows that lower cost insurance policies provide less generous coverage than other polices and that Lodge purchased a low cost policy.
8. Meaning Shown (Brochure). Assurance also may assert that the brochure says "(including foundation)" and that plainly means that building materials include that foundation.

*Reply*

9. Meaning Shown (Dictionary). Lodge will reply that a foundation is not a component of a building but instead something a building rests on.
10. Meaning Shown (Usage of trade). Lodge will reply that, under the usage of trade, builder's risk insurance policies begin after construction of the basement floor -- not when the foundation is poured. Hurst v. Lake. Evidence of other policies therefore cannot determine the meaning of Lodge's policy.
11. Meaning Shown (Context of Fire Insurance). Lodge further will argue that it would make no sense for fire insurance to start before flammable materials are brought to the building site.
12. Meaning Shown (Brochure). Lodge will reply that the phrase "(including foundation)" refers to the building site, which is distinct from the building materials. (In other words, building materials are brought to the foundation).

*Fourth Defense (Whose meaning controls?)*

13. Whose Meaning Controls. Assurance finally will argue that even if parol evidence is admitted, Lodge cannot show that its meaning should control. Lodge had reason to know that Assurance would consider the foundation to constitute building materials because that was the plain meaning as

indicated by the dictionary. Rest. § 201; Frigalment v. BNS Int'l Sales.

*Reply*

14. Whose Meaning Controls. Lodge may make the opposite argument in reply; but does not want to argue that there was no contract.

*Remedy:*

15. Expectation Damages. Lodge will seek expectation damages equal to the amount of the insurance provided for in the policy for property loss at the construction site.

*Other*

16. Other

PROBLEM II.

FAVRE v. CINQUE BAMBINI

*Claims:*

1. Breach of Contract. Favre might sue Cinque Bambini for breach of contract, claiming that Cinque Bambini (1) promised to sell the property and did not do it; (2) promised to provide a survey and did not do it; and (3) implicitly promised not to cut trees before conveying the property, and cut the trees.

*First Defense:*

2. Non-Occurrence of Constructive Conditions. With respect to Favre's claim that Cinque Bambini did not sell the property, Cinque Bambini will defend on grounds of non-occurrence of two constructive conditions. Cinque Bambini will argue that its performance was constructively conditioned upon (1) Favre's surveying the property and (2) Favre's making the third installment payment of \$200,000. Favre did not render these performances, and Cinque Bambini will argue that these failures were material breaches. Rest. § 237; Walker & Co. v. Harrison.

*Reply:*

3. Waiver (alleged oral agreement). Favre will respond that it was excused from making the survey by an oral agreement that Cinque Bambini would make the survey. It further will contend that it did not have to make the third payment because that third payment itself was constructively conditioned on Cinque Bambini's surveying the property.

*Second Defense:*

4. Parol Evidence Rule (Prior Agreements). Cinque Bambini will deny making the oral agreement and assert further that, if the oral agreement was made before or at the same time the written contract was made, it was discharged under the parol evidence rule because it is inconsistent with the written agreement. Rest. § 213(1).

*Third Defense:*

5. Lack of Privity. Cinque Bambini also might defend on grounds of lack of privity because it made the contract with RMC rather than Favre. Favre, however, will reply that the RMC assigned the contract, and that it therefore may enforce it. Rest. § 317(1); Herzog v. Irace. Although Favre agreed to assign the contract back to RMC if RMC repaid a debt, there is no indication that RMC otherwise retained the right to buy the land. Cf. Shiro v. Drew.

*Remedy:*

6. Specific Performance / Expectation Damages. Favre make seek specific performance (delivery of the land) plus expectation damages equal to the value of the timber removed. (If Favre obtains specific performance, Favre would have to pay the balance of the purchase price).

Alternatively, Favre might seek expectation damages equal to the loss in value (the value of the land with all the timber) minus costs avoided (purchase price minus that \$175,000 paid).

CINQUE BAMBINI v. RMC

*Claim:*

7. Breach of Contract. Cinque Bambini might sue RMC for breach of contract, claiming that RMC promised to pay for the property, and only made the first two installments. (Note that Favre never promised Cinque Bambini that it would make the payments, and the facts do not suggest that Cinque Bambini assented to a delegation of the duty to pay.)

*Defenses:*

8. Non-Occurrence of a Constructive Condition. As the problem says, RMC (through Favre) will defend on grounds of non-occurrence of a constructive condition because Cinque Bambini did not survey the property.
9. No breach. RMC conceivably might argue that no breach has occurred because the time for performance has not passed. The contract does not define the "effective date." (Alternatively, he may argue that the contract is too indefinite to enforce without this term defined.)

CB, however, will contend that it may introduce extrinsic evidence of the meaning of "effective date," notwithstanding the plain meaning rule, because the term is ambiguous. Rest. § 214(c); Masterson v. Sine. Here the extrinsic evidence is the general partner's affidavit. In addition, the parties' course of performance -- namely, when the \$150,000 payment was made -- also may reveal the meaning of the term "effective date."

*Remedy:*

10. Expectation Damages. Cinque Bambini will seek expectation damages equal to the loss in value (total purchase price minus \$175,000 already paid) and the costs avoided (value of the property).

FAVRE v. CINQUE BAMBINI

*Claims:*

11. Unjust Enrichment. If Favre cannot recover for breach of contract, Favre might sue Cinque Bambini, claiming that he would be unjustly enriched by retaining the payments that she made. Favre would assert

that the enrichment would be unjust even if Favre breached the contract.  
Britton v. Turner.

*Remedy:*

12. Restitution. Favre will seek the amount of payments in excess of any damages caused. Rest. § 374(1); Britton v. Turner.

Other

13. Other

PROBLEM III.

STAMTEC v. ASCO

*Claim:*

1. Breach of Contract. Stamtec might sue ASCO for breach of contract, alleging that Stamtec promised to buy two presses for \$1.6 million, and broke that promise when it did not make either the down payment or any subsequent payment for them.

*Defense:*

2. No Acceptance. ASCO might argue that there was no acceptance of any offer, and therefore no contract. First, ASCO would say that the Stamtec's proposal was just preliminary negotiations, and that ASCO's purchase orders were the offers made. § 2-206(1)(b) (purchase orders construed as offers). Second, ASCO would say that, even if Stamtec's proposal was an offer, the purchase orders were not acceptances of the proposal because the quantity and the amount of the down payment differed. Third, ASCO would say that Stamtec did not accept its purchase orders because it did not make a prompt promise to ship the goods and did not promptly ship them. § 2-206(1)(b).

*Reply:*

3. "Battle of the Forms" Exception to Mirror Image Rule. Stamtec might argue that ASCO's purchase orders were a definite and seasonable expression of acceptance to its proposal even if they contained different terms. § 2-206(3).
4. Reliance on Offer. Alternatively, Stamtec may argue that ASCO's purchase orders were offers, § 2-206(1)(b), and that ASCO cannot revoke them because it relied on them, E.A. Coronis v. M. Gordon Construction. The facts simply say that Stamtec "acted on" the purchase orders, presumably by ordering the goods from Chin Fong. Accordingly, they can still be accepted. (Not all courts agree that reliance on an offer makes it irrevocable.)

*Remedy:*

5. Lost Profit. Stamtec may seek damages measured by lost profit (\$1.989 million minus \$1.6 million), plus the additional damages that it had to pay to Chin Fong as consequential damages (see below). § 2-708(2). Resale and market price damages would be inadequate to compensate Stamtec because it did not resell the goods (having never obtained them) and because there is no evidence of the market price. §§ 2-706, 2-

708(1). Stamtec, furthermore, would contend that it lost volume because it could have sold machines to both ASCO and Precision Tool (provided that Chin Fong or another manufacturer could have produced them).

CHIN FONG v. STAMTEC

*Claim:*

6. Breach of Contract. Chin Fong might sue Stamtec for breach of contract, alleging that Stamtec promised to buy two presses for \$1.6 million, and did not do it.

*Defense:*

7. Non-Occurrence of a Condition. Stamtec may argue in response that its payment was conditioned on Chin Fong's delivery of the goods, and this condition was not met when Chin Fong wrongfully cancelled the contract. § 2-507(1).

*Reply:*

8. Insecurity. Chin Fong may claim that it had a right to suspend performance because ASCO's failure to make a down payment gave it reasonable grounds for feeling insecure, § 2-609(1), and that it had a right to cancel the contract when no adequate assurance of performance was provided within a reasonable time, § 2-609(4). Clem Perrin Marine Towing v. Panama Canal Co. The facts do not specify whether Stamtec tried to provide other forms of adequate assurance.

*Remedy:*

9. Lost Profit. Chin Fong will seek damages equal to its lost profit, which is the contract price (two times \$1.6 million minus the cost of producing the equipment), plus incidental damages (\$213 thousand in interest and \$560 thousand in storage fees). § 2-708(2); § 2-710(1).
10. Resale Damages. Alternatively, Chin Fong may seek resale damages equal to the difference between the contract price with Stamtec and the contract price with Precision Tool. § 2-706(1). It could recover incidental damages for the interest and storage fees (discussed above) and for the "salvage loss" (\$272 salvage loss). § 2-710(1).

*Remedy Limitations:*

11. No Loss Volume. Stamtec may argue that the Chin Fong cannot recover lost profit because it resold the presses to Precision Tool. The facts do not establish that Chin Fong could profitably have made the sale to both Stamtec and Precision Tool.

Other

12. Other

Note: Chin Fong cannot seek the contract price for the machines because the machines were resold. (If Stamtec paid the full price, it would be entitled to the machines, but that is now impossible.)

PROBLEM IV.

KELLER v. INLAND METAL

*Claim:*

1. Breach of Warranty (FFPP). The Kellers might sue Inland Metals for breach of contract, claiming that Inland Metals warranted that the dehumidifier would be fit for the particular purpose of dehumidifying their swimming pool area and it was not. § 2-315; Tyson v. Ciba-Geigy Corp. The President of Inland Metals specifically told them a 7 1/2 ton dehumidifier would suffice for their needs.

*First Choice Remedy:*

2. Market Damages. The Keller's first choice would be to reject or revoke acceptance the goods and recover the price already paid (apparently nothing), plus the difference between the market price of a dehumidifier that would be fit for their particular purpose (\$40,740) and the contract price (\$30,081), plus the incidental expenses of inspecting the goods (\$2,793). §§ 2-711; 2-713; 2-715. They want to reject or revoke acceptance so that they do not have to pay for the 7 1/2 ton machine, and can purchase a machine of the correct size.

*Remedy Limitations:*

3. Untimely Rejection. Inland Metals will argue that the Kellers cannot reject the goods and recover market damages, because they were deemed to have accepted the goods when they failed to reject them in a timely manner. § 2-606(1)(b). Even if the Kellers were out of town when the dehumidifier arrived, their employees could have reject the goods. Cf. Bloom & Sons v. Skelley.
4. No right to revoke acceptance. Inland Metals also will argue that the Kellers had no right to revoke acceptance because the defect was not latent and because Inland Metals gave them no reason to believe that the problem would be cured. On the contrary, Inland Metals insisted that the 7 1/2 ton dehumidifier would work.

*Reply:*

5. Timely Rejection. The Kellers will reply that they rejected as soon as possible under the circumstances. § 2-606(1)(b). They could not reject earlier because simply turning off the dehumidifier would have caused structural damage to the club facilities, resulting in even greater consequential damages that Inland Metals would have to pay.

*Second Choice Remedy:*

6. Warranty Damages. Alternatively, if the Kellers did not properly reject, the Kellers might sue Inland Metals for breach of the implied warranty of fitness for a particular purpose. They will seek the difference between value the humidifier would have if were as warranted (\$40,740) and the value of the humidifier as it is (presumably \$30,081). § 2-714(1); Chatlos Systems v. Nat'l Cash Register. Of course, they then will have to pay the purchase price for the 7 1/2 ton machine.

INLAND METALS v. KELLERS

*Claim:*

7. Breach of Contract. Inland Metals might sue the Kellers for breach of contract, claiming that they promised to pay for their dehumidifier and did not do it.

*Remedy:*

8. Contract Price. Inland Metals will seek the contract price for the goods because they have been accepted. § 2-709(1)(a).

OTHER

9. Other

Note: It seems unlikely that either party would argue that the UCC does not apply. The costs of the dehumidifier probably predominated over the installation. In addition, the complaint seems to be about the power of the dehumidifier, not the installation.

PROBLEM V.

JAS --> AAV --> CIS --> Dallas Aerospace

DALLAS v. CIS

*Claim:*

1. Breach of Express Warranty. Dallas might sue CIS for breach of warranty, claiming that CIS warranted (via Dallas's purchase order sent with payment) that the engine would be airworthy and would not have been subject to an incident.
2. Breach of Implied Warranty. Alternatively, Dallas might sue CIS for breach of an implied warranty based on usage of trade that the engine was properly overhauled. § 2-314(3)

*Defense:*

3. Disclaimer and Waiver. CIS will say that it disclaimed all representations regarding the engine. It will say that, although the disclaimer did not use the wording found in § 2-316(1), the language used should suffice under § 2-316(3). (CIS also might say that Dallas waived any implied warranty by inspecting the goods before purchase, § 2-316(3)(b), but Dallas would respond that the inspection could not reveal the engine had been subject to an incident.)

*First Reply:*

4. Contract modified. Dallas first will reply that, even if the parties initially formed a contract containing the disclaimer, the purchase order accompanying payment was a proposal to modify the contract. Dallas further will assert that CIS accepted the proposed modification when it delivered the engine. § 2-209(1). It also will say that no consideration is needed for the modification.

*Response:*

5. No acceptance of Proposed Modification. CIS will assert that its silence cannot constitute acceptance of the proposed modification. Klocek v. Gateway; Rest. § 69; § 1-103.

*Second Reply:*

6. Battle of the Forms. Dallas alternatively will assert that no contract was formed until it sent its purchase order and payment. Given that the forms of the parties do not agree, the terms of the contract would consist of the terms upon which both forms agreed and gap fillers. § 2-

207. They would include the implied warranty based on the usage of trade, but would not include the disclaimer.

*Remedy:*

7. Market Damages. Dallas's first choice would be to revoke acceptance of the goods (based on the latent defect) and recover the price already paid (unspecified), plus the difference between the market price of an airworthy engine and the contract price. §§ 2-711; 2-713.
8. Warranty Damages. Dallas would seek damages for breach of warranty, equal to the difference between the value of engine as warranted (i.e., an airworthy engine) and an incident-related engine. § 2-714(2). It will also seek its lost profits on resale as consequential damages. §§ 2-714(3); 2-715(2).

CIS/DALLAS v. JAS/AAV

*Claim:*

9. Breach of Warranty. Dallas also might sue JAS/AAV for breach of implied warranty that the engine was not incident-related. § 2-314(c). If CIS is liable to Dallas, it also might sue JAS/AAV for breach of warranty.

*Defense:*

10. Lack of Privity. They will defend with respect to Dallas on grounds that Dallas is not an intended third-party beneficiary of their contract, and therefore cannot enforce it. Dallas, however, will claim that he may recover as a remote purchaser. See 2-318; Morrow v. New Moon Homes.

*Remedy:*

11. Warranty Damages. Dallas would seek damages for breach of warranty, equal to the difference between the value of engine as warranted (i.e., an airworthy engine) and an incident-related engine.

*Remedy Limitations:*

12. Pure Economic Loss. JAS/AAV may argue that a remote purchase should not be able to recover for pure economic loss. But Dallas will respond that some courts have allowed such recovery. Morrow v. New Moon Homes.

OTHER

13. Other

Maybe there is a public policy argument against disclaimers in connection with airplane engines because of public safety concerns.

Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Professor Gregory E. Maggs

Note: The edited excerpts in the problems came from the following cases: (1) *Guidry v. Hedburg*, 722 So.2d 1036 (La. App. 1998); (2) *Washington Properties, Inc. v. Chin, Inc.*, 760 A.2d 546 (D.C. 2000); (3) *Blue Creek Farm, Inc. v. Aurora Co-op. Elevator Co.*, 614 N.W.2d 310 (Neb. 2000); (4) *Wagal v. SI Diamond Technology, Inc.*, 998 S.W.2d 299 (Tex. App. 1999); (5) *Villette v. Sheldorado Aluminum Products, Inc.*, 2001 WL 881055, 45 UCC Rep.Serv.2d 470 (N.Y. Sup. 2001).

PROBLEM I.

ELMER GUIDRY et al. v. BREAUX BRIDGE EXPORTS and STEFAN HEDBURG

Claims:

1. Breach of Contract. Elmer Guidry might sue Breaux Bridge Exports (BBE) for breach of contract, claiming that BBE initially promised that it would pay his salary (when "he went on salary"), and did not pay him \$25,257.72 of his salary.
2. Breach of Contract. Elmer Guidry also might sue Stefan Hedburg and BBE for breach of contract, claiming that they promised in the Buy-Sell Agreement to pay BBE's debt to him for back salary (as an obligation listed on Exhibit "A"), and did not pay him.
3. Breach of Contract. Marvin Guidry and Luke Bourque may sue both BBE and Stefan Hedburg, claiming that BBE and Hedburg both promised in the Buy-Sell Agreement to pay BBE's debt to Elmer Guidry, and did not pay him.

Defense:

4. No Promise to Pay. Citing Vincent Saitta's proffered testimony, Stefan Hedburg might argue that, despite the language of the Buy-Sell Agreement, he did not mean to promise that he would pay Elmer Guidry his back salary.

Replies:

5. Parol Evidence Rule (Meaning of Terms). Elmer Guidry and the other plaintiffs might reply that the Buy-Sell Agreement has a plain meaning, namely, that Hedburg will pay the back salary. They will argue that, under plain meaning rule, the court must interpret the contract in accordance with this plain meaning, and cannot consider extrinsic evidence of a different meaning. This defense, however, would not apply in a jurisdiction that has abandoned the plain meaning rule in favor of the modern intent rule. See *Pacific Gas v. G.W. Thomas*. Under the

modern intent rule, the court could consider the proffered parol evidence.

6. Misunderstanding. Elmer Guidry and the other plaintiffs will argue that, even if Hedburg actually believed (which is not very credible) that the Buy-Sell Agreement did not require him to pay, the misunderstanding should be resolved in their favor. They had no reason to know the implausible meaning he had attached to the agreement, and he had reason to know the plain meaning they had attached. Rest. 201(2)(b); *Frigalimint v. BNS Int'l Sales*.

Defense:

7. Lack of Privity. Stefan Hedburg might argue that Elmer Guidry is not a person entitled to enforce a promise in the Buy-Sell Agreement because he was not a party to the original contract and was not an intended third-party beneficiary. Hedburg will cite the addendum to support this argument.

Reply:

8. Intended Third-Party Beneficiary. Elmer Guidry might respond that the plain language of the agreement indicates that he was an intended third-party beneficiary of the contract, and he therefore may enforce it. Rest. 302 & 304; *Bain v. Gillespie*.
9. Parol Evidence Rule (Discharge of Prior Agreements). If the addendum was made before or contemporaneously with the Buy-Sell Agreement, Elmer Guidry also might argue that the parol evidence rule discharges the addendum because it was not included in the written Buy-Sell Agreement. If the Buy-Sell agreement is completely integrated, then the addendum is clearly within its scope. Rest. 213(2); *Gianni v. R. Russel*. If the agreement is only partially integrated, Elmer Guidry will argue that the addendum is in conflict, but Hedburg may assert that it is not really inconsistent to say that he will pay but Elmer cannot enforce. Also, it may be challenged as unauthenticated.

Remedy:

10. Damages. Elmer Guidry will seek expectation damages equal to payment of his back salary of \$25,267.72. It is not clear how failure of BBE or Hedburg to pay would injure Marvin Guidry and Luke Bourque.

OTHER

11. Other

PROBLEM II.

CHIN v. WPI

Claim:

1. Breach of Contract. Chin might sue WPI for breach of contract, claiming that WPI promised to pay him an option fee in eight annual installments of \$10,000, and WPI paid only the first \$10,000 installment and repudiated its obligation to make further payments.

Defenses:

2. Non-Occurrence of a Constructive Condition. WPI may argue that his payments were excused by the non-occurrence of a constructive condition.

He may argue that his payments were constructively conditioned on Chin's obtaining the consent of the mortgage holder to be bound by the agreement, which Chin did not do.

Replies:

3. No Condition. Chin will argue that obtaining the mortgage lender's consent was not a condition to the payment of the money. These were independent promises in the contract. Rest. 232 illus. 3 (syllabus appendix 2).
4. No material breach. Chin also will argue that Chin did not materially violate the condition even if it did exist. The failure to obtain the mortgage lender's consent did not substantially harm WPI because there was no default. Rest. 241; Walker & Co. v. Harrison; Jacobs & Young v. Kent; Plante v. Jacobs. But WPI may say that the money paid was put at risk.

Remedy:

5. Expectation Damages. Chin will seek expectation damages equal to \$70,000 (\$80,000 minus the \$10,000) already paid. Perhaps some of these damages are avoidable by entering into another transaction. (Note there was no acceleration clause.)

WPI v. CHIN

Claims:

6. Breach of Contract. WPI might sue Chin for breach of contract, claiming that Chin promised that WPI would have the option of purchasing the property for eight years, and that Chin broke this promise when he refused to sell the property to WPI.
7. Breach of Contract. WPI also might sue Chin for breach of contract, claiming that he promised to obtain the mortgage holder's consent to the terms of the agreement and did not do it.

Defense:

8. Non-Occurrence of Constructive Condition. Chin will argue that he was excused from performing his promise to allow WPI to purchase the property because WPI did not make the required annual payments of \$10,000, and those payments were a constructive condition of Chin's performance. Rest. 237; Kingston v. Preston, etc.

Reply:

9. Non-Occurrence of Condition to the Condition. WPI will argue that he was excused from making the \$10,000 payments because these payments were conditioned on Chin's obtaining the consent of the mortgage lender, and Chin did not obtain this consent. Cf. Luttinger v. Rosen (exercise of due diligence was condition to condition of obtaining financing).

Remedy:

10. Specific Performance/Expectation Damages. WPI will seek specific performance, requiring Chin to sell the property, or expectation damages equal to the value of the property minus the agreed upon price. WPI may have difficulty proving how much the failure to obtain the consent of the mortgage holder injured WPI.

OTHER

11. Other

Maybe Chin made a unilateral promise to keep the option open if WPI made the annual payment, but WPI never promised to pay.

Chin was not unjustly enriched by the initial \$10,000 payment because he kept the option open for a year.

Note: Section 12 is not an express condition.

PROBLEM III.

AURORA (buyer) v. BLUE CREEK (seller)

Claim:

1. Breach of Contract. Aurora might sue Blue Creek for breach of contract, claiming that Blue Creek promised to deliver 25,000 bushels of corn, and repudiated that promise when it said the contract was cancelled.

Defenses:

2. Non-Occurrence of a Constructive Condition. Blue Creek may argue that its performance was excused by the non-occurrence of a constructive condition. It will assert that Aurora's acceptance of delivery in March was a constructive condition of its duty to deliver, and Aurora refused to accept delivery. Rest. 237; Kingston v. Preston.

Reply:

3. No Material Breach/Substantial Performance. Aurora may argue that it was willing to accept delivery on April 1 and April 12, and that the minor delay was not a material breach excusing Blue Creek's performance. Rest. 241; Walker & Co. v. Harrison; Jacobs & Young v. Kent; Plante v. Jacobs.

Remedy:

4. Market Damages. Aurora might seek market damages, equal to the difference between the presumably higher market price and the contract price, plus incidental and consequential damages. 2-713. (Cover damages would not be available unless Aurora covered, which the facts do not indicate.)
5. Replevin. If Aurora has not covered because Aurora was unable to cover, Aurora also could seek replevin. 2-716(2).

BLUE CREEK (seller) v. AURORA (buyer)

Claim:

6. Breach of Contract. Blue Creek might sue Aurora for breach of contract, claiming that Aurora promised to take delivery of 25,000 bushels of corn in March, and then refused to take delivery.

Defenses:

7. Modification. Aurora will argue that paragraph 4 allowed it to extend

the time for accepting delivery by 30 days because circumstances beyond its control occurred. (Aurora in fact expressly made this argument on March 29.)

Blue Creek, however, will respond that paragraph 4 does not give Aurora the power to modify the agreement. It also will assert that it never agreed to a modification.

8. Non-Occurrence of an Express Condition/Frustration of Purpose. Aurora alternatively might argue that its duty to accept delivery was completely excused by paragraph 4 or on grounds of frustration of purpose. [This argument, however, would undercut any claim that Aurora might have against Blue Creek for breach of contract.]

Remedy:

9. Cancellation. Blue Creek has attempted to cancel the contract as a remedy. It will assert that it has this right because Aurora repudiated its obligations with respect to these goods. 2-703(f). Aurora, however, will argue that it only repudiated its obligation to take delivery, not to pay.
10. Market Damages. If the market price has fallen, or if Blue Creek suffered large incidental damages, Blue Creek also may want market damages under 2-708(1). These damages would equal the difference between the contract price and the market price, plus incidental damages, less expenses saved.

OTHER

11. Other

The facts indicate only that the Aurora failed to take delivery; they do not indicate whether Aurora missed any payment that was due or repudiated any obligation to make payment.

PROBLEM IV.

SIDT (seller) v. WAGAL (buyer)

Claim:

1. Breach of Contract. SIDT might sue Wagal for breach of contract, claiming that Wagal promised to pay \$30,000 for the laser equipment, and only paid \$15,000.

Remedy:

2. Price (good accepted). SIDT will seek the price of the 18 pieces of equipment that Wagal took to the extent the price exceeds the \$15,000 paid already because those 18 pieces have been accepted.
3. Resale damages (goods not accepted). SIDT resold the other equipment, and will might seek resale damages, equal to the difference between what SIDT promised to pay for the other equipment and the resale price.

WAGAL (buyer) v. SIDT (seller) & OTHER BUYER

Claims:

4. Wrongful Disposition/Possession. Wagal might sue both SIDT and the other buyer of the equipment. It might claim that title to all of the equipment passed to from SIDT to Wagal at the time of contract, 2-401(3)(b), and that SIDT therefore wrongfully sold the equipment to another buyer and the other buyer is in wrongful possession. (This is a tort claim of conversion, but could be characterized in other ways.)

Defenses:

5. Revesting of Title. SIDT, however, may argue that title revested in the equipment that SIDT sold because Wagal left without retaining the goods. 2-401(4). But Wagal may dispute that it abandoned the goods.

Remedy:

6. Damages. Wagal will seek damages from SIDT and the other buyer equal to the value of the equipment. Wagal cannot get the goods back from SIDT because SIDT does not have them. But perhaps it could get them back from SIDT by replevin.

OTHER BUYER v. SIDT

Claim:

7. Breach of Warranty of Good Title. If Wagal prevails on his claim against the other buyer, the other buyer might sue SIDT for breach of warranty of good title. 2-312(1). The other buyer will claim that SIDT warranted that SIDT could convey good title to the equipment and breached this warranty.

Remedy:

8. Damages. The other buyer will seek damages from SIDT equal to its liability to Wagal. 2-714(2).

SIDT (seller) v. WAGAL (buyer)

9. Unjust enrichment. SIDT also might sue Wagal for restitution, claiming that Wagal was unjustly enriched by leaving its equipment on SIDT's property after December without paying rent.
10. Restitution: SIDT will also seek the fair value of the rent.

OTHER

11. Other

PROBLEM V.

VILLETTE v. SHELDORADO

Claim:

1. Breach of Warranty. Villette might sue Sheldorado for breach of the implied warranty of merchantability and implied warranty of fitness for a particular purpose. She will claim that the awning was not

merchantable for two reasons: (1) the awning was not fit for ordinary purposes because it collapsed under the snow; and (2) the awning lacked adequate warnings about the possibility that it might collapse. 2-314(2)(a) & (2)(c). She will argue that it is not fit for the particular purpose of using it in the location where it was used because of the snow and wind. 2-315.

Defense:

2. No Implied Warranty. Sheldorado might argue that it did not make an implied warranty under 2-314 or 2-315 because this contract was not a contract for the sale of goods. Instead, it was a hybrid contract of both goods (i.e., the awning materials) and services (i.e., the installation of the awning). Cf. *Coakley & Wms. v. Shatterproof Glass*.

Responses:

3. Predominate Purpose. Villette might argue that 2-314 and 2-315 should apply because the goods were the predominate purpose of the contract. Perhaps the best indication is that installation was "included," suggesting it was a minor part of the contract. *Coakley & Wms. v. Shatterproof Glass*.
4. Gravamen of the Complaint. Alternatively, Villette might argue that 2-314 and 2-315 should apply because the gravamen of her complaint is that the goods, rather than the installation was defective. *Anthony Pools v. Sheehan*. The facts, however, do not make entirely clear whether the collapse was caused by breakage of the goods or improper installation.
5. Analogy. Finally, Villette might argue that 2-314 and 2-315 should be applied by analogy because the purchase was very similar to the sale of goods. *Barco Auto v. PSI; Zapatha v. Dairy Mart*.

Second Defense:

6. No Breach. Sheldorado also might argue in defense that the awning was merchantability and fit for her purpose. The collapse was not the fault of the awning, but the high winds and failure of Villette to remove the snow.

Remedy:

7. Damages. Villette will seek damages equal to the difference between the value of the awning as warranted and the actual value of the awning, plus consequential damages. 2-714(2). In this case, the actual value of the awning is nothing because it collapsed, and the consequential damages are the damages to the Mercedes automobile.

Remedy Limitations:

8. Unforeseeability. Sheldorado might argue that the damage to the Mercedes was not a loss resulting from requirements that the it "at the time of contracting had reason to know." 2-715(2)(a). But Villette may counter that it is foreseeable that an awning might damage a car if it collapsed.

SHELDORADO v. VILLETTE

Claim:

9. Breach of Contract. Sheldorado might sue Villette for breach of contract, claiming that she promised to pay the full \$3000 and did not pay all of it.

Remedy:

10. Damages (Price). Sheldorado will seek the remainder of contract price because Villette accepted the goods. 2-709(1). (Villette, however, might offset whatever claim for damages she has.)

OTHER

11. Other

Note: There is no statute of frauds issue since the goods were delivered and accepted. 2-201(3). Villette cannot both revoke acceptance and seek damages for breach of warranty.

Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Professor Gregory E. Maggs

Grading Guide

Note: The edited excerpts in these problems came from the following cases: Doherty v. DeVaughn, 1998 WL 502950 (Tex. App.) (Problem I); Provident Life and Accident Ins. Co. v. Goel, 274 F.3d 984 (5th Cir. 2001) (Problem II); Stalnaker v. Lustik, 745 A.2d 1245 (Pa. Super. 1999) (Problem III); Lickley v. Max Herbold, Inc., 984 P.2d 697 (Idaho 1999) (Problem IV); Hou-Tex, Inc. v. Landmark Graphics, 26 S.W.3d 103 (Tex. App. 2000) (Problem V).

PROBLEM I.

DeVAUGHN (buyer) v. DOHERTY (seller) [Breach of Contract]

Claim:

1. Breach of Contract (Failure to Refund Earnest Money). DeVaughn might sue Doherty for breach of contract, claiming that Doherty promised in paragraph 4(D) to refund the \$2500 earnest money if DeVaughn could not obtain financing in 45 days, and Doherty did not refund the money.

Defense:

2. Non-Occurrence of a Constructive Condition (Applying for Financing). Doherty will argue that the termination provision in paragraph 4(D) was conditioned upon DeVaughn's applying for a loan within three days, and making every reasonable effort, which DeVaughn did not do. Cf. Luttinger v. Rosen (due diligence issue); Rest. 237.

Response:

3. Substantial Performance/No Material Breach. DeVaughn will argue that applying for financing within three days was only a constructive condition (nothing says what happens if he misses the deadline). Although he applied late, he substantially performed and thus satisfied the condition. The denial of his loan applications soon afterwards permits an assumption that he would not have obtained financing even if he had applied within three days. Cf. Jacobs & Young v. Kent.

Remedy:

4. Damages. DeVaughn would seek the return of \$2500 earnest money.

DeVAUGHN (buyer) v. DOHERTY (seller) [Restitution]

Claim:

5. Unjust Enrichment (Retention of Earnest Money). Alternatively, if the contract was not terminated, DeVaughn might claim that Doherty would be unjustly enriched by retaining the \$2500 earnest money.

Defense:

6. No Unjust Enrichment. Doherty may argue that retaining the earnest money is not unjust because DeVaughn breached the contract by not seeking financing. Some courts, however, allow restitution even despite a material breach. See Britton v. Turner. Moreover, the understanding of the parties may have been the deposit would be forfeited upon breach.

Remedy:

7. Restitution. DeVaughn will seek restitution of the \$2500, less any damages caused by any breach. Britton v. Turner.

DOHERTY (seller) v. DeVAUGHN (buyer)

Claim:

8. Breach of contract. Doherty may sue DeVaughn for breach of contract, claiming that DeVaughn promised to: (a) apply for financing within three days; (b) pay for the ten-acre tract of land; and (c) pay for cost of the survey; and that DeVaughn broke each of these promises.

Defense:

9. Non-Occurrence of a condition (obtaining financing). DeVaughn may argue that his promises to pay for the property and pay the surveyor were conditioned on his obtaining financing within 45 days, which did not happen. [see above]

Responses:

10. Non-Occurrence of a condition (applying for financing). Doherty will assert that termination for failure to obtain financing was itself conditioned on DeVaughn's applying for a loan in three days, which did not happen. [see above for substantial performance reply]
11. No constructive condition (paying for surveyor). Doherty also will argue that DeVaughn's promise to pay for the surveyor was independent of his ability to obtain financing. Cf. Kingston v. Preston.

Remedy:

12. Damages. Doherty will seek expectation damages equal to the loss in value (price of land plus cost of surveyor minus the \$2500 earnest money paid) minus the cost avoided (market value of land). (Note: It is possible that the deposit was liquidated damages.)

LANEY v. DeVAUGHN and DOHERTY

Claim:

13. Breach of contract (Doherty). Laney may sue Doherty for breach of contract, claiming that Doherty hired him over the telephone to prepare the survey plat, and he did not pay him for it.
14. Breach of contract (DeVaughn). Laney also may sue DeVaughn for breach

of contract, claiming that Laney promised in paragraph 6(C)(1) of his contract with Doherty to pay for the survey, and that Laney he is a intended third-party beneficiary of this Laney's promise.

Defense (by DeVaughn):

15. Not a person entitled to enforce. DeVaughn will argue that Laney is not an intended third-party beneficiary. It is not appropriate to recognize in Laney a right to enforce because Laney can seek to enforce the contract against Doherty, who hired him. Cf. Bain v. Gillispie

Remedy:

16. Damages. Laney will seek damages equal to the price of the survey.

OTHER

17. Other

PROBLEM II.

GOEL v. PROVIDENT [breach of contract]

Claim:

1. Breach of Contract. Dr. Goel will claim that Provident promised to provide him \$15,000 a month if he was disabled, and that Provident broke this promise when it stopped making payments.

Defense:

2. Non-Occurrence of a Constructive Condition. Provident will argue that it does not have to pay because its duty to pay was constructively conditioned on Dr. Goel's cancellation of his Paul Revere policy within 30 days, and Dr. Goel did not cancel. See Rest. 237. (This is not an express condition because nothing says what will happen if he does not cancel.)

First response:

3. No Agreement to Cancel. Dr. Goel may argue that there was no agreement to cancel the Paul Revere Policy because he insisted in his interview that he would not cancel it.

Reply to first response:

4. Parol Evidence Rule. Provident also will argue that the parol evidence rule bars any prior oral agreement that Dr. Goel may have made with the agent about not canceling the Paul Revere Policy. Regardless whether the insurance contract is completely or partially integrated, the alleged oral agreement is inconsistent with the written amendment. See Rest. 213(1).

Rebuttal to reply to first response:

5. Reformation. Dr. Goel may argue that the court should reform the written contract by removing the amendment. He will assert that reformation is justified because the parties were mutually mistaken as to the content of the writing.

Three facts potentially support Dr. Goel's contention: (a) Dr. Goel insisted that he would not cancel the Paul Revere policy; (b) neither he nor the Provident agent can remember signing the amendment; (c) Provident did not initially check to see if he had canceled his policy. See Rest. 155; cf. *Bollinger v. Central Penn Quarry*.

Second response:

6. Independent Promise/No Constructive Condition. Dr. Goel also might argue that even if he did promise to cancel his Paul Revere Policy, this promise was independent of Provident's promise to pay him. Provident, however, may assert that the two promises were linked; it wanted Dr. Goel's total disability coverage limited to insure he took proper care.

Third response:

7. Substantial Performance/No Material Breach. Alternatively, Dr. Goel may argue that even if there was a condition, his failure to cancel the Paul Revere Policy was not a material breach. He substantially performed by paying the premiums. He should be able to enforce the contract, although Provident would be entitled to an allowance for damages (such as a reduction in the amount of coverage). Cf. *Jacobs & Young v. Kent*.

Remedy:

8. Damages/Specific Performance. Dr. Goel will seek an order requiring Provident to pay him \$15,000 in accordance with the contract while he remains disabled (minus an allowance for damages if he committed a non-material breach).

PROVIDENT v. Dr. GOEL [Restitution of Payments]

Claim:

9. Unjust Enrichment. Provident also will argue that, if Dr. Goel's failure to cancel the Paul Revere policy makes his contract with Provident unenforceable, Dr. Goel was unjustly enriched by the payments that it has made to him.

Remedy:

10. Restitution. Provident will seek restitution of the payments it made.

Dr. GOEL v. PROVIDENT [Restitution of Premiums]

Claim:

11. Unjust Enrichment. Dr. Goel may claim that, if he cannot enforce the contract, Provident was unjustly enriched by the monthly premiums that he paid for two years.

Defense:

12. No-Unjust Enrichment. Provident may argue that no unjust enrichment has occurred because Dr. Goel failed to cancel the Paul Revere policy as required by the contract. Dr. Goel, however, may assert that he should be able to recover notwithstanding his default, as some courts permit. See *Britton v. Turner*.

Remedy:

13. Restitution. Dr. Goel will seek restitution of his premiums, minus any damages that he may have caused.

OTHER

14. Other

-- If a contract was formed before the Amendment was signed, the Amendment may lack consideration.

PROBLEM III.

STALNAKER (buyer of timber) v. LUSTIK'S ESTATE (seller of timber)

Claim:

1. Breach of Contract. Stalnaker may sue Lustik's Estate for breach of contract, claiming that Lustik promised to sell him standing timber, and did not do it.

[Note: Under the U.C.C., parties may effect a present sale of standing timber upon identification. See 2-107(2). If that is what happened, then Lustik had no power to convey title to the timber to a third party because title would have transferred to Stalnaker. But the facts suggest the parties viewed their agreement as a contract to sell.]

First Defense:

2. Statute of Frauds. Lustik's estate may argue that, under the statute of frauds in 2-201(1), Lustik's promise to sell the timber is not enforceable because Lustik never signed a writing sufficient to indicate the a contract for sale was made. Standing timber is a good, see 2-107(2), and the alleged price of the contract (\$40,000 plus various services worth about \$13,500) exceeded \$500.

Responses to First Defense:

3. Exception for Price Paid and Accepted. Stalnaker may respond that 2-201(3)(c) contains an exception for where the price is paid and accepted. Although Stalnaker has not paid Lustik any money, he has conferred some of the "price" by rendering services.

The estate, however, will assert that the court at most may enforce the contract by apportioning a quantity of the standing timber based on the fraction of the total price paid. See 2-201 cmt. 2.

4. Exception for Admissions. Stalnaker also may respond that 2-201(3)(a) contains an exception for admissions in testimony that the contract was made. If Mrs. Lustik is the executor of Mr. Lustik's estate, and was speaking on behalf of the estate, her admission under oath could satisfy this exception.
5. Not a contract for the Sale of Goods. Stalnaker also might argue that this is not a contract for the sale of goods, but instead involves a hybrid of goods and services, and therefore the statute of frauds does not apply. See Coakley & Wms. v. Shatterproof.

Lustik, however, will respond that Lustik was clearly selling only goods (standing Timber), even if he was taking services in exchange. This is a contract for the sale of goods, because title to goods is being

transferred for a price. See 2-106(1). In any event, the goods clearly predominated over other aspects of the contract.

Second Defense:

6. Right to Cancel Upon Breach. Lustik's estate also will argue that it had a right to cancel, and sell the timber to someone else, because Stalnaker breached the contract by failing to pay \$40,000 and to cut down the standing timber within a reasonable time. See 2-703(f) (right to cancel). Because the contract stated no time for performance, it was implied that Stalnaker would perform in reasonable time, and taking no action by July was not reasonable. See 2-309(1). Stalnaker may respond that waiting four months was not unreasonable given the size of the contract.

Remedies:

7. Buyer's Market Damages. The facts say that Stalnaker will seek \$45,000 in "lost profit." Under the U.C.C., a buyer (unlike a seller) cannot collect "lost profit," cf. 2-708(2), but Stalnaker might claim this amount as the difference between the market price of the timber (\$85,000) and the contract price (\$45,000). See 2-713. There is no evidence of consequential or incidental damages.

Lustik's estate, however, should respond that the contract price is not really \$45,000 but instead \$45,000 plus the \$13,500 value of the services of removing the tree and relocating the fence and equipment. Accordingly, market damages would be only:  $85,000 - (45,000 + 13,500)$ .

8. Payment for Services. Under 2-711, when the seller breaches, the buyer is entitled to a refund of the purchase price. Stalnaker also will seek recover for his services (\$3,500 for removing the tree and \$10,000 for the other services), arguing that the services were part of the contract price. Because the services cannot be returned, he should be able to recover their value. But Lustik's estate might say that they are not really part of the price because he agreed to throw them in at no additional cost.

Remedy Limitation:

9. Expenses Saved. Lustik's estate also will argue that Stalnaker's recovery must be reduced by the presumably large costs that Lustik saved by not having to cut and remove the timber. See 2-713.

STALNAKER (buyer) v. LUSTIK'S ESTATE (seller)

Claim:

10. Unjust Enrichment. If Lustik's promise to sell the timber is not enforceable, Stalnaker may claim that Lustik's estate has been unjustly enriched by the services that Stalnaker performed.

Remedy:

11. Restitution. Stalnaker will seek restitution of the value of his services, which he alleges is \$13,500.

Remedy Limitations:

12. Retention of \$500. If the contract is not enforceable because Stalnaker breached (see point 6 above), Stalnaker could obtain restitution, but

Lustik's estate would be entitled to retain \$500 of the "price" paid by Stalnaker plus any damages (of which there appear to be none). See 2-718(2). [If the promise is not enforceable because of the statute of frauds, Lustik's estate could not retain this money.]

OTHER

13. Other

It is unlikely that the estate would sue Stalnaker because it has suffered no damages.

PROBLEM IV.

LICKLEY (seller of potatoes) v. HERBOLD (buyer of potatoes)

Claim:

1. Breach of contract. Lickley will sue Herbold for breach of contract, claiming that Herbold promised to pay for the potatoes that Lickley delivered, and that Herbold did not do it. See 2-301.

Defense:

2. Rejection/Revocation of Acceptance. As a partial defense, Herbold may argue that he rejected or revoked acceptance of the potatoes delivered on the first four days. He will assert that had a right to reject these shipments under paragraph (c)(4)(b) because they were too small. See 2-601. A buyer does not have to pay for rejected goods. See 2-711(1).

Responses:

3. No Rejection/Revocation of Acceptance. Lickley will assert that Herbold in fact accepted the potatoes delivered on the first four days because he retained possession of them. See 2-606; 2-607. Lickley will contend that, instead of rejecting or revoking acceptance of them, Herbold merely designated the accepted potatoes as ones for which the parties would have to renegotiate the price in accordance with paragraph (C)(4)(e).
4. Right to Cure. Lickley also might argue that Herbold could not reject without giving him an opportunity to cure. Lickley will argue that he had reasonable grounds for thinking that potatoes would be acceptable because (1) the contract indicated that smaller potatoes would be accepted (with a renegotiated price); (2) some of his potatoes were acceptable to Herbold; and (3) his potatoes were acceptable to other growers. See 2-508(2).

[Note: A difficult issue is when Lickley would have to notify Herbold of an intention to cure given the ambiguity about when, if ever, Herbold rejected.]

Remedy (last two days)

5. Contract Price (last two days). Lickley will argue that a seller must pay the contract price for goods accepted. See 2-607(1); 2-709(1)(a). The contract price for the last two days of shipment is \$6.15 per cwt. because those potatoes passed Herbold's inspection and were accepted.

Remedy (first four days, if accepted)

6. Contract Price (first four days). If Herbold is deemed to have accepted the potatoes delivered on the first four days, he also must pay the contract price for them. See 2-607(1); 2-709(1)(a). Because the contract did not specify a price for potatoes in commingled rejectable loads, the contract price is a reasonable price. See 2-305(1). Lickley will argue that, in this case, a reasonable price is \$7.50 to \$8.00 per cwt., the price at which Lickley sold other potatoes from the same field.

Remedy Limitations:

7. Reasonable Price. Herbold may respond by arguing that even if he is required to pay a reasonable price for the rejectable potatoes, \$7.50 - \$8.00 is not a reasonable price. That price for rejectable small potatoes exceeds the contract price for non-rejectable larger potatoes.
8. Good Faith. Herbold also may respond that the requirement of good faith, depending on standards of fair dealing and whether Lickley is a merchant, may prevent Lickley from seeking more than the contract amount for the rejectable potatoes. Cf. 1-203; 2-103(1)(b); *Loeb & Co. v. Schreiner*.

Remedy (first four days, if rejected)

9. Right to Recover Rejected Potatoes. Alternatively, if Herbold did succeed in rejecting the potatoes delivered during the first four days, Lickley would argue that Herbold has duty to hold the potatoes at Lickley's disposal. See 2-602(2)(b). Although the potatoes have been commingled, Lickley might accept similar potatoes because he can resell them at \$7.50 to \$8.00 per cwt.

HERBOLD (buyer of potatoes) v. LICKLEY (seller of potatoes)

Claim:

10. Breach of Contract. Herbold may claim that Lickley promised to sell potatoes meeting the standard in paragraph (C)(4)(B), and broke this promise because the shipments during the first four days were too small. If he rejected the goods, or if he accepted them, he still has a claim that they were defective. (He also might have a breach of warranty claim if he accepted them.)

Remedies:

11. Damages (if goods rejected). If the Herbold succeeded in rejecting the goods (as described above), he would be entitled to the difference between the market price for non-rejectable goods (presumably more than \$8.00) and the contract price (\$6.15), see 2-713(1), but would be required to hold the rejected goods for Lickley, see 2-602(1)(b).
12. Damages (if goods accepted). If Herbold is deemed to have accepted the goods, despite their non-conformity with paragraph (C)(4)(b), he would have to pay the contract price (i.e., a reasonable price, as discussed above), but could get damages measured in any reasonable manner. See 2-714(1). Lickley, however, would argue that the establishment of reasonable price addresses any damages that Herbold might suffer.

OTHER

13. Other

PROBLEM V.

HOU-TEX (driller) v. SAGUARO (geological consultant)

Claim:

1. Breach of Contract/Malpractice: Hou-Tex might sue Saguaro, claiming that Saguaro implicitly promised to provide competent advice on where to drill the well, and breached this promise by selecting a site north and east of where it should have been.

Remedy:

2. Damages. Hou-Tex might seek as damages the cost of drilling a replacement well in the correct place. (This will avoid any damages suffered from drilling in the wrong place.)

SAGUARO (consultant) & HOU-TEX (driller) v. LANDMARK (software licensor)

Claim:

3. Breach of Implied Warranty of Merchantability/Fitness for a Particular Purpose. Hou-Tex and Saguaro might sue Landmark for breach of implied warranties of merchantability and fitness for a particular purpose. They would claim that Landmark's SeisVision program was not fit for ordinary purposes or for the particular purpose of finding drilling sites because the program miscalculated data. See 2-314(1); 2-315.

First Defense:

4. No Warranty Made (Scope of UCC). Landmark may argue that it did not make an implied warranty of merchantability or fitness because it did not sell any goods. It will assert that software is not a good and that, in any event, it did not sell the software but instead merely licensed it.

Responses to First Defense:

5. Software is a Good. Saguaro and Hou-Tex may respond that most courts hold that software is a good, at least when it is subsumed in a tangible medium. See *Advent Systems v. Unisys*.
6. Application by Analogy. Alternatively, Saguaro and Hou-Tex may argue that the UCC should apply by analogy. See *Barco Auto Leasing v. PSI Cosmetics*.

Second Defense:

7. Disclaimer. Landmark also may argue that it disclaimed the warranty because the contract says that Saguaro "waives any and all claims."

Response to Second Defense:

8. Inadequate Disclaimer. Saguaro and Hou-Tex might argue that the disclaimer is inadequate because it does not mention merchantability of say that it applies to warranties. See 2-316(2). Landmark, however, may assert that the disclaimer is sufficient because it makes plain there is no liability at all. See 2-316(3)(a).
9. Good Faith/Unconscionability. Saguaro and Hou-Tex will argue the disclaimer is unconscionable. The disclaimer is oppressive because it leaves users with no remedy. It also is not necessary. Landmark discovered the bug and fixed it for some users but not Saguaro.

Landmark may reply that the software was clearly only a test version. It cannot be responsible for all defects in test versions of software. Also, it did not know of the bug at the time the contract was made. See 2-302(1); *Martin v. Joseph Harris*.

#### Third Defense:

10. Lack of Privity (with respect to Hou-Tex). Landmark may defend in part by arguing the Hou-Tex is not a party to the contract, and therefore cannot recover for breach of warranty.

#### Response to Third Defense:

11. Intended Third-Party Beneficiary. Hou-Tex may argue that it is entitled to enforce because it was reasonable to expect that a driller would be affected by the program if it was purchased by a drilling consultant. See 2-318. (But could the "non-disclosure" affect this?")

#### Remedy:

12. Damages for Breach of Warranty. Hou-Tex and Saguaro will seek the difference in value between a working program and the defective one that received. See 2-714(2).
13. Consequential Damages. Hou-Tex and Saguaro also will seek as consequential damages. See 2-714(3). For Hou-Tex (if Hou-Tex does not recover from Saguaro, these damages include the cost of drilling another well in the correct place. For Saguaro, these damages will include its liability to Hou-Tex. Hou-Tex and Saguaro will argue that Landmark could foresee that its software would be used to select places to drill wells (that was the whole point of it) and the facts suggest no way in which they could have avoided these damages. See 2-715(2)(a).

[Note: If Hou-Tex recovers from Saguaro, then it might not suffer any damages.]

#### OTHER

14. Other

Hou-Tex also may have a malpractice tort claim against Saguaro.

UCITA would apply if Maryland or Virginia law governed this contract.

Final Examination In  
CONTRACTS II  
(Course No. 203-14; 3 credits)  
Professor Gregory E. Maggs

PROBLEM I.

Frost v. Duncan [Breach of Contract]

Claim:

1. Breach of Contract. Frost will sue the Duncans, claiming that they promised to pay him for his work on the dealership, and did not fully pay him all that is due.

Defenses:

2. Non-Occurrence of a Construction Condition. The Duncans will defend on grounds that Frost's proper completion of the work was a constructive condition of their duty to pay, and that Frost made numerous deviations from the agreed plan and also did not complete the work. Rest. 237.

Responses to Defenses:

3. Divisibility. Frost may argue that certain parts of the work, such as the lighting, are divisible from the other parts. His breach of some parts of the contract should not prevent him from recovering for the divisible parts that he has completed. Rest. 240.

The Duncans, however, may argue that the entire project should be viewed as an indivisible unit because of the inconvenience of having to pay for individual portions of the construction. Kirkland v. Archbold.

4. Substantial Performance. In addition, Frost may argue that even if he breached with respect to some parts of the contract, the breaches were not material breaches (i.e., he substantially performed), and he therefore satisfied the constructive condition of prior performance. To avoid forfeitures, courts have granted builders considerable room for error in deciding what is a material breach. Plante v. Jacobs; Jacob & Youngs v. Kent.

The Duncans, however, will insist that these errors and omissions are far greater than what these precedents allowed.

Remedies:

5. Damages (Completed Parts): If Frost prevails on his argument that the contract is divisible, he would be entitled to the full contract price for the parts completed. (Frost is seeking \$76,237.81, but it is not clear that is for completed parts of the contract.)
6. Damages (Substantial Performance): For the parts of the contract that

he has substantially performed, Frost would seek his loss in value (i.e., the price that the e Duncans promised to pay him), minus his costs of avoided (i.e., whatever it would have cost him to continue working).

#### Frost v. Duncan [Restitution]

##### Claim:

7. Unjust Enrichment. If Frost may not recover for breach of contract because he did not substantially perform, he alternatively might seek restitution, claiming that the Duncans would be unjustly enriched by being allowed to keep the value of the work done. Britton v. Turner.

##### Defenses:

8. No Unjust Enrichment. The Duncans may argue that they were not enriched by erroneous work. They also might cite the traditional rule, still followed in many jurisdictions which have rejected Britton v. Turner, that a defaulting plaintiff may not recover in restitution.

##### Remedies:

9. Restitution: Frost would request the reasonable value of his services, above whatever damages he has caused. Britton v. Turner; Rest. 374. This is the stipulated price minus the cost of completion. The stipulated price is \$313,000, unless that figure is limited by the parol evidence rule. (See below.) We don't know the cost of completion.

#### Duncan v. Frost [Breach of Contract]

##### Claim:

10. Breach of Contract. The Duncans will sue Frost, claiming that he promised to do the construction work described in the floor plan and did not do it as required. He did not use concrete or renovate the bathrooms, and he installed the exhaust ports in the wrong place.

##### Remedy:

11. Damages: The Duncans will claim as damages equal to their loss in value (probably measured by the cost of completion), plus other loss (e.g., lost business, etc.) minus the costs avoided (the difference between the amount promised to Frost and the amount actually paid [\$313,200 - \$227,564]).

##### Remedy Limitations:

12. Parol Evidence Rule: Frost will contend that his oral guarantee that the work would cost only \$313,200 was discharged by the written agreement and therefore this figure cannot be used to calculate expectation damages. He will assert that the floor plan was meant to be a complete integration and therefore discharge any other agreements within its scope. Cf. Gianni v. R. Russell. (Frost will contend that the costs of the contract should be a reasonable price, since none is stated.)

The Duncans, however, will contend that floor plan is not a complete integration under either the Four Corners test or All Circumstances test. For example, the floor plan does not even mention price. Cf.

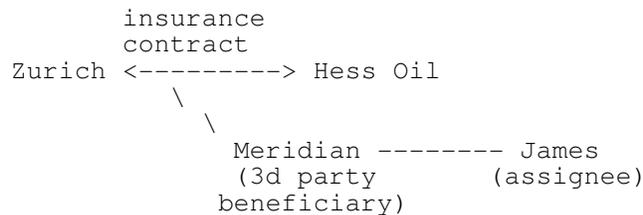
Masterson v. Sine. They therefore will argue that it does not discharge the oral guarantee of \$313,200 because that figure is not inconsistent.

Other

13. Other

Note: It is not a defense to a claim of breach of contract that the breach was not material.

PROBLEM II.



James v. Zurich [breach of contract]

Claim:

1. Breach of Contract. James may claim that, in the insurance contract between Zurich and Hess, Zurich promised to pay for Meridian's liability in the FCCU project, and that Zurich broke this promise by not paying the liability for his injuries.

Zurich's Defense:

2. Non-Privity. Zurich first might argue that James cannot enforce the insurance provision because neither Meridian nor James is a party to the contract. Zurich made the contract with Hess.

James's Initial Responses:

3. Assignment. James will argue that, he even though he had not rights of his own under the contract, he may assert Meridian's rights because Meridian assigned the rights to him in the settlement agreement. Rest. 317(1); Herzog v. Drew.
4. Intended Third-Party Beneficiary. James further will argue that Meridian, as a "contractor", is an intended third-party beneficiary of Zurich's promise under the language of the insurance contract requiring as described in the facts. Rest. 302(1). As an intended third-party beneficiary, Meridian therefore may enforce the promise. Rest. 304; Seaver v. Ransom.

Zurich's Reply:

5. Not an Intended Third-Party Beneficiary under the Intended Meaning of the Contract. Zurich will cite the testimony of Zurich and Hess Officials to show the insurance contract does not cover Meridian. The testimony indicates that the parties believed that the policy covers only those contractors that Hess was required to insure, and Hess was not required to insure Meridian.



Feb: Zhong Ya -----> ICT/Denasso -----> Rodco -----> ICT

Zhong Ya v. ICT [Non-Payment for July & February orders]

Claim:

1. Breach of Contract [July order]. Zhong Ya might sue ICT for breach of contract, claiming that ICT promised to pay \$77,329 for 5000 kg of Vitamin E powder delivered on July 2 and did not do it. 2-301
2. Breach of Contract [February order]. Zhong Ya also might sue ICT for breach of contract, claiming that ICT promised to pay \$28,000 for 2000 kg of Vitamin E powder in February and did not do it. 2-301

Defenses:

3. Frustration of Purpose [July order]. ICT has asserted Rodco's insolvency as a reason for not paying Zhong Ya for the July order. This frustration of purpose defense is valid if ICT's ability to resell the goods to Rodco was a basic assumption on which ICT and Zhong Ya made the contract. Rest 265; 1-103.
4. Statute of Frauds [July order]. ICT might argue that the July order was made over the telephone and does not satisfy the statute of frauds, but Zhong Ya could cite the exception for goods accepted. 2-201(1),(3)(c).
5. Revocation of Acceptance [February order]. ICT may argue that it does not have to pay for February shipment because it revoked acceptance. ICT may argue that it had a right to revoke acceptance because the contamination was a latent defect and it substantially impaired the value of the contract. 2-608(1)(b).

Zhong Ya, however, may argue that ICT did not revoke acceptance. If ICT really were revoking acceptance, ICT should have held the goods for Zhong Ya's disposition. 2-608(3); 2-602(2)(b).

Remedies:

6. Damages (Contract Price). Zhong Ya will claim that ICT has a duty to pay the contract price (\$77,320 plus \$28,000) for all of the goods because ICT accepted them. 2-709(1).

ICT v. Zhong Ya [Non-Delivery/Merchantability]

Claims:

7. Breach of Contract (Non-Delivery). If ICT successfully revokes acceptance of the February shipment, ICT may claim Zhong Ya promised to deliver 2000 kg conforming to the contract, and did not do it. 2-301
8. Breach of Warranty (Merchantability/contamination). If ICT cannot revoke acceptance, ICT may contend that the Zhong Ya breach an implied warranty that the vitamin E shipped in February would be suitable for their ordinary purposes because it was contaminated. 2-314(2)(c).
9. Breach of Warranty (Merchantability/Packaging). ICT also may counterclaim that Zhong Ya made an implied warranty that the goods would be adequately packaged and they were not. 2-314(2)(e).

Defenses:

10. Waiver (Packaging). Zhong Ya might argue that ICT waived any claim that the poor packaging made the goods unmerchantable because ICT apparently expected to have repackage orders from Zhong Ya. ICT, however, may argue that Zhong Ya should have disclaimed the implied warranty in accordance with the requirements of 2-316.

Remedies:

11. Damages [Non-Delivery]. If ICT prevails on its claim that Zhong Ya failed to deliver the 2000 kg. ordered for February, it may recover the price paid plus damages equal to the difference between the contract and market price. (The facts do not suggest that ICT covered.) 2-713(1).
12. Damages [Breach of Warranty]. To the extent that ICT prevails on its breach of warranty claims, it may recover damages measured by the difference in value of the goods as they are and as warranted. This would include the loss in payment from Rodco and the cost of repackaging them. 2-714(2).

ICT v. Rodco [Non-Payment / July Order]

Claim:

13. Breach of Contract. ICT will sue Rodco (or its bankruptcy estate), claiming that Rodco promised to pay for the vitamins shipped in July, and failed to do it. 2-301

[Assumption: ICT had a right to reclaim goods or Rodco voluntarily gave them back.]

Remedy:

14. Market Damages. Although Rodco might not have enough money to pay the claim in full, ICT might recover market damages. (Cover damages are not available because ICT did not cover.) 2-713(1). ICT might also seek lost profits, but the facts do not provide enough information to determine whether he could get it. 2-708(2).

[Note: Under 2-702(3)'s second sentence, if ICT actually reclaimed the goods, most courts would hold that ICT could not also collect damages. But this limitation would not apply if Rodco voluntarily returned the goods.]

Rodco v. ICT [Non-Delivery / Feb. order]

Claim:

15. Breach of Contract. Rodco may sue ICT, claiming that ICT promised to deliver 2000 kg of uncontaminated Vitamin E in February, and failed to do it. 2-301

Remedy:

16. Market Damages. Rodco might recover the difference in the contract and market price for the goods (assuming Rodco did not cover). 2-713(1).

Other

17. Other

Note: Rodco has not claim against Zhong Ya or ICT for breach of warranty because it did not accept the contaminated shipment. Also, allowing ICT to reclaim \$5000kg did not excuse Rodco from liability.

PROBLEM IV.

popcorn			
Smith (seller)	----->	Paoli/Harmon (buyer)	
March	Sept.	April	May
----- ----- ----- -----			
contract 10 cents	harvest/ inspection	rejection/ revocation of acceptance?	resale 6 cents

Smith v. Paoli [Failure to Pay]

Claim:

1. Breach of Contract. Smith might sue Paoli for breach of contract, claiming that he promised to pay 10 cents a pound for the popcorn, and failed to pay it. 2-301.

1st Defense:

2. Rejection. Paoli argue that he does not have to pay for the goods because he properly rejected them on April 4. He will assert that the contract contained an implied warranty of merchantability, 2-314(1), and that the popcorn did not conform to the implied warranty of merchantability because the fungus made them unfit for ordinary purposes. 2-314(c); 2-314(1); Martin v. Harris & Co. This non-conformity gave him a right to reject. 2-601(a); Neumiller Farms v. Cornett.

Reply:

3. Failure to Reject in a Reasonable Time. Smith might reply that Paoli failed to reject the goods within a reasonable time. 2-602(1). He therefore accepted them. 2-606(1)(b). In addition, Paoli cannot revoke acceptance because there were no latent defects or assurances that any problems would be remedied. 2-608(1).
4. No Breach of Implied Warranty of Merchantability. Smith may argue that there was no implied warranty of merchantability because, as a farmer, he is not a merchant. 2-314(1); 2-104(1); Loeb v. Shreiner. Some courts disagree with this conclusion. In addition, he may argue that Colorado Cereal's willingness to take the popcorn shows it is merchantable.

2d Defense:

5. Revocation of Acceptance. Paoli alternatively might argue that, even if he accepted the popcorn, he was permitted to revoke acceptance in April. Smith, however, will respond Paoli had no right to revoke that the defect was easy to discover and Smith gave no assurances that the non-conformity would be cured. 2-608(1) & (2).

Remedy:

6. Damages (Price). If Paoli accepted the goods (by failing to make a

timely rejection), then Smith would be entitled to the purchase price of the goods. 2-709(1)(a). (Note: It does not matter that the goods remained in the control of Smith. See 2-709(2).)

Remedy Limitations:

7. Allowance for Resale. Paoli, however, would argue that, when Smith sold the accepted goods still in his possession, Paoli became entitled to a credit for the net proceeds of resale. 2-709(2). [Note: This is not really a case for 2-706 because Paoli has accepted the goods.

Paoli further will argue that the net proceeds should be calculated using the 6.25 cents offered by Paoli, rather than the lower 6 cent price paid by Colorado Cereal. The resale was not done in a good faith and commercially reasonable manner.

Paoli v. Smith

Claims:

8. Breach of Warranty (Merchantability). If Paoli accepted the goods by failing to reject them in a reasonable time (as Smith claims above), and if Smith is a merchant (see discussion in point #4 above), then Paoli may assert a claim against Smith for breach of the implied warranty of merchantability.
9. Breach of Contract (Failure to Deliver Conforming Goods). Alternatively, if Paoli properly rejected the goods, he might sue Smith for failing to deliver conforming goods. 2-301.

Remedies:

10. Damages (Breach of Warranty): If Paoli prevails on his breach of warranty claim, he would be entitled to the difference between the value of popcorn with fungus and without fungus. 2-714(2). He has a fairly good argument that this difference equals 4 cents a pound, because that is the discount at which Smith had to resell it.
11. Damages (Market or Cover). If a court concludes that Paoli never accepted the goods, he would be entitled to damages measured by either the contract or cover differences. 2-712, 2-713. Paoli, however, would have to prove these numbers. These facts contain no evidence of them.

Other

12. Other

PROBLEM V.

Moeller v. Huntting Elevator

Claims:

1. Breach of Contract (Late Application). Moeller may sue Huntting Elevator for breach of contract, claiming that it made an implied promise to apply the fertilizer in a reasonable time, 2-309(1), and did not do it when it waited until June 13.

2. Breach of Warranty (Express/F.F.P.P.). Moeller further will claim that Huntting Elevator breached an express warranty that Accent "would work, when it did not. 2-313(1). Huntting also made an implied warranty that the herbicide would be fit for the particular purpose of killing the weeds in Moeller's field. 2-315.
3. Breach of Contract (Improper Mixture). Moeller also may claim that the Huntting promised to sell him Accent herbicide, but instead used a mixture.

Defenses:

4. Indefiniteness (Common Law). Huntting Elevator may argue in defense that the common law applies and that, under the common law, the alleged promises are too indefinite to enforce. The terms of the contract were not "reasonably certain" because the parties never expressly agreed on a time for delivery, whether other herbicides would be used, and what the term "would work" means. Rest. 33. Huntting Elevator would argue that this common law definition of indefiniteness should apply to this hybrid contract, if the court applies the gravamen of the complaint test, to the extent that Moeller is complaining about the delay in providing the services. *Anthony Pools v. Sheehan*.

Moeller may reply that the U.C.C. governs the agreement and that under the U.C.C. the agreement is not too indefinite to enforce because the parties clearly intended to make a contract and a reasonably certain basis for giving the parties an appropriate remedy (see below). 2-204(3). Moeller would argue that this U.C.C. should apply to this hybrid contract, if the court applies the predominant purpose test, because the goods (herbicides) predominate over the service of spreading them. *Coakley & Williams v. Shatterproof Glass*.

5. No UCC Warranties. For similar reasons, Huntting may argue that the common law applies and there are no UCC warranties under 2-313 or 2-315.

Remedy:

6. Damages (Breach of Warranty). For the breach of warranty claim, Moeller would want damages equal to the difference between the goods as warranted and those which he got. This would be difference in price of a herbicide that "would work" and the price that he paid. (He also would want consequential damages, as discussed below. 2-714(3).)
7. Damages (Late Delivery/Improper Mixture). Because Moeller accepted the fertilizer despite the non-conformity to the contract by reason of late delivery and improper mixture, he would seek damages for the non-conformity as measured in any reasonable manner. 2-714(1). For example, there might be a difference in price for the delivery time and mixture that he requested. (He also would want consequential damages, as discussed below. 2-714(3).)
8. Consequential Damages (Diminished Crop Yield/Low Price from Early Sale). Moeller also would seek to recover as consequential damages the loss from the diminished crop yield caused by the weeds and the lower price at which he had to sell the crop in order to cover his loan to the bank. 2-715(2)(a).

Remedy Limitation.

9. Avoidability (Diminished Crop Yield). Huntting Elevator may argue that

Moeller cannot recover for his diminished crop yield because a buyer may recover as consequential damages only those losses "which could not reasonably be prevented by cover or otherwise." 2-715(2)(a). Moeller could have avoided these losses by hiring someone else once he recognized the foxtail problem.

10. Unforeseeability (Loss from early sale of crop). Huntting Elevator would argue that Moeller may recover as consequential damages only those losses of which it has reason to know. 2-715(2)(a). Huntting Elevator could not know that errors in supplying the herbicide would cause Moeller to have to sell his crop early.

Other

11. Other

Note: Even if the parties did not have a written contract, the exception for goods accepted and paid for would apply. 2-201(3)(c).

Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Associate Professor Gregory E. Maggs

GRADING GUIDE

PROBLEM I.

Joan Webster & Estate of Jack Webster v. A.I.A. Insurance

Claim:

1. Breach of Contract. Joan Webster and Jack Webster's Estate will claim that A.I.A. breached its promise to pay 20% of the Webster Agency's gross commissions to them for a full 8 years because A.I.A. ceased making payments after 3 years when Jack died.

First Defense:

2. Non-Occurrence of a Constructive Condition. A.I.A. Insurance will argue that Jack's continuing service as a manager was a constructive condition to its duty to pay the commissions for 8 years. See *Kingston v. Preston*; Rest. § 237. A.I.A. will argue that Jack did not substantially perform because he worked for just 3 of 8 years, and even during that time he did not serve in good faith because he made questionable payments. Cf. *Walker & Co. v. Harrison*.

Responses to First Defense:

3. Parol Evidence Rule (Discharge of Prior Agreement). Joan and Jack's Estate will respond that, under the parol evidence rule, the written contract discharged any prior oral agreement that Jack had to serve as a manager because it was within the scope of the written agreement. This substantial obligation is something that would have been included. See *Masterson v. Sine*; Rest. § 213(2).

A.I.A. Insurance, however, will reply that the written agreement was only a partial integration and that it did not discharge the prior agreement that Jack would serve as a manager because that agreement is not inconsistent with the rest of the contract. See Rest. § 213(1).

A court would have to determine whether the agreement was a complete or partial integration using either Williston's "Four Corners Test" or Corbin's "All Circumstances Test." Compare *Masterson v. Sine* with *Masterson v. Sine*; see also Rest. § 214(a).

4. Independent Covenants. Joan also may argue that even if Jack agreed to

serve as manager, that obligation was independent of A.I.A.'s duty to pay for Webster Agency. See *Hanks v. GAB Business Services*. At most, A.I.A. could stop paying Jack's salary.

Second Defense:

5. No Breach (Alternate Performance). A.I.A. Insurance also will argue that it did not breach because Jack Webster had agreed that A.I.A. Insurance could satisfy its obligations through the alternate performance of purchasing a \$25,000 life insurance policy and having the proceeds paid to Joan.

Responses to Second Defense:

6. Parol Evidence Rule. Joan may contend that the parol evidence rule also discharged any agreement that A.I.A. could satisfy its obligations by purchasing life insurance. This agreement would be inconsistent with written agreement, which states an absolute duty to pay 20% of the commissions. This argument however will fail if the insurance agreement was made after the written contract (the facts don't indicate).
7. No Agreement. Joan also may argue that A.I.A. owed the obligation to pay commission to both Jack and her, and that she never agreed to accept life insurance proceeds as an alternate performance.

Third Defense:

8. Frustration of Purpose. A.I.A. Insurance may argue that its performance under the contract was discharged because Jack's death frustrated its purpose in purchasing Webster Agency. See *Krell v. Henry*; Rest. § 265.

Remedies:

9. Expectation Damages. Joan and the estate will seek expectation damages equal to 20% of the unpaid gross commission. A.I.A., however, will insist that the \$25,000 life insurance payment be subtracted.

Joan Webster & Estate of Jack Webster v. A.I.A. Insurance

Claim:

10. Unjust Enrichment. If Joan and Jack's Estate cannot enforce their contract claim against A.I.A. Insurance because Jack did not substantially perform, they may claim A.I.A. has been unjustly enriched through its receipt of the Webster Agency. See *Britton v. Turner*; Rest. 374(1).

Remedy:

11. Restitution. Joan and Jack's will seek the value of the agency minus the commissions paid, the life insurance proceeds, and any loss suffered as a result of Jack's non-performance. See *Britton v. Turner*; Rest. 374(1).

Webster Agency/A.I.A. v. Estate of Jack Webster

Claim & Remedy:

12. Webster Agency or A.I.A. will seek compensation for the \$20,000 spent on questionable personal expenses. (The facts do not indicate sufficiently what theory -- tort, contract, unjust enrichment, etc. -- might be used.)

Other

13. Other

Could a court divide A.I.A.'s obligations to Jack and Joan?

Joan might argue that Jack fulfilled his duty to A.I.A. because any further service as manager was rendered impracticable by Jack's death. See *Taylor v. Caldwell*; Rest. 261. This argument, however, is weak because A.I.A. could respond that, while Jack's death discharges him, it did not satisfy the condition of substantial performance. It also gives credence to the frustration of purpose argument.

Would A.I.A. sue the estate for Jack's failure to continue? This seems unlikely because it wants to retain the business and the estate would have a defense of impossibility.

Statute of Frauds?

## PROBLEM II.

Mel Frank Tool & Supply and Real Estate Agent v. Di-Chem

Claim:

1. Breach of Contract. Mel Frank and possibly the Real Estate agent may claim that Di-Chem breached its promise to pay the agreed upon rent.

Defense:

2. Frustration of Purpose. Di-Chem will argue that the city's enforcement of the prohibition on storing chemicals on the premises frustrated the purpose of the contract. See *Krell v. Henry*. It will contend that the possibility of storing chemicals was a basic assumption on which the contract was made because Mel Frank knew they wanted to sell chemicals.

Mel Frank will respond that Di-Chem has no frustration of purpose defense for three reasons. First, if the prohibition of storing chemicals was in effect when the contract was made, it is not a supervening event. Second, although both parties know that Di-Chem wanted to store chemicals, it was not a basic assumption of both parties that Di-Chem wanted to engage in unlawful storage of hazardous chemicals because the lease specifically prohibited unlawful uses of the property.

3. Lack of Privity. Di-Chem will argue that the real estate agent cannot enforce its promise to Mel Frank because of lack of privity.

The real estate agent may contend that it was a third-party beneficiary of the lease because it was to receive a percentage. See Rest. §§ 302 & 304. Di-Chem, however, may not have intended the Real Estate agent to be a beneficiary because the facts do not indicate that it knew of the fee arrangement. Cf. *Bain v. Gillespie*. In addition, because Mel Frank is capable of enforcing the contract, it is not so reasonable to think the parties want the real estate agent to have that power. Cf. *Seaver*

v. Ransom.

Remedies:

4. Expectation Damages: Mel Frank will seek the amount of the unpaid rent, less any sums that could be avoided by leasing the premises to someone else.

Real Estate Agent v. Mel Frank Tool & Supply

Claim:

5. Breach of Contract. The real estate agent will claim that Mel Frank breached its agreement to pay percentage of the rent.

Defenses:

6. No breach. If Mel Frank fails to recover from Di Chem (as discussed above), Mel Frank will argue that it has not breached the contract because the contract only required it to pay a percentage of the rent received, not the rent state in the contract. Parol evidence might be needed to clarify this ambiguity in the contract. See *Frigalment v. BNS Importing*; Rest. § 201.
7. Frustration of Purpose: Mel Frank also will argue that Di-Chem's refusal to pay rent frustrated the purpose of the contract. *Krell v. Henry*; Rest § 265. It was a basic assumption that Di-Chem was going to continue paying the rent.

Remedy:

8. Expectation Damages. The real estate agent would seek its fee from Mel Frank based on the agreed rental amount.

Real Estate Agent v. Di-Chem

Claim:

9. Breach of Warranty. Di-Chem may contend that Mel Frank personally or through his Real Estate Agent made an implied warranty that Di-Chem could use the premises to store its chemicals. Although this case does not fall within the scope of the U.C.C. because it does not involve the sale of goods, see U.C.C. § 2-102, Di-Chem might cite the implied warranty of fitness for a particular purpose as an analogy. See *Barco Auto Leasing v. PSI Cosmetics*; U.C.C. § 2-315. Di-Chem will point out that it told Mel Frank that it needed the premises for storing chemicals.

Defense:

10. No Warranty. Mel Frank will argue that he did not make the warranty because neither he nor the Real Estate agent knew Di-Chem's particular purpose of storing hazardous chemicals and they did not know that Di-Chem was rely on them to furnish a suitable location. Cf. § 2-315. In addition, the prohibition on unlawful use may constitute a disclaimer of any such warranty.

Remedies:

11. Expectation Damages: Di-Chem will claim damages equal to the increased costs of renting a different storage facility, plus incidental expenses

of moving to a new facility, plus consequential damages of any lost profit.

Other

12. Other

Does Mel Frank have claim against the agent?

PROBLEM III.

Stoughton/Ultralite v. APL

Claim:

1. Breach of Contract. Stoughton may claim that APL breached its promises to pay a price of \$17,367 per container for the 2000 containers under the original contract or, as discussed below, for 62 containers under the modified contract.

Defenses:

2. Non-Perfect Tender. APL may contend that it had a right to reject the containers and refuse to pay anything under the perfect tender rule. The separation of the foa, made the containers unfit for ordinary use and therefore not in conformity with the implied warranty of merchantability. See 2-601; 2-314(1) & 2(c). The containers also may not have conformed to express contract specifications, which the facts do not specify.

Stoughton will respond that Transamerican's satisfaction with the goods shows that they were not defective. Instead, APL rejected them in bad faith because the price had fallen. See *Neumiller Farms v. Cornett*. It also will assert that APL waived the defects by agreeing to a modification.

3. Modification. If APL loses its argument that it had a right to reject, APL will argue that, at most, Stoughton/Ultralite only may recover damages in connection with 62 containers because the contract was modified. Cf. 2-209(1). Stoughton will argue that the modification was not valid because APL did not seek it in good faith. See 2-209 cmt. 1.

Response to Defenses:

4. Right to Cure (Surprise Rejection). Stoughton will argue that APL has no right to reject the containers, and that it has a right to cure because it believed that the containers would be accepted (as Transamerican did in fact accept them). See 2-508(2). Accordingly, although APL may be entitled to an allowance for damages for any non-conformity, it cannot reject and refuse to pay for all of the containers.

Remedies:

5. Liquidated Damages: If the modification was invalid, Stoughton will seek liquidated damages under the contract equal to \$600,000 plus a forfeiture of APL's interest in the joint venture. See 2-718(1).
6. Price (White Elephants): Alternatively, if the modification was valid,

Stoughton/Ultralite may seek the price for the 62 units, arguing that it could not resell them at a reasonable price after reasonable efforts. See 2-709(1)(b). The facts say that Stoughton could not resell them at \$14,500 but might have been able to sell them for \$10,000 or \$5,000.

7. Market Damages: If Stoughton/Ultralite cannot recover the price, they will seek market damages, equal to the difference in the contract price (\$17,367) and the market price at the time of tender (probably close to the later price of \$13,800). (Stoughton/Ultralite cannot recover resale damages or allege lost volume because there have been no further sales.)

Remedy Limitations:

8. Damages for Non-Conformity. If the court holds that the containers were defective, but that APL must accept them because Stoughton had a right to cure, then APL may set off a claim for non-conformity measured in any reasonable manner. See 2-714(1).

APL v. Stoughton/Ultralite and Transamerican v. APL

Claim:

9. Breach of Contract. In theory, APL might raise a claim against Stoughton/Ultralite, and Transamerican might raise a claim against APL for failing to deliver the promised containers in a non-defective condition. In reality, however, the decline in the market price probably means that these buyers have not suffered any significant damages. They therefore would not sue.

Defenses:

10. No-Breach/Modification. Stoughton/Ultralite would defend on grounds that the containers are not defective and that it only stopped delivery when APL repudiated. If Stoughton/Ultralite do not prevail in this argument, they then will argue that APL gave up its claim to 2000 containers when the parties modified the contract.

Remedies:

11. Damages: As noted, APL and Transamerican as buyers probably have suffered no significant damages because the market price is less than the contract price. They may, however, wish to recover consequential or incidental damage and any price that they have paid.

Other

12. Other

Stoughton/Ultralite may have some kind of claim against APL for damaging its reputation, and thus preventing Transamerican and possibly others from purchasing its containers.

What is the status of the joint venture?

PROBLEM IV.

Savage Industries v. American Pulverizer (Double Roll Crusher)

Claim:

1. Non-Conformity/Breach of Warranty (FFPP). Savage will claim that American Pulverizer either did not deliver a crusher that conformed to the contract (the precise terms of which we do not know) or that it breached an implied warranty of fitness for a particular purpose because the double roll crusher did not crush the coal to a small enough size.
2. Breach of Warranty (merchantability). Savage alternatively will claim that American Pulverizer breached an implied warranty that the double roll crusher would be merchantable. It would contend that the crusher was not fit for ordinary purposes because it did not crush the coal small enough. See 2-314(1) & (2)(c).

Defenses:

3. Modification. American Pulverizer will respond that the parties settled these claims when they agreed to modify the contract to require American Pulverizer to supply a recirculation system. Accordingly, Savage Industries now may present only a claim for failing to provide the recirculation system.

Savage Industries will reply that American Pulverizer's immediate repudiation of its obligation to provide the recirculation system rendered the modification agreement void because modifications must be made in good faith. See 2-209(1) cmt. 1; 1-203. Surely, Savage Industries was not being honest in implying that it could perform. See 2-103(1)(b). Thus, claims on the original contract remain valid.

4. No Breach of Warranty. If the modification defense fails, American Pulverizer will respond that it did not breach any warranty. It will assert, depending on the facts, that it did not know how small the coal had to be and thus did not make a warranty of fitness for a particular purpose. In addition, it will assert that the coal crusher is fit for ordinary purposes, just not Savage Industries' special purposes.

First Choice Remedies:

5. Revocation of Acceptance. Savage Industries will want to revoke acceptance of the double roll crusher. See 2-608(1). It will contend that it did not discover the difficulty with the system until after it had been paid for, although the facts may show otherwise.
6. Recovery of Price. If Savage Industries is permitted to revoke acceptance, Savage Industries will want to recover the price that it paid for the double roll crusher. See 2-711.
7. Cover Damages. Savage Industries also will want to recover cover damages, measured by the difference in price between the vertical impact crusher and the double roll crusher in substitution. American Pulverizer may question whether a vertical impact crusher is a reasonable purchase. See 2-712(1) & (2).
8. Incidental & Consequential Damages. In addition to the cover difference, Savage Industries will want to recover incidental damages (such as the cost of procuring and installing the vertical impact crusher) and consequential damages (such as the liability to Charles T. Main and the cost of hiring additional workers).

Second Choice Remedies:

9. Warranty Damages/Damages for Non-Conformity. If Savage Industries is not permitted to revoke acceptance, it would want to recover damages for breach of warranty or damages for accepted non-conforming goods, measured by the difference in value between the double roll crusher actually delivered and the one promised. See 2-714(1) & (2). Savage also could recover incidental and consequential damages as indicated above.

Savage Industries v. American Pulverizer (Recirculation System)

Claim:

10. Breach of Contract. If Savage Industries is not permitted to recover on the original contract (see point 3 above), it will claim that American Pulverizer breached its subsequent promise to deliver a recirculation system as a way of refurbishing its original performance.

Remedies:

11. Market Damages. Because Savage Industries has not covered by purchasing a replacement recirculation system (but instead a replacement crusher), it will seek the difference between the market price of a recirculation system and the "contract price," plus incidental and consequential damages as measured above. See 2-713.

The "contract price" is presumably equal to whatever claim for the price and damages Savage was giving up by agreeing to allow American Pulverizer to fix the problem with the double-roll crusher using a recirculation system.

Charles T. Main v. Savage Industries (Coal Crushing System)

Claim & Remedy:

12. Breach of Contract. The problem notes that Charles T. Main has a claim against Savage Industries for late delivery of the entire coal crushing system. Charles T. Main also may be a third-party beneficiary of American Pulverizer's promises and warranties to Savage Industries.

Other

13. Other

Insolvency of American Pulverizer

Problem V.

Puritan Systems, Inc. v. M.G. Industries

Claim:

1. Breach of Contract. Puritan Systems may claim that M.G. Industries breached its promise to supply liquid nitrogen pursuant to (1) the oral agreement made on July 23, 1993; (2) an agreement formed by acceptance of the purchase order which was faxed on July 23, 1993; or (3) possibly the form service agreement signed on July 27, 1993.

First Defense:

2. Statute of Frauds. Assuming that the price was for more than \$500, M.G. Industries will argue that the statute of frauds makes the alleged oral agreement on July 23, 1993, unenforceable beyond the quantity actually shipped. See 2-201(1).

Puritan, however, will respond that the fax sent to M.G. Industries satisfies the confirmation exception to the statute of frauds, and makes the contract enforceable for a least a period of 2 years. See 2-201(2). The form service agreement also may count as a confirmation.

3. No acceptance: M.G. Industries will further argue that, even though Puritan Systems made offers in the purchase order and form service agreement, M.G. Industries did not accept them. The offer made on the form service agreement specifically required acceptance by an executive officer of M.G. Industries. See 2-206(1)(a).

Puritan, however, will argue in response that M.G. Industries accepted the purchase order sent by fax simply shipping the liquid nitrogen. See 2-206(1)(b). (The facts indicate that M.G. Industries supplied the liquid nitrogen until July 30.)

Remedy:

4. Cover Damages: Puritan will seek to recover cover damages, or the difference between what it had to pay Air Products and what it agree to pay M.G. Industries for two years, plus incidental damages. See 2-706(1).

Air Products v. Puritan Systems, Inc.

Claim:

5. Breach of Contract. Although Air Products probably is satisfied with the new agreement, it may claim that Puritan Systems implicitly repudiated its requirements contract for liquid nitrogen by negotiating with M.G. Industries. See 2-610 & cmt. 2. A requirements contracts precludes the buyer from purchasing from any other source. Cf. 2-306(1); Mid-South Packers v. Shoney's.

Defense:

6. Retraction. Puritan Systems did buy some liquid nitrogen from M.G. Industries from 7/23 to 7/30 but otherwise it may respond that it retracted its repudiation when it failed to obtain liquid nitrogen from M.G. Industries. See 2-611(2). Air Products, however, will maintain that its refusal to deal with Puritan Systems indicated that it considered the repudiation final. See 2-611(2).

Remedies:

7. Cancellation. Air Products will assert that it had a right to cancel the original contract (i.e. refuse to deal with Puritan Systems), and then enter a new contract at a higher price. See 2-610(b); 2-703(f).
8. Damages. Air Products may recover incidental damages for Puritan Systems. See 2-715(1). It also may recover damages for the nitrogen that Puritan Systems bought from M.G. Industries from 7/23 to 7/30. However, the subsequent contract between Air Products and Puritan Systems at a high price suggests that Air Products has not additional damages as measured by the difference between the contract price or resale price. See 2-706; 2-708(1). In addition, Air Products has not

lost volume because it re-established a contract with Puritan Systems, and thus has the same volume. It therefore cannot recover lost profit. See 2-708(2); R.E. Davis Chemical v. Diasonics.

Puritan Systems, Inc. v. Air Products

Claim:

9. Breach of Contract. If Puritan Systems prevails on its defense that it retract its repudiation, it may claim that Air Products breached the original requirements contract when Air Products refused to deal.

Remedy:

10. Cover Damages. Puritan will seek cover damages, or the difference between what it formerly paid Air Products and the high renegotiated price, plus incidental expenses. See 2-706.

Other

11. Other

Parol evidence rule

Grading Guide For  
Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Associate Professor Gregory E. Maggs

PROBLEM I. (36 points)

Timmeny v. Tropical Botanicals

Claim:

1. Breach of Contract: Timmeny will claim that Tropical breached its promise, in paragraph 1.2, to give him 60 days' notice before terminating his employment and then to pay him for 12 months.

Defenses:

2. No Breach: Tropical will argue that it did not breach the contract (except perhaps by not giving 2 weeks' notice) because paragraph 2.1 authorized Tropical to terminate Timmeny's employment when he refused to work without "reasonable cause."

The parties will dispute whether illness constitutes "reasonable cause." The court should admit parol evidence to determine the meaning of this term, under any standard, because it is ambiguous. See Rest. 214(c); Masterson v. Sine; Pacific Gas v. G.W. Thomas.

If there was a misunderstanding because the parties attached different meanings to the term "reasonable cause," the court must attempt to determine whether either party was at fault. See Rest. 201; Frigalment v. Int'l Sales.

Tropical should argue that the parties did not consider illness a reasonable cause because they dealt with the issue of illness by arranging disability insurance for Timmeny.

3. Non-Occurrence of a Constructive Condition: Tropical alternatively will argue that Timmeny's service was a constructive condition of its duty to pay him. Timmeny's failure to perform excused Tropical from paying beyond the amount that he performed. See Rest. 237; Kingston v. Preston; Jacob & Youngs v. Kent.

Timmeny will respond that the court should not find a condition because the contract expressly indicates what should happen if Tropical terminates his employment.

4. Frustration of Purpose: Tropical may argue that the purpose of the contract was frustrated when Timmeny stopped working. See Rest. 265; Krell v. Henry.

Timmeny, however, will respond that there was no frustration of purpose because his good health was not a basic assumption upon which the contract was made. The preliminary drafts show that the parties considered the possibility of ill health and decided that Tropical would bear the risk.

Remedies:

5. Damages: Timmeny will want Tropical to pay him the total of the 12 monthly payments. (Even under Tropical's theory, he is entitled to 2 week's pay.)

Remedy Limitations:

6. Avoidability. Tropical will argue that Timmeny may recover only the portion of his lost salary that he did not avoid by receiving disability insurance payments.

Tropical Botanicals v. Timmeny

Claim:

7. Breach of Contract: Tropical Botanicals may claim that Timmeny breached his promise to work for a year when he stopped working in February.

Defenses:

8. No Breach. Timmeny will argue that paragraph 2.1 excused him from performing if he became ill. As described above, the parties will argue about whether ill health constitutes "reasonable cause."
9. Impracticability. Timmeny also may argue that his ill health made performance impracticable. See Rest. 261; Taylor v. Caldwell. Tropical, however, will argue that Timmeny's good health was not a basic assumption upon which the contract was made because the parties considered the issue and dealt with it with disability insurance.

Remedies:

10. Expectation Damages. Tropical Botanicals wants expectations damages, or the cost of hiring someone else to do the work from February until June, minus what it would have paid Timmeny.

Other

11. Other

PROBLEM II.

(36 points)

Hipolito Flores's Estate and Family Members v. Baca Funeral Homes

Claim:

1. Breach of Contract: Hipolito Flores's estate and members of his family will claim that Baca Funeral Homes breached its promise in the pre-need funeral contract to embalm Hipolito's body properly upon his death because the embalming stopped at the waist and did not prevent decomposition.

Defenses:

2. No breach: Baca will argue that it did not breach the pre-need funeral contract because it never promised to embalm the body. The contract says that embalming is "authorized," not required.
3. Parol Evidence Rule: Baca also will argue that the parol evidence rule discharges any oral agreement that the parties might have made regarding embalming. See *Gianni v. Russell*; Rest. 210.

The family members, however, will contend that they may introduce parol evidence to explain the meaning of the term "authorized" under either the plain meaning or the intent rule because it is ambiguous. See *Pacific Gas v. G.W. Thomas*; Rest. 214(c).

4. Lack of Privity: Baca also will claim that the family members have no right to enforce Hipolito's contract because they were not a party to the contract. See *Bain v. Gillispie*.

The Flores family members will respond that they are intended third-party beneficiaries of the contract. It is appropriate to recognize their right to enforce the contract because they paid the contract price and Hipolito cannot enforce it himself. See *Seaver v. Ransom*; Rest. 302, 304.

5. Disclaimer: Baca also will argue that they have no claim against him because the contract indicated that the embalming would not preserve the body. The family members, however, still may claim that Baca did not fully complete the embalming.

Remedy:

6. Damages: The family members will want damages. Expectation damages would include the difference between what they were promised (complete and effective embalming) and what they got (partial and ineffective embalming). If expectation damages cannot be proved with reasonable certainty, they may settle for restitution of the contract price.

Remedy Limitations:

7. Uncertainty/Emotional Distress: Baca will argue that he is not responsible for their emotional distress. See Rest. 353.

Maria Flores v. Baca

Claim:

8. Rescission: Maria Flores will seek to rescind her pre-need contract with Baca Funeral Homes. She will argue that Baca's successful execution of funeral services for her husband was a constructive condition of her contract.

Defense:

9. Divisibility: Baca Funeral Homes will argue that the contracts were divisible, and breach of one does not discharge the other. See Rest. 240; *Kirkland v. Archbold*.

Other

10. Other

- Notes:
- (1) Answers should not discuss material breach/substantial performance because Baca Funeral Homes is not suing the Flores Family members. They are suing Baca and they can recover for any breach, whether material or not.
  - (2) Article 2 almost surely does not apply here and probably would not change the outcome if it did.

PROBLEM III.

(36 points)

MAIL v. MKC Equipment [Dealer Agreement]

Claim:

1. Breach of Contract: MAIL will claim that MKC repudiated its promises in the Dealer Agreement to buy one machine each quarter, to promote sales of the machine, and to attend seminars. See Rest. 250.

Defenses:

2. No Offer and Acceptance: MKC will argue that parties never completed formation of the Dealer Agreement that MAIL sent on June 3 because they did not sign it.

MAIL will respond that (1) the dealer packet was an invitation; (2) MKC made an offer when it returned the packet on January 23; (3) MAIL accepted the offer and sent notice of its acceptance by mailing the Dealer Agreement on June 3.

Alternatively, MAIL will respond that the parties formed a contract by conduct when MKC bought a barcoding machine at the dealer discount price.

3. Statute of Frauds: MKC also will argue that the statute of frauds makes the Dealer Agreement unenforceable. The Dealer Agreement requires MKC to purchase goods costing more than \$500 (i.e., one barcoding machine each month), but MKC never signed it. See 2-201.

MAIL will respond that 2-201 does not apply because this contract primarily is for services (i.e., marketing the barcoding machines), and not for goods. See *Coakley & Williams v. Shatterproof Glass*; *Zapatha v. Dairy Mart*.

(MAIL also might argue that it should be able to enforce the dealer agreement based on promissory estoppel because it rejected the application of another dealer in reliance on its contract with MAIL. Cf. *Monarco v. Lo Greco*.)

4. No Repudiation: If MKC did not want to get out of the agreement, it might argue that it did not repudiate its promises in the dealer agreement because of Grauberger's statements and its continuing efforts to sell the barcoding machine.

Remedy:

5. Expectation Damages: MAIL will seek the loss of profits that it would have made under the Dealer Agreement and that it cannot avoid.

MKC Equipment v. MAIL [Defective Machine]

Claim:

6. Breach of Warranty: MKC will claim that the MKC breached an implied warranty of merchantability when it delivered a defective machines. See 2-314(1).

Remedies:

7. Damages: MKC might seek damages for breach of warranty based on the diminution in the value of the machine. See 2-714(1).
8. Revocation of Acceptance and Damages: MKC does not appear to want to revoke acceptance because it is continuing its efforts to sell the machine. However, if MKC discovered the defect within a reasonable time, MKC could revoke acceptance of the machine, see 2-608(2), and recover the price paid plus market or cover damages. See 2-711; 2-712; 2-713.

MAIL v. MKC Equipment [Dealer Discount]

Claim:

9. Breach of Contract or Restitution: If the dealership agreement is not enforceable, MAIL will claim that MKC breached an implied promise to pay the full undiscounted price the barcoding machine purchased on March 19 if MKC decided not to become a dealer.

Defenses:

10. No Promise: MKC will argue that it never made an implied promise to pay the full purchase price.

Remedy:

11. Damages: MAIL will seek the balance of the undiscounted purchase price of the machine because it has been accepted. See 2-709(1)(a).

Other

12. Other

Did the defective machine excuse MKC from performing under the Dealer Agreement?

PROBLEM IV.

(36 points)

Cincinnati v. The Colonel's [Machine I]

Claim:

1. Breach of Contract: Cincinnati will claim that The Colonel's breached its promise to pay for Machine I. See 2-301.

Defenses:

2. Unknown: The facts do not indicate that The Colonel's had any grounds for rejecting Machine I (or Machine II).

Remedy:

3. Damages [Price for Goods Accepted]: Cincinnati will seek the balance of the purchase price on grounds that The Colonel's accepted Machine I. See 2-709(1)(a). It will argue that the attempted rejection was ineffective because The Colonel's delayed unreasonably causing work to continue work on Machine II. See 2-602(1), 2-606(1)(b). The Colonel's may argue that it needed time to inspect Machine I. See 2-513(1).
4. Damages [Price for White Elephant]: Cincinnati alternatively will seek the balance of the purchase price for Machine I on grounds that it is a white elephant that cannot be resold "reversed." See 2-709(1)(b).
5. Possession of Goods and Damages. If Cincinnati cannot recover the purchase price, it has a right to remove Machine I. See 2-602(2)(b). Cincinnati then may seek market or resale damages. See 2-706(1), 2-708(1).

Cincinnati v. The Colonel's [Machine II]

Claim:

6. Breach of Contract: Cincinnati will claim that The Colonel's breached its promise to pay for Machine II. See 2-301.

Defenses:

7. No offer and acceptance: The Colonel's will argue that the parties never formed a contract for Machine II because Cincinnati never executed the Sale Agreement for it and never agreed on a shipment date.

Cincinnati, however, will respond that the partially executed agreement, the partial payment, and the discussion of reasons for not signing show that the parties had formed a bargain. See 2-104.

8. Indefiniteness: The Colonel's may argue that the alleged contract for Machine II is too indefinite to enforce because the parties did not agree on a shipment date.

Cincinnati will respond that the parties can leave terms open, without having the contract fail for indefiniteness, so long as they intend to form a bargain. See 2-204(3). Absent an express agreement, delivery would have to occur at a reasonable time. See 2-309(1).

9. Statute of Frauds: The Colonel's may argue that the statute of frauds prevents enforcement of the alleged contract for Machine II. But Cincinnati will respond that the party against whom enforcement is sought (The Colonel's) signed it. See 2-201(1). In any event, the specially manufactured goods exception would apply. See 2-201(3)(a).

Remedy:

10. Damages (Price): Cincinnati will seek the balance of the purchase price on grounds that Machine II is a white elephant that could not be sold "reversed as it was." See 2-709(1)(b).

The Colonel's will argue that Cincinnati cannot recover the price (or even resale damages) because it actually resold Machine II to Davidson Textron for more than the contract price. See 2-709(1); 2-706(1).

Cincinnati will argue in response that it sold essentially a different machine to Davidson Textron because Machine II had to be rebuilt substantially.

11. Damages (Lost Profit): If Cincinnati cannot recover the purchase price, it will seek the profit that it expected to make on the sale of Machine II. The sale to Davidson Textron shows that it lost volume because it would have made two sales instead of just one. See 2-708(2).

The Colonel's v. Cincinnati [Restitution]

Claim:

12. Unjust Enrichment: The Colonel's will claim that it is unjust for Cincinnati to retain its partial payment for Machine II.

Remedy:

13. Restitution: The Colonel's will seek restitution as measured by the (price paid) - \$500 - (damage to Cincinnati). See 2-718(2),(3).

Other

14. Other

Note: If Cincinnati breached with respect to Machine I, then that breach might excuse The Colonel's with respect to Machine II. But is there evidence of a breach?

PROBLEM V.

(36 points)

Far West v. Hobart [Unrepaid Loan]

Claim:

1. Breach: Far West will claim that Hobart breached its promise to repay the loan.

Remedy:

2. Damages: Far West will seek the outstanding principal, interest, and financing charges.

Hobart v. Saeilo [Original Contract]

Claim:

3. Breach of Contract: Hobart will claim that Saeilo breached its original promise to deliver a new lathe by sending a used one. See 2-601.

Defenses:

4. Waiver/Modification: Saeilo will argue that Hobart waived this claim by agreeing to a modification. Hobart, however, will contend that the modification agreement is not enforceable because Saeilo acted in bad faith because it never intended to perform. See 2-209(1) & cmt. 2.

Remedy:

5. Damages [Rejected Goods]. Hobart will contend that its attorney effectively rejected the goods after they arrived. Hobart has not covered, and therefore may recover market price damages. See 2-713(1).

Hobart would seek as incidental or consequential damages the additional money that it paid to Far West. See 2-715.

Hobart v. Seailo [Modification]

Claim:

6. Breach of Contract. If the modification is enforceable, Hobart will claim that Seailo breached its promise to deliver a new lathe "as soon as possible."

Remedy:

7. Damages [Non-Delivery]. Hobart has not covered, and therefore may recover market price damages. See 2-713(1). Hobart again would seek as incidental or consequential damages the additional money that it paid to Far West. See 2-715. (Of course, he could not recover twice.)

Seailo v. Hobart [Unjust Enrichment]

Claim:

8. Unjust enrichment: Assuming that Seailo must return the purchase price to Hobart, Seailo will claim that Hobart was unjustly enriched in two ways. First, although Hobart rejected the demonstrator lathe, Hobart continued to use the lathe in its business. Second, Hobart also benefitted when Far West repossessed the lathe in partial satisfaction of Hobart's loan.

Defenses:

9. No Injustice. Hobart will claim that no injustice occurred with respect to the use of the lathe because Seailo gave Hobart permission to use the lathe and delayed in replacing it.

Remedy:

10. Restitution. Seailo would seek the value of the use of the lathe plus whatever credit Far West gave Hobart for the lathe after repossession and sale.

Other

11. Other

Discussion of Hobart's apparently superfluous objection to the lack of horsepower of Seailo's lathes.

Discussion of the indefiniteness of the time for delivery under the modified contract.

Discussion of whether Hobart is insolvent because it refused to pay Far West.

Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Associate Professor Gregory E. Maggs

PROBLEM I. (30 points)

Charter Oil v. Bliss Oil

Claim:

1. Breach of Contract: Charter will claim that Bliss breached its promise to take the oil to a waste disposal site.

Defense:

2. No Promise: Bliss may argue that, despite Charter's "understanding," it never specified how it would dispose of the oil. More facts are necessary to evaluate this defense.

Remedy:

3. Damages: Charter Oil will seek expectation damages, including compensation for the pollution liability as consequential damages. Bliss may argue that these damages were not foreseeable.

Charter Oil v. First Three Insurers

Claim:

4. Breach of Contract: Charter will claim that the first three insurers breached their promises to indemnify it from liability.

Defense:

5. Pollution Exclusion: The insurers will argue that the pollution exclusion precludes coverage for Charter's liability.

Response to Defenses:

6. Exception for "Sudden and Accidental" Releases: Charter will argue that the pollution exclusion does not apply because it contains an exception for "sudden and accidental" releases. Charter will contend that "sudden" means "unexpected and unintended" based on dictionary definitions and representations made to insurance regulators. It will argue that release by Bliss was unexpected and unintended by it.
7. Interpretation Against The Draftsman: Charter will argue that a court should interpret the word "sudden" against the insurers because they

drafted the insurance contract. See Rest. 206.

Replies to Responses:

8. Inapplicability of the Exception: The insurers will argue that the exception does not apply because the word "sudden" means abrupt, and that the release was planned and coordinated, and not abrupt. It also will argue that, if they had wanted to say unexpected and unintended, they would have said that -- as the fourth insurer in fact did.
9. Parol Evidence Rule: The insurers will argue that the court should exclude extrinsic evidence of the meaning of the term "sudden" because it has a plain meaning. See *Masterson v. Sine*.

Charter will respond that the court may consider extrinsic evidence for three reasons. First, the term is ambiguous. Second, the parol evidence rule does not exclude dictionary definitions because they are objective evidence of the meaning of words. Cf. *Hurst v. Lake*. Third, the modern approach always allows use of extrinsic evidence to show the meaning of words. See *Pacific Gas v. G.W. Thomas*; Rest. 214(c).

10. Rule on Misunderstandings: The insurers will argue that Charter should have understood "sudden" to mean "abrupt" and they had no reason to know that it meant only "unexpected and unintended." Accordingly, their meaning should prevail. See Rest. 201(2).

Remedies:

11. Damages: Charter will want to recover damages equal to its coverage.

Charter Oil Co. v. Fourth Insurer

Claim:

12. Breach of Contract: Charter will argue that the fourth insurer breached its promise to indemnify it for liability.

Defense:

13. Pollution Exclusion: The fourth insurer also will argue that the pollution exclusion precludes coverage.

Responses to Defenses:

14. Exception for Releases that are not "Expected or Intended": Charter Oil will contend that the pollution exclusion contains an exception for releases that are neither "expected" nor "intended," and that it did not expect or intend Bliss Oil to dispose of the oil in the manner it did. The fourth insurer may argue Bliss Oil's intent should control.

Remedies:

15. Damages: Charter will want to recover damages equal to its coverage.

Other

16. Other

Insurers may have subrogation rights against Bliss.

PROBLEM II.

(30 points)

Scottsdale Plaza Resort v. Kuhn

Claim:

1. Breach of Contract: Scottsdale Plaza Resort will claim that Kuhn breached its promise to pay for the rooms and spend \$8,000 on food and beverages.

Defense:

2. Frustration of Purpose: Kuhn will argue that the parties made the contract upon the assumption that Kuhn's European employees would travel to the resort. The terrorist threats substantially frustrated the purpose of the contract by discouraging these employees from traveling. See *Krell v. Henry*; Rest. 265.

Response to Defense:

3. No Frustration or Impracticality. Scottsdale Plaza will contend that it did not assume anything or, at most, it assumed only that Kuhn's employees could travel to the resort. Nothing prevented them from attending. Moreover, Kuhn's performance was not impracticable because it only promised to pay money. Cf. *Taylor v. Caldwell*; Rest. 261.

Remedy:

4. Damages for the Rooms: Scottsdale Plaza will seek the profit lost on the rooms. Kuhn may argue that Scottsdale Plaza could have avoided damage by renting to someone else or rescheduling the conference. Perhaps forfeiting the deposit is a liquidated damage measure.
5. Damages for the Food & Beverages: Although the food and beverage portion of this hybrid contract does not predominate, a court might apply article 2 by analogy to determine the remedy for Kuhn's failure to pay. Cf. *Barco Auto Leasing v. PSI Cosmetics*; *Zapatha v. Dairy Mart*.

Scottsdale Plaza probably could recover the market or resale price difference. See 2-706; 2-708(1). If these damages would be inadequate, Scottsdale Plaza might claim to be a lost volume seller and seek the profit that it would have made on the sale. See 2-708(2).

Kuhn v. Scottsdale Plaza Resort

Claim:

6. Unjust Enrichment: Kuhn will claim that the Scottsdale Plaza Resort will be unjustly enriched if it keeps the deposit.

Defense:

7. No Injustice: Scottsdale Plaza Resort will argue that no unjust enrichment occurred because it reserved the rooms as it promised and Kuhn breached the contract. Indeed, that is exactly what a deposit is for.

Response to Defense:

8. *Britton v. Turner*: Kuhn also may argue that the court should adopt the

rule of *Britton v. Turner*, which allows a defaulting plaintiff to seek restitution for unjust enrichment. See Rest. 374(1); 2-718(2).

Remedy:

9. Restitution: Kuhn would seek restitution of the damage deposit.

Remedy Limitation:

10. Allowance for Damages: Scottsdale Plaza would seek to subtract from the deposit the damages that it suffered from Kuhn's breach. See *Britton v. Turner*; Rest. 374(1).

Independently-Owned Shops v. Kuhn

Claim:

11. Breach of Contract: The independently-owned shops will claim that Kuhn breached its promise to attend the conference.

Defense:

12. No Promise: Kuhn first will argue that it merely promised to pay money and did not promise to attend the conference. The independently-owned shops, however, might contend that Kuhn implicitly promised that the guests would be on the premises to spend money.

13. Lack of Privity: Kuhn will argue that it made a promise only to Scottsdale Plaza Resort and that the independently-owned shops cannot enforce it. See, e.g., *Bain v. Gillispie*; Rest. 301. The independently-owned shops, however, will argue that they are intended third-party beneficiaries. See, e.g., *Ransom v. Seaver*; Rest. 302..

Remedy:

14. Damages: The shops will seek to recover the profit that they would have made if Kuhn's employees had attended the convention.

Other

15. Other

PROBLEM III.

(30 points)

Robco                   bricks  
(seller) <-----> Beehive [Young/Larkin]  
                          \$\$                   (buyer)

Beehive/Larkin v. Robco [Buyer v. Seller]

Claim:

1. Breach of Contract: Beehive will claim that Robco promised to deliver one million bricks of a particular color, and that Robco (1) breached the promise in part by shipping non-conforming bricks, see 2-601, and (2) repudiated the rest of promise by stating that it is unable to produce the bricks, see 2-611 cmt. 2.

Defenses:

2. No Acceptance: Robco will argue, based on the introduced testimony, that receipt of the telephone order does not mean Robco accepted it.

Beehive will respond that an order is construed as an offer inviting acceptance by a prompt shipment of conforming or non-conforming goods. See 2-206(1)(b). Accordingly, unless Robco notified Beehive that the shipments for accommodation only, Robco accepted the offer when it shipped the non-conforming bricks.

3. Statute of Frauds: Robco will argue that the alleged promise to sell the bricks is not enforceable because the contract was made over the telephone. See 2-201(1).

Beehive will respond that the exception to the statute of frauds for goods delivered and accepted is satisfied for the 200,000 bricks that it received and accepted. See 2-201(3)(c). It also will argue that Robco's letter of April 15 is sufficient to indicate that a contract has been made. See 2-201(1). (The exception for specially manufactured goods exception probably does not apply because the bricks apparently can be sold to others. See 2-201(3)(a).)

4. Impracticability: Robco will argue that the parties assumed that the materials necessary for making the bricks would be available. The inability to obtain the necessary radioactive element made performance impracticable. See *Taylor v. Caldwell*; Rest. 261.

Remedy:

5. Specific Performance. Beehive could seek specific performance if the promised bricks would be difficult to obtain from another source. See 2-716(1) & cmt. 2. Seeking specific performance, however, would accomplish little because Robco apparently cannot produce the bricks.
6. Damages for Non-Conformity: Beehive might seek damages for any non-conformity in the 200,000 bricks that it accepted in the first and second batches. See 2-714(1). One problem, however, is that it used them without complaint. The court can measure these damages in any reasonable way. See *id.* For example, the court could compare the price of the bricks to the price of comparable bricks.
7. Damages for Non-Delivery: Beehive will seek damages for non-delivery for the remaining 800,000 bricks. The damages will equal the difference between the contract price and the cover price (if Beehive covered), see 2-712(2), or the contract price and the market price, see 2-713(1).

Remedy Limitations:

8. Rejected Bricks Sold on Consignment: Beehive did not have a right to resell the 26,000 bricks from the third batch because it did not pay for them. The court must deduct the proceeds from this sale from Beehive's damages. See 2-711(3).
9. Rejected Bricks Not Sold: Beehive has a duty to hold the remaining bricks from the third batch with reasonable care and to allow Robco to remove them. See 2-602(2)(b).

Robco v. Beehive/Larkin [Seller v. Buyer]

Claim:

10. Breach of Contract: Robco will claim that Beehive has a duty to pay for the 200,000 bricks it accepted in the first two batches. See 2-301.

Remedy:

11. Damages: Robco will seek the price of the bricks delivered and accepted. See 2-709(1)(a). (Beehive can subtract damages as described above.)

Alternatively, if the contract is not divisible, and Robco breach the whole, then Robco only may recover under a theory of restitution.

Other

12. Other

PROBLEM IV.

(30 points)

	gas		rights to gas	
Roye	----->	AER	----->	Blue Jay
(seller)	<-----	(buyer)		
	\$\$			

AER v. Roye [Buyer v. Seller]

Claim:

1. Breach of Contract: AER will claim that Roye promised to deliver the gas that it requested over a two year period, and broke this promise by failing to deliver the gas requested in January and February of 1990.

Defenses:

2. Non-Occurrence of a Condition (Confidentiality): Roye will argue that confidentiality was a condition of its performance, and that AER's disclosure to Blue Jay excused its performance. Cf. Kingston v. Preston.

3. Non-Occurrence of a Condition (Excessive Pressure): Roye also will argue that an implied condition of the agreement was that AER would not have excessive pressure in its pipeline. See id. AER, however, will respond that the contract permitted pressure up to 800 psi.

Remedies:

4. Damages: AER will seek damages for the undelivered gas based on the cover price (if it covered), see 2-712(2), or the market price, see 2-713.

Roye v. AER [Seller v. Buyer]

Claim:

5. Breach of Contract: AER has two claims against Roye. First, Roye breached the contract by disclosing its terms after promising confidentiality. Second, to the extent that AER has not paid, AER has breached its promise to pay for all of the gas.

Defense:

6. Non-Occurrence of Condition (Failure to Tender Goods): AER will argue that it does not have to pay for the gas requested but not delivered in October, January, and February. See 2-507(1).

Response to Defense:

7. Attempt to Cure: Roye will respond that, although it initially failed to deliver, it had a right to cure, and AER rejected its attempt. See 2-508(1). AER might reply that the attempt to cure was not reasonable because it called for shipment that exceeded projections. [Note: This response also could be a defense to the first suit.]

Remedy:

8. For Violation of Confidentiality. Roye may have a right to cancel the contract, if the disclosure constitutes a breach of the whole. See 2-703(f). It also can collect damages for harm caused by the disclosure.
9. For Gas Accepted: Roye will ask for the unpaid price of any gas that AER accepted. See 2-709(1)(a).
10. For Gas Not Delivered: Roye may argue that the contract required AER to pay for all of the gas. AER, however, will argue that it does not have to pay for gas that it request and that was not delivered.

Blue Jay v. Roye [Assignee of Buyer v. Seller]

Claim:

11. Breach of Contract: Blue Jay will claim that Roye promised to deliver the gas to AER, that AER assigned its rights (at least for October), and that Roye breached by refusing to deliver the gas in October, 1989.

Defense:

12. Lack of Privity (No Effective Assignment): Roye will defend on grounds of lack of privity, arguing that the contract was between Roye and AER. Although assignees ordinarily may enforce contracts, the confidentiality provision implicitly prohibited assignment of the contract rights. See Rest. 317; Herzog v. Irace.
13. Insecurity: Roye will argue that it had a right to suspend performance because it felt insecure about whether AER would perform when it assigned it rights to Blue Jay. See 2-609. Blue Jay, however, will respond that Roye only had a right to suspend performance until it received adequate assurance of performance. See id.

Remedy:

14. Damages: Blue Jay will seek damages based on the cover price (if it covered), see 2-712(2), or the market price, see 2-713.

Other

15. Other

PROBLEM V.

(25 points)

Stair v. Gaylord Enterprises, General Irrigation, and Goodyear [First Hose]

Claim:

1. **Breach of Implied Warranty of Merchantability:** Stair will claim that Gaylord Enterprises, General Irrigation, and Goodyear all warranted that the original hose would be merchantable, see 2-314, 2-318, and that the hose was not merchantable because it was susceptible to leaking and thus not fit for ordinary purposes.

(Alternatively, he might claim that these defendants warranted that the hose would be fit for the particular purpose of irrigation.)

Defenses:

2. **No Breach:** The defendants may argue that the hose was merchantable. All hoses can spring leaks, especially after being used for over a year.
3. **Waiver:** The defendants also will argue that Stair waive his rights when he agreed to return the old hose for credit against a new hose.

Remedy:

4. **Damages for Breach of Warranty:** Stair will seek the difference in value between the hose he bought and a merchantable hose. See 2-714(2). He also will seek consequential damages for the difficulty encountered during the 1978 growing season. See 2-715(2)(a).

Remedy Limitation:

5. **Foreseeability:** The defendants will argue that they had no reason to know that Stair had only one hose would suffer consequential damages from a leak in the hose. See 2-715(2)(a).

Stair v. General Irrigation and Goodyear [Second Hose]

Claim:

6. **Breach of Contract:** Stair will claim that General Irrigation and Goodyear breached their promise to deliver the replacement hose by April 15, 1979, when they delivered it on June 14, 1979.

Defenses:

7. **Waiver/Modification:** The defendants will argue that Stair waived his rights by sending money on April 26, after the time for performance had passed. In effect, he agreed to a modification of the contract. See 2-209.

Remedies:

8. **Damages for Non-Delivery:** Stair will seek to recover the price paid plus damages equal to the difference between the cover price (unstated) and contract price (\$1207.12 + 337.88). See 2-712. He also will seek consequential damages for harm to his crops during the 1979 growing season. See 2-715(2)(a).

Remedy Limitations:

9. **Avoidability:** The defendants will argue the Stair could have avoided the damage to his crop by covering earlier. See 2-715(2)(a).

Other

10. Other

Grading Guide For  
Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Associate Professor Gregory E. Maggs

PROBLEM I. (25 points)

Pay \$80,000 by January 14, 1992  
Chester Brown -----> Eleanor Brown  
& coexecutors <-----  
convey interest in property

Coexecutors v. Eleanor Brown

Claim:

1. The coexecutors may claim that Eleanor Brown promised in the settlement agreement to convey her interest in the property and did not do it.

Defense:

2. Non-Occurrence of a Condition: Eleanor will assert that she did not have to convey the property because her duty to convey the property was conditioned on Chester's payment of \$80,000 by January 14, 1992, and Chester failed to pay the money.

Replies to the Defense:

3. Independent Covenants: The coexecutors will argue that their duty to pay \$80,000 was independent of Eleanor's duty to convey the property. See *Hanks v. GAB Industries*. They will contend that Chester was not buying the property; instead, the two of them were dividing their assets at divorce.

Eleanor, however, will argue that the \$80,000 clearly was a payment for her interest in the property. In fact, the agreement specifically discussed the "exchange" of money for the marital residence.

4. Substantial Performance: The coexecutors also will argue the breach was not material. A slightly late payment would not seem to implicate any of the factors identified in Restatement 241.

Eleanor first will contend that the payment by January 14, 1992, was an express condition. As a result, the doctrine of substantial performance does not apply.

Alternatively, Eleanor will argue that the late payment was a material breach. The parties would not have stated the date in the contract if it did not matter. She also will assert that she pointed out the importance of the date.

5. Parol Evidence Rule: The co-executors also will argue that the parol evidence rule discharges any oral agreement that the deal would be off if Eleanor did not have the payment by January 14, 1992. That agreement would be within the scope of the written settlement agreement.

Eleanor may argue that the agreement is not a complete integration. If that is true (we do not have the facts), then a prior agreement that she needed to have the money on time would not be discharged because it would not be inconsistent.

Eleanor will argue that she is not introducing parol evidence to show a prior agreement. Instead, she is introducing the evidence to prove the importance of a provision of the contract because the contract itself does not make the importance clear.

Remedy Sought:

6. Specific Performance: The co-executors will seek specific performance of Eleanor's promise to convey the property, or an order that the agreement is still binding.

Remedy Limitation:

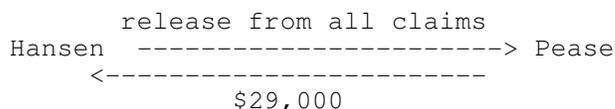
7. Allowance for Damages: Eleanor may seek an allowance for damages caused by the delay in payment.

Other

8. Other

Problem II.

(25 points)



Ford Motor Co.  
(third party)

Hansen ("Brenda") v. Ford Motor Co.

Claims:

1. Hansen will claim breach of express and implied warranties. Even if Ford did not sell the car to her, she is a third-party beneficiary of the warranties under 2-318.)

Defenses:

2. Release: Ford also will argue that, in the settlement agreement with Pease, Hansen released all "other persons, firms, or corporations" from liability.

First Response:

3. No Right to Enforce: Hansen will argue that Ford cannot use the release as a defense because it was not a party to the settlement agreement.

Reply:

4. Intended Third Party Beneficiary: Ford will argue that, even though it was not a party to original contract, it is an intended third party beneficiary to the contract. The contract, as noted, specifically releases all other firms or corporations.

Hansen will argue that Ford is not a third-party beneficiary because the insurance company (the promisee) did not owe anything to Ford and had no reason to confer a benefit on Ford. See Rest. 302(b).

Second Response:

5. Meaning of the Contract. Hansen alternatively will argue that the release does not mean that she is giving up her rights to sue Ford when it says that she releases all corporations. As her testimony indicates, she only wanted to release the Peases and the insurance company.

Replies:

6. Parol Evidence Rule: Ford will argue that because the settlement agreement is plain on its face, the plain meaning rule precludes Hansen from introducing extrinsic evidence about what she meant by it. Cf. *Masterson v. Sine*.

Hansen will argue that she may introduce parol evidence to prove her intent under the liberal approach, see *Pacific Gas v. G.W. Thomas*, or because a general release is inherently ambiguous on the issue of who can enforce it.

7. Extrinsic Evidence: If the court admits extrinsic evidence to prove intent, Ford will show that Hansen had familiarity with the form and thus did not have the intent that she claims. Also, her experience tends to negate an argument of unconscionability.

Remedy Sought:

8. Hansen will want the difference in value of a car with a working air bag and one without, see 2-714(2), and consequential damages for her injuries. See 2-715(2)(b).
9. Hansen may be able to recover tort remedies as an alternative.

Other

10. Other

-- Reformation  
-- Unconscionability

PROBLEM III.

(25 points)

                  \$15,000  
Daughtrey -----> Ashe  
(buyer) <----- (seller)  
                  bracelet

Daughtrey v. Ashe

Claims:

1. Express Warranty: Daughtrey will claim that Ashe expressly warranted in the appraisal that the diamonds were v.v.s. quality, and they were not. See 2-313(1)
2. Implied Warranty: Ashe, as a merchant, implicitly warranted that the goods were merchantable. See 2-314(1). The goods were not merchantable because they do not "conform to the promises or affirmations of fact made on the container or label." 2-314(2)(f).

Defenses:

3. Express Warranty -- Basis of Bargain: Ashe will argue that the appraisal was not a "basis of the bargain" because he merely described the goods as nice. He gave the appraisal to Daughtrey only after Daughtrey had purchased the bracelet. As a result, the appraisal did not create an express warranty. See 2-313(1).

Daughtrey will respond that comment 7 to 2-313 says that the exact timing of the warranty does not matter. Instead, the only question is whether the warranty "is fairly to be regarded as part of the contract." Conformity to the appraisal would seem part of the contract.

4. Express Warranty -- Opinion: Ashe will argue that he was merely expressing an opinion about that quality of the diamonds.

This argument will succeed with respect to the claim that Ashe warranted that the diamonds were nice. It should fail with respect to the appraisal. The appraisal is stated as a matter of fact.

5. Implied Warranty -- Basis of Bargain: Ashe similarly will argue that he did not make an implied warranty because Daughtrey did not see the label until after he purchased the bracelet.

Daughtrey will respond that official comment 10 says that 2-314(2)(f) applies whenever there is a label. As the comment explains, good faith requires that a buyer not be forced to use goods under a false impression of their quality.

Responses:

6. Modification: Daughtrey also may argue that, even if the original contract did not contain any warranties, the contract was modified by the appraisal. See 2-313 cmt. 5. Modifications require no consideration. See 2-209(1).

Remedy Sought:

7. Specific Performance: Daughtrey wants Ashe to replace the bracelet with one having diamonds of v.v.s. quality. See 2-716(1). He will argue that the circumstances make specific performance proper.
8. Damages: Daughtrey, as a second choice, could recover damages under 2-714(2). Damages would be measured in any reasonable manner, such as the difference in the value of the bracelet.

Note: Daughtrey does not want to revoke acceptance. He therefore cannot cover or seek market damages.

Remedy Limitation:

9. Ashe will argue that Daughtrey only can receive his money back because the parties agreed on that limitation of damages. The limitation does

not appear unconscionable. See 2-302.

Other

10. Other

-- Good faith

PROBLEM IV.

(25 points)

1650 trees @ \$11.60  
Lambert -----> Kysars  
(buyer) <----- (seller)  
2600 trees @ \$11.60

Lambert v. Kysars

Claim:

1. Lambert may claim that the Kysars violated an implied warranty that the trees would be fresh. See 2-314, 2-315.

Defense:

2. No contract: The Kysars might claim that there was no contract because Lambert's acceptance did not match their offer. But a contract would seem to have been formed under 2-207(1) or 2-207(3).

3. No breach: The Kysars will argue the trees were fresh when delivered, but that Lambert damaged them by exposing them to extremely cold weather.

Remedies Sought:

4. Rejection: Lambert may reject the trees, recover the deposit, withhold further payments, and collect damages based on the market or cover price. See 2-601(a); 2-711(1)(a) & (b).

If Lambert rejects, he may hold the trees already received, see 2-602(2)(b), or he may sell them to obtain a refund of his deposit, see 2-711(3).

5. Acceptance: As an alternative, Lambert may accept the 1650 trees, pay the balance due on them, but subtract damages for the breach of warranty. See 2-601(b); 2-714(2), (3).

Remedy Limitation:

6. Cure: The Kysars have a right to cure because the contract did not require delivery until December 10. See 2-508(1).

Kysars v. Lambert

Claim:

7. Breach of Contract: The Kysars will claim that Lambert implicitly repudiated his promise to pay for the Christmas trees by complaining about

their quality.

Defenses:

- 8. Non-Occurrence of a Constructive Condition: Lambert will argue that he does not have to pay for the trees because their freshness was a constructive condition of his duty to pay, and they were not fresh.

Remedies Sought:

- 9. Trees Sent: The Kysars will want the full purchase price of any trees that they already have sent. See 2-709(1)(a).
- 10. Trees Not Yet Sent: The Kysars may ask for damages for the 950 trees that they have not already sent. Damages could be measured by either the resale or market price. See 2-706, 2-708. If it would be hard to resell the trees (perhaps because Christmas is so near) they could get the full purchase price. See 2-709(1)(b).

Remedy Limitations:

- 11. Quantity: Assuming that a contract was formed under 2-207(1) or 2-207(3), a question is how many trees the contract called for. Lambert will argue that all the trees have been sent because his acceptance called for only 1650 trees.

The Kysars will argue that the contract called for 2600 trees under two theories: (1) the offer controls; or (2) the different terms are treated as additional terms and they do not become part of the contract because they would materially alter it. See 2-207(2)(b).

The outcome is unclear if the knockout approach applies or if the contract was formed under 2-207(3). The quantity would be unspecified. The court might use 1650 as the proper figure.

- 12. Retraction of Repudiation: Lambert has until December 10 to retract his repudiation. See 2-611.

Other

- 13. Other

PROBLEM V.

(25 points)

4 adult ostriches

Gross & Dixon -----> Roberts  
 <-----

- 1. cash
- 2. option to buy 20 chicks in 1988 @ \$750
- 3. option to buy 20 chicks in 1989 @ mkt price

10/87	?/88	11/88	spring/89
options given	1st attempt to buy chicks (20 @ \$750)	negotiations & letter	2nd attempt to buy chicks (20 @ \$750)

Gross & Dixon v. Roberts (modified contract)

Claim:

1. Breach of Contract: Gross and Dixon will claim that, during the renegotiations in 1988, Roberts promised to sell 20 chicks from the 1989 hatch for \$750 each, and that Roberts broke that promise.

Defense:

2. Statute of Frauds: Roberts will argue that the renegotiated promise is not enforceable because it is for the sale of goods (ostrich chicks) for a price of more than \$500, and he did not sign a writing sufficient to show that a contract was made. See 2-201(1).

Response:

3. Confirmation Exception: Gross and Dixon will argue that the statute of frauds is satisfied because they sent a letter of confirmation within a reasonable time after the contract was made, and Roberts did not respond. See 2-201(2).

Reply:

4. Not Merchants: Roberts will reply that the confirmation exception applies only in contracts between merchants (i.e., both parties must be merchants). See 2-201(2). Gross and Dixon are not merchants because the facts say that they were "amateurs" who hoped to get involved in the new field. See 2-104(1); *Loeb & Co. v. Schreiner*.

Gross and Dixon will argue that they are merchants because, as "entrepreneurs," they have knowledge as to business practices such as letters of confirmation. See 2-104(1) & cmt. 2.

Remedy Sought:

5. Type of Damages: Gross and Dixon will want damages measured by the difference between the market price and contract price. See 2-713(1). They apparently did not cover and, therefore, cannot claim cover damages. See 2-712(2).
6. Calculation of Damages: The appropriate time to measure the market price is when the buyer "learned of the breach." 2-713(1). Gross and Dixon will argue that they learned of the breach of the oral contract in 1989, when the market price was \$6000 per pair (or \$3000 each). Damages equal:

$$20 * (3000 - 750) = \$45,000 \quad [ 10 * (6000 - 1500) = \$45,000 ]$$

Gross & Dixon v. Roberts (original contract)

Claim:

7. If the court will not enforce the modified contract, Gross and Dixon may claim that Roberts originally promised to sell the chicks in 1987, and that he broke that promise in 1988.

Defenses:

8. None. Roberts does not appear to have a defense, provided that the second contract is invalid. (Note: Section 2-205 does not apply because the Roberts received consideration for the option.)

Remedy:

9. Damages: Gross and Dixon again will seek market damages. They learned of the breach in 1988 when the market price was \$5000 per pair (or \$2500 each. Damages equal:

$$20 * (2500 - 750) = \$ 35,000 \quad [ 10 * (5000 - 1500) = \$35,000 ]$$

Other

10. Other