

The George Washington  
University Law School

June 7, 2021

Past Final Examinations In

CONTRACTS II

Professor Gregory E. Maggs

This document contains examinations given in my Contracts II  
classes on the following dates:

April 30, 2019	May 2, 2005
May 2, 2017	April 29, 2004
April 28, 2014	May 8, 2003
April 30, 2013	April 30, 2002
May 1, 2012	May 4, 2001
April 21, 2011	May 9, 2000
April 27, 2010	April 28, 1998
April 28, 2009	May 9, 1997
April 29, 2008	May 2, 1996
April 26, 2007	May 1, 1995

I do not have copies of earlier examinations.

Final Examination In

CONTRACTS II

(Course No. 6203-21; 3 credits)

Professorial Lecturer Gregory E. Maggs

Instructions:

1. This examination consists of five problems of equal weight (i.e., 20% each).
2. Absent special arrangements, you have 3 hours to complete this examination. I recommend that you devote approximately 36 minutes to each problem, but you may allocate your time as you see fit.
3. Your answers for the five problems combined may not exceed a total of 4500 words.
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### Tips for Writing Good Answers:

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When identifying and discussing claims, be very specific about who might assert them and what they might allege (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ..."). If you are not careful in addressing the possible claims, you will have difficulty discussing defenses and remedies.

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Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[STC (Lender) made a loan to SRWR (Debtor), a business owned by Mostoller.] An important component of the [loan agreement] was Mostoller's pledge to STC of Mostoller's right to a federal income tax refund attributable to losses incurred by the Debtor in year 2015, and imputed to Mostoller by virtue of the Debtor's taxation as an S-Corporation. [The agreement said:] "Mostoller agrees to assign to Lender any rights in the 2015 tax refund due to him individually, but attributable to the operating losses of the Debtor."

STC alleges the tax refund pledge would include the refund of federal taxes paid by the Debtor in 2014, as that refund was generated on account of 2015 operating losses. [Mostoller and SRWR] proffer that the refund of taxes paid in 2014 is not a "2015 Federal tax refund" and is instead a prior year tax refund.

In support of its interpretation, STC offered testimony of Teitz and Fuchs. The gist of this evidence is that the parties understood that the entirety of any refund to be generated on account of the 2015 operating losses was referred to by the parties as the "2015 refund." [T]o the extent that Mostoller could claim ignorance of STC's understanding of the deal, Mostoller's knowledge of the size of the refund to be pledged contradicts his position. Fuchs credibly testified that Mostoller understood that the collateral would need to be significant. [Assume that SRWR did not repay the loan to STC and that the government paid all tax refunds to a bankruptcy trustee for distribution to the appropriate creditors.]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Davis and J&J entered into a contract, whereby J&J agreed to pour a concrete slab foundation for Davis's Quonset hut. The parties agreed on a price of \$9,500.

The parties [have] stipulated that a 16-inch depth was a specification, together with a requirement that the foundation's strength was to be no less than 2,500 psi [i.e., pounds per square inch].

Davis was running electricity to the Quonset hut a few weeks after the structure was assembled when he noticed the foundation was not 16 inches all around. [An] inspection revealed the concrete depth varied from 12 to 16 inches.

Davis [consulted] two experts. Conger explained that the depth is important to protect structures from frost. When structures are subjected to wet and then cold conditions, [slab foundations] buckle, twist, and at their worst, destroy a building. As to the cost of repair, Conger advocated disassembling the entire building, removing the defective foundation, re-pouring it, and lastly, reassembling the building. In his own words, "You cannot put a footer in after the fact." This undertaking would cost approximately \$50,000. The second expert provided Davis with an estimate of \$49,118 to completely disassemble the structure, remove and then pour a new foundation, and finally, reassemble the building.

Davis agree[s] the foundation met the psi requirements of the contract since it had a psi of 4,500. [Davis] also agree[s] the foundation and, correspondingly, the Quonset hut, were undamaged and that the foundation served its purpose without fault since it was built over three years ago. [Assume that labor costs and concrete costs were nearly equal in pouring the slab and that Davis told J&J that the slab was unacceptable and that he would withhold any remaining payment.]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[On January 6,] Ormet entered a contract to sell 17,086 tons of carbon anodes to Alcoa for \$252 per ton for a total contract price of \$4,305,672.

The "Delivery & Freight Terms" provided: "Buyer shall arrange pick-up from Seller's facility, with delivery deemed complete upon loading of the Products onto Buyer's trucks by Seller's personnel." The Anode Purchase and Sale Agreement also stated: "Buyer shall use reasonable best efforts to remove the Product within 60 days from the date of this Agreement, but shall have 120 days to remove the Product from the date of this Agreement." Ormet agreed to provide personnel and equipment to "timely load" Alcoa's trucks and to grant Alcoa and its trucking contractors necessary access to the facility.

Alcoa began removing the anodes from the facility in February, after making the first payment of 75%. Ormet used an overhead crane to load the anodes onto trucks supplied by Alcoa. Alcoa experienced difficulties with trucking contractors. In June, which was after the contractual 120-day delivery period, a new trucking contractor transported a load of anodes for Alcoa. As before, Ormet loaded the anodes onto the truck. By that time, Alcoa had removed 7,316 tons of anodes so that 9,770 tons remained at the plant.

On July 29, Hannibal Development [purchased all of Ormet's assets except inventory that had been sold.] When Alcoa tried to resume transportation of anodes (using a new trucking contractor) in August, Hannibal Development denied access to Alcoa.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[Late last year and early this year], SunOpta entered into two contracts for the sale of soybeans to Kim. [The contracts required SunOpta to deliver the soybeans to Kim in multiple loads upon receiving orders from Kim. Kim hoped to resell the soybeans at a profit.] These contracts required germination rates of 85%. SunOpta began attempting to fill Kim's orders. Both SunOpta and Kim were involved in testing the germination rate of the soybeans, and while the beans always tested at over 80% germination, many loads failed to reach the 85% threshold. SunOpta emailed Kim, asking if he was willing to purchase the failed loads. Kim told SunOpta representatives, "I am sure I could move them to the soy meal market." [But] Kim repeatedly delayed the shipping date [from SunOpta], claiming he was having a hard time finding buyers.

Kim emailed SunOpta on July 6, stating that market conditions and low germination rates prevented him from reselling the soybeans. Kim told SunOpta he could resell 500 tons of the germination-failed soybeans to a buyer if SunOpta reduced its price. Through email exchanges, SunOpta eventually agreed to the quantity, shipping date, and price. The parties made no mention of required germination rates. SunOpta shipped the soybeans in mid-July and sent Kim invoices in early August. While the paperwork sent to Kim did not mention germination rates, it did describe the soybeans sold as "for sprout." The soybeans arrived August 15.

[Kim] failed to pay [\$278,451] in September as the parties agreed. Kim emailed SunOpta several times requesting extensions on the payment date, claiming that he failed to resell the soybeans due to market conditions. This continued until November 22, when SunOpta demanded payment and Kim complained that the soybeans suffered from "extremely bad germination" rates of around 65%.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Ride Auto purchased a Ford F-350 pickup truck from Metro Salvage Yard for \$6,770. [Earlier,] a Ford dealer diagnosed the truck as having a "blown" motor. Ride Auto had the truck delivered to it on a flatbed truck and ensured that the truck would start and drive short distances.

Sorchaga and her husband went to Ride Auto to look at trucks for her husband's roofing business. They spoke with Perez about the truck. During the test drive, the truck smoked from the tailpipe and the check-engine light was illuminated. Sorchaga asked about the check-engine light. Perez told Sorchaga that the truck had a faulty oxygen sensor but represented that the oxygen sensor would be easy to fix. Perez also indicated that the truck could be driven with the check-engine light on and, if purchased, could be brought back to Ride Auto to be fixed after a couple of days. Ride Auto provided Sorchaga with an ASC Vehicle Protection Plan (ASC agreement) at no cost, and told Sorchaga that the ASC agreement would allow her to have the truck inspected and repaired for free.

Sorchaga purchas[ed] the truck for \$12,950. Sorchaga signed a purchase agreement, which stated that the truck had a salvage title and that the check-engine light was on. The purchase agreement also provided: "Dealer's disclaimer of warranty and pollution system. AS IS, NO WARRANTY. You will pay all costs for any repairs. The Seller assumes no responsibility for any repairs regardless of any oral statements." Sorchaga also signed the ASC agreement. Because the truck had a salvage title, the ASC agreement would cover a maximum of \$500 in repair expenses.

Sorchaga sought assistance from Ride Auto within days of purchase, but Ride Auto refused to diagnose or repair the truck. Sorchaga had the truck towed to Inver Grove Ford and inspected for \$1,415. Inver Grove Ford concluded that the truck should not be driven and recommended a full engine replacement, which would cost Sorchaga approximately \$20,000.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

END OF EXAMINATION

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Final Examination In

CONTRACTS II

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**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Respondents are brothers who together own and operate Grathwohl Brothers LLP. Respondents own and manage hog barns to raise hogs for other entities. [R]espondents needed a manure easement to appropriately dispose of manure from the barns. Maday and respondents entered into a "Manure Easement Agreement," wherein Maday agreed to convey an easement over portions of his property "for purposes of hauling and applying manure and other animal waste generated by the livestock facilities." The easement agreement documented that Maday would "receive the benefit" of reduced fertilizer costs and expenses in exchange for allowing respondents "to apply manure" generated by their facilities on Maday's farmland. The agreement did not require Maday to otherwise compensate respondents for the manure, nor did it [expressly] require respondents to provide manure. The agreement also stated that "[t]he foregoing constitutes the entire Agreement between the parties."

[For seven years,] Maday emptied respondents' manure pits and applied the manure to his farmland. On three occasions, when Maday did not use all of the manure, Maday made other arrangements to empty the manure pits. [Two years ago], respondents began selling the manure from the pits to third parties [for \$2500 per manure pit], reducing the amount of manure otherwise available to spread on Maday's land. Maday [alleges that] respondents [made] an oral agreement to supply all of the manure produced in the hog barns to Maday at no cost, as an additional condition "for the manure easement."

Maday contends that the oral agreement "is consistent with the easement [agreement]" and addresses terms that would naturally be contained in a "separate agreement." Respondents emphasize that the written agreement establishes their ownership of the manure, and merely grants respondents "a right, but not a duty, to spread the manure over [Maday's] land." Maday argues that the circumstances and "conduct of the parties indicate that the parties did not intend" a complete integration. [Assume Maday is also considering alternative arguments concerning implied terms and terms established by course of performance.]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

APAC proposed the winning bid to repave a 6.93-mile section of State Route 336 [for TDOT]. Pursuant to [Clause] SP 411C, TDOT utilized a Road Profiler, which consists of a van equipped with sensors, to perform pre- and post-tests of rideability. The pre- and post-tests compared the smoothness of the road, sectioned mile by mile, before and after resurfacing. If the improvement was less than 30% but more than 15%, partial payment would result. If the contractor failed to improve rideability by at least 15%, SP 411C required the contractor to take corrective action by removing the deficient asphalt and resurfacing again. TDOT performed the post-ride test and determined that nearly all of the roadway APAC paved failed the rideability requirement, with the majority of road sections actually rougher than they had been before the repaving.

[The contract gave TDOT authority to exempt certain road sections from the rideability requirement.] SP 411C provides in pertinent part: "[S]ections to be considered for exemptions are urbanized areas . . . where there are numerous commercial driveways. Rural locations where there are constant changes should also be considered for exclusion." [TDOT exempted two sections based on these criteria, but withheld \$232,081 from APAC for the other sections failing the rideability test.]

APAC argues that because sections of the project included elements listed as candidates for exemption, the exemption paragraph contained a latent ambiguity because it was open to two interpretations: (1) that of APAC construction supervisors believing the [entire] Project would be exempt because of the existence of elements listed and (2) that of the TDOT project engineer and his supervisory TDOT reviewers declaring only two [specific sections] exempted. APAC further argues that the exemption language is ambiguous because it does not contain definitions of the contract terms "urban," "rural," "numerous," and "constant." APAC further argues that TDOT breached the implied duty of good faith and fair dealing by arbitrarily placing limitations on construction that rendered compliance with SP 411C unlikely, including restricting the hours APAC could pave to 9:00 a.m. to 3:00 p.m.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Dingxi Longhai Dairy agreed to ship 612 metric tons of Inulin, a dietary fiber extract, to Becwood Technology Group. The contract called for four shipments. Becwood received the first two shipments, paid for one, and refused to pay for the second because of mold on the exterior of the packaging. Dingxi recalled the third and fourth shipments before they reached their destination.

Dingxi [has] alleged that it timely delivered all four shipments to the ["F.O.B." location] specified in the signed purchase order; that Becwood failed to pay for the last three shipments; and that Dingxi was therefore entitled to recover [the full contract price of] \$1,415,086 "together with interest, disbursement costs, expenses and reasonable attorneys' fees."

[Becwood's expert prepared an affidavit saying in part: "Dingxi's President acknowledged that at least some of the packaged inulin was transported from Dingxi's factory to the port with unenclosed trailers [covered by tarps]. Dingxi's use of unenclosed trailers was, in my opinion, an improper method of transporting the packaged inulin in accordance with acceptable standards in the inulin industry. If an unenclosed trailer is used, it makes the product more susceptible to a greater range of temperature gradients due to a lower insulation factor. The practice of using a tarp has potential to create surface condensation on packaging, which can initiate vegetation of mold spores provided that an adequate temperature, moisture and surface nutrients are available for mold growth. While the exterior of the bags had mold, testing of the inulin inside the bags showed that the inulin powder was not contaminated with mold spores. Mold spores are highly mobile. Upon the arrival of the first two shipments, [Becwood] demanded that the shipments be removed from its warehouse so the bags could not contaminate other product, which in my opinion was a safe and proper way of handling the shipments given their condition."]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Metal Partners sold steel-related products to Carson Concrete. [They formed contracts requiring Metal Products to deliver Carson Concrete steel requirements for four projects.] Despite [terms requiring Carson to pay for each installment within 30 days of delivery], on average it took Carson 71 days to pay. Metal Partners never objected to Carson's payment practices before April 19. The negotiated price was \$860 per ton. Metal Partners was also to provide detailing services to Carson Concrete and it hired Vector Shades to do the detailing. Generally speaking, detailing is the first step in fabricating steel rebar. In this case, Vector Shades would generate shop drawings. Shop drawings specify size, shapes, bar marks and lengths and are done for each specific portion of a project designating what rebar is to be installed in that specific section.

Carson had complaints with respect to the quality and accuracy of the drawings, fabrication, and the timeliness of the deliveries. At one point in April, Carson Concrete was delayed from working for a period of 11 days because it didn't receive the correctly fabricated rebar. Although Carson repeatedly informed Metal Partners that it was on a very tight schedule, that Metal Partners' delays and errors were costing Carson money, and it did return several portions of the shipments to Metal Partners to be re-fabricated correctly, at no time did it cancel any of its orders with Metal Partners. As a consequence of the delays caused by Metal Partners, Carson Concrete was forced to incur higher labor costs and equipment rental expenses.

Mr. Samango [of Carson] sent an email to [Metal Partners] reciting the recent problems. Mr. Bergren [of Metal Partners] called Mr. Samango on April 19. Mr. Bergren then told Mr. Samango that they needed to discuss unpaid invoices that were past 60 days, and that he wouldn't be able to ship more steel unless he received payment from Carson. In response, Mr. Samango told Mr. Bergren that he wouldn't get his money until Mr. Samango got his steel. At present, there remains \$246,998.38 in unpaid invoices. Carson was thereafter supplied steel by Men of Steel at \$910 per ton.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Liguria Foods is a pepperoni manufacturer. Liguria creates its pepperoni by combining pork and beef trimmings with a curing agent and a customized spice blend. Griffith Laboratories is [a] manufacturer of spice blends. Liguria worked with Griffith to develop a special spice blend to be used in Liguria's most popular pepperoni product. Griffith called this formula "Optimized Pepperoni Seasoning." At the request of Liguria, Griffith added [government-approved food preservatives called] butylated hydroxyanisole ("BHA") and butylated hydroxytoluene ("BHT") to the Optimized Pepperoni Seasoning. Liguria relied upon Griffith to ensure that the BHA and BHT were uniformly distributed in the Optimized Pepperoni Seasoning.

Liguria received complaints from customers that the pepperoni containing Optimized Pepperoni Seasoning was prematurely turning green and grey. This was occurring within 140 to 160 days after production. Liguria Pepperoni was supposed to have a shelf life of 270 days from slicing. Liguria concluded that the Optimized Pepperoni Seasoning contributed to the premature spoilage of its pepperoni products. Liguria used the same type and quality of meat in multiple products, but only the pepperoni containing the Optimized Pepperoni Seasoning experienced premature spoilage.

Liguria contends that Griffith should have purchased [BHA and BHT] in a liquid form or dissolved the BHA and BHT into vegetable oil before adding them to the mix. Griffith counters that many factors, other than the amount of antioxidants in the spice blend, affect a product's shelf life. Specifically, Griffith points to a general decline in the quality of the pork supply that has resulted from an ethanol production by-product as pig feed. [Although the written sales contract between Griffith and Liguria did not address the shelf-life that Liguria's pepperoni should have,] a Griffith sales representative was told that the seasoning Griffith was formulating was to be used in a pepperoni product that would have to last nine months. [Griffith's seasoning contained the following label: "Shelf Life: Up to 180 days when held at proper conditions."].

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**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[JB Pool] agreed to supply [the Four Seasons] condominium association with lifeguards and maintenance services for the association's indoor pool. During the term of that contract, a mold infestation was discovered in the pool facilities, prompting government officials to order the pool closed for seven months while the mold was remediated.

Significantly the contract contained the following terms that would apply in the event of a pool closure: "[JB Pool] will have no liability for its failure to perform this Agreement, or any part thereof, where such failure is attributable to reasons beyond its control, including but not limited to inclement weather, acts of God, acts of war, labor disputes, strikes, riots, fire or other casualty, or customer requested closing. There will be no reduction in charges of the contract amount for any closing."

For the first three full months while the pool was closed JB Pool billed Four Seasons its usual monthly fee, and Four Seasons paid those sums. However, as the problem progressed, Four Seasons contended that JB Pool permanently waived the charges since it was not providing its regular services during that time frame. Four Seasons did not remit the [final] four months of charges to JB Pool, which otherwise would have totaled \$16,376.

[Among other legal principles,] Four Seasons cited Sections 237 and 261 of the Restatement (Second) of Contracts (1981). [Testimony at trial suggested that the pool closure clause was intended to cover only short periods of disruption:] "like, a couple days, it's raining and you can't--the people can't use the pool, or lightning is going on, you can't use the indoor pool because it, you know, is not safe."

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Kathryn Podraza and her husband brought suit against New Century Physicians to recover for injuries sustained after New Century's physicians failed to discover her appendicitis at Lakeside Hospital. Lakeside Hospital is owned by Alegant Health. The Podrazas settled their claims with Alegant.

Neither Premier Health nor New Century participated in the settlement negotiations between the Podrazas and Alegant. The release signed by the Podrazas and Alegant stated in pertinent part that in consideration for \$13,000, the Podrazas agreed to "release, acquit and forever discharge the said Released Parties, and all others directly or indirectly liable or claimed to be liable, if any, from any and all claims and demands, actions and causes of action, damages, [and] claims for injuries [which were] in any way growing out of any and all care received by Kathryn Podraza at Lakeside Hospital." New Century [was] not specifically named [as a Released Party and was not one of the] signatories to the release agreement and did not contribute to the settlement payment.

The release recited that it contained the entire agreement between the parties and that there were "no agreements or understandings between the parties hereto, other than those expressed or referred to herein."

The Podrazas [have presented] testimony that the parties to the release agreement did not intend for the agreed-upon amount to fully compensate them for their loss, nor did they intend for the agreement to release New Century. Rather, the Podrazas testified that Alegant had specifically told them the release would not apply to any subsequent action against New Century.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Richard Green is an art dealer who offered a painting by Pierre Bonnard for sale at the International Fine Art Fair. The McClendons are sophisticated art collectors. On May 12, the McClendons visited Green's booth and expressed interest in the painting to Green, who told them about the history of the work and allowed them to inspect it with an ultraviolet light. [They] told him that they would be "delighted" to buy the painting for \$4.2 million.

Mr. McClendon wired \$500,000 to [Green]. [Green] argues that the \$500,000 was the first instalment of the purchase price, but Ms. McClendon now argues that the payment was merely to hold the painting for a year but not a firm commitment to purchase.

On May 13, Green delivered to the McClendons' hotel in New York a description of the work and a cover letter signed by Green congratulating the defendants on "the purchase of the painting," "confirm[ing] the purchase price of \$4,200,000," referring to the \$500,000 payment as a "deposit," and confirming that the painting would be held in Green's headquarters until the balance was paid. Green subsequently sent an invoice confirming receipt of the \$500,000 payment. The McClendons did not object to any of the statements in these documents.

On July 30, Green emailed Ms. McClendon requesting payment. In a subsequent phone call, Mr. McClendon informed Green that he did not have the money owed. Green attempted [unsuccessfully] to sell the painting to another buyer, but by that time world financial events lowered the estimated price of the painting. Ms. McClendon argues that there was no justifiable reliance. However, [Mr. Green] was harmed as a result of the subsequent loss in value in the painting.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Oakley Fertilizer (Seller) entered into negotiations with Ameropa North America (Buyer) for the sale of approximately 3000 tons of fertilizer to be shipped on barges operated by a third party carrier. Subsequently, Seller sent a "sales contract" to Buyer, which Buyer received but did not sign or return. The sales contract memorialized the terms discussed during the parties' negotiations. The contract also included a term providing that the cargo's title and risk of loss would transfer from Seller to Buyer after Seller received "good funds" from Buyer and that "Buyer assumes responsibility of product insurance at [that] point." In response to Seller's sales contract, Buyer emailed an electronically signed agreement to purchase the cargo (purchase agreement) to Seller. The purchase agreement did not mention the sales contract and included the term, "\$200.00/[TON] FOB BARGE EX NEW ORLEANS."

Between August 23 and 24, the cargo was loaded onto the barges in New Orleans. On August 29, storms damaged the barges. Initially, Seller advised Buyer that the cargo was not damaged. Relying on this advice, Buyer tendered full payment to Seller on September 8. However, when, shortly thereafter, the cargo arrived at its destination, Buyer rejected it due to "crusty wet product." Seller later sold the damaged cargo at salvage value.

Seller demanded coverage [from its insurer] Continental for the loss to the cargo. Continental denied coverage on the grounds that the cargo's title and risk of loss transferred from Seller to Buyer at the time the cargo was loaded in New Orleans, prior to the damage, and, therefore, Buyer, not Seller, was responsible for the loss.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Crystal Manor had contracted with [Nichole] to provide a hall, beverages, and food for a cocktail hour and a meal to be served at [Nichole's] wedding reception, for a total cost of \$15,000, which sum [Nichole] had paid in full prior to the reception. [Nichole] and two other individuals who had attended the reception testified, among other things, that the food served at the reception was undercooked and partially inedible and that it had been served so late that some of the wedding guests had departed before being served. [Nichole] had provided Crystal Manor with unassembled pieces of her wedding cake, in adequate quantities, which Crystal Manor was to assemble and serve to the guests, but Crystal Manor failed to serve many of the guests the cake. Crystal Manor's witness contested allegations concerning the inadequacy of the food and services provided at the reception.

[Nichole seeks] to recover the difference between the value of the food provided and the value of the food as it was impliedly warranted [and] the difference in the value between the services contracted for and those delivered. [Crystal Manor argues that] determining whether there was substantial performance under the contract is pivotal.

Notwithstanding having over 300 guests at the reception, not a single disinterested witness testified on [Nichole's] behalf. According to testimony, on the night of the affair, [Crystal Manor] did not receive any complaints about the quality of the food. Rather, two days after the reception, [Nichole] requested a refund for "no-show" guests.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

END OF EXAMINATION

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Please note that some sentences and words were omitted from the preceding quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes. The names and citations of the cases are not identified here. They will be revealed later.

Final Examination In

CONTRACTS II

(Course No. 6203-21; 3 credits)

Professor Gregory E. Maggs

Instructions:

1. This examination consists of five problems of equal weight (i.e., 20% each).
2. Absent special arrangements, you have 3 hours to complete this examination. I recommend that you devote approximately 36 minutes to each problem, but you may allocate your time as you see fit.
3. Your answers for the five problems combined may not exceed a total of 4500 words.
4. This is an open-book examination. You may consult any written materials that you have brought with you.
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### Tips for Writing Good Answers:

Each problem presents some facts and then asks you to "Write an essay identifying and discussing any claims and defenses that the parties might assert, and any remedies that they might seek."

When identifying and discussing claims, be very specific about who might assert them and what they might allege (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ..."). If you are not careful in addressing the possible claims, you will have difficulty discussing defenses and remedies.

When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law (e.g., "Y might defend on grounds of non-occurrence of an express condition, asserting that Y's performance was conditioned on ... and that event did not happen.").

When addressing remedies, identify the type or measure of relief that the parties might seek (e.g., "X might seek damages equal to ....") and any possible reasons for denying or limiting the relief.

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In addition, as on all exams, you should plan before writing, budget your time, and consider all the facts. You should not waste time discussing subjects not at issue.

Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

On September 10, the parties executed a Land Purchase and Sale Agreement pursuant to which C & E agreed to purchase a tract of land from Sisco and Close Properties. The agreement recited a sales price of \$550,000 and a closing date of October 9. The contract contained no financial contingency. The agreement also provided that it constituted the sole and entire agreement between the parties, and recited no "special stipulations." C & E paid earnest money to Sisco and Close [Properties] in the amount of \$25,000. C & E did not close on the property on October 9. On December 11, the property was sold at auction [to another party] for a sales price in the amount of \$350,000.

C & E asserted that Sisco and Close [Properties] was not entitled to retain the earnest monies. C & E additionally asserted that Mr. Sisco informed [C & E] that Lamar Nashville ("Lamar") had offered to purchase perpetual billboard easements on the property at a purchase price of \$95,000. C & E asserted that the Lamar offer was a material factor in its decision to enter the agreement. It submitted that Mr. Sisco provided a letter from Lamar dated July 19, in which Lamar offered to purchase the billboard easements, and that, subsequent to the execution of the September 10 agreement, Lamar informed C & E that it did not intend to purchase the easements. C & E asserted that it refused to close on the property "based on this material failure of a basic and underlying factor in [its] decision to agree to purchase the Property." C & E additionally asserted that the property was not owned by Sisco and Close Properties, but by Mr. Sisco and Mr. Close, individually, as tenants in common. [C & E] also asserted that the actual size of the property was approximately three-fourths of an acre less than the size recited in the contract to purchase. C & E asserted that a failure of consideration therefore existed, and that it was relieved of its duty to purchase the property and entitled to damages from Sisco and Close. [C & E also argued] that the alleged offer by Lamar to purchase an easement on the property was part of the parties' agreement

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[David Hunt and Carol Santangelo] filed a lawsuit in federal court against Robert and Amy Armstrong. [They] alleged that the Armstrongs leased a condominium unit to Hunt and that during Hunt's tenancy he was exposed to various hazardous substances as a result of living in the contaminated unit. Subsequently, a settlement agreement was reached and plaintiffs executed the following release: "In consideration of \$21,000, David Hunt and Carol Santangelo release and forever discharge Robert Armstrong and Amy Armstrong, and any and all other persons, firms or corporations charged or chargeable with responsibility or liability, from any and all claims which have been sustained in consequence of the lease of a condominium unit."

Thereafter, [Hunt and Santangelo] filed suit against Lower Harbor Properties (LHP), [alleging that LHP] had built the condominium unit that Hunt leased from the Armstrongs, that LHP had sold the unit to the Armstrongs, that Hunt was exposed to harmful toxic substances while residing in the unit during his leasehold, and that the exposure was due to LHP's negligence. [Hunt and Santangelo] first argue that the plain language of the release on its face did not encompass [LHP] but only those in privity with the landlords, i.e., the Armstrongs. [In addition, Hunt submitted an] affidavit in which he averred that he "understood the language" in the release "to be for the purpose of releasing other persons who were or might have been involved in procuring me to be a tenant in the residence. It was not intended to release parties who were not involved in leasing the unit." [Hunt and Santangelo further say that it can be inferred that LHP was not covered because] the \$21,000 settlement was small, making it unlikely that they intended to forgo additional suits against other allegedly responsible parties.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Dement was the prime contractor on a bridge construction project, and Razorback was its concrete provider. Pursuant to a written contract requiring payment by Dement within thirty days of receiving monthly statements, Razorback was to supply concrete that met the requisite strength level for the bridge. However, some of the concrete failed strength tests. As a result, Dement had to allow extra time for the concrete to strengthen. Dement sent a letter to Razorback on April 4 noting that the project had a time charge of \$5,000 for each day that it took Dement to complete the project and that Dement considered "that 30 days of time charged for [Razorback's] account would be equitable." Razorback responded that the concrete was not substandard, but rather that the tests were flawed. Additionally, Razorback inquired of Dement "whether it is your intention to attempt to set off payments for future deliveries." After receiving no response from Dement, Razorback wrote that it would rely on Dement's failure to respond as a representation no amount would be withheld.

On May 18, Dement learned that concrete used in "probably the most critical pier in the structure" had substandard strength-test results. Furthermore, Dement was informed on June 8 that the Federal Highway Administration might require concrete to be replaced if a break were to occur. Dement, in June and August, withheld some of the amount owed for delivered concrete and Dement stopped making any payments after August. In light of what it viewed as a breach of contract by Dement, Razorback terminated the contract and refused to supply any additional concrete. Razorback asserted that it was entitled to \$318,767, representing lost profits that it would have earned by supplying concrete for the remainder of the project. In September, Dement wrote to Razorback stating that removal and replacement of the concrete, if necessary, would cost approximately \$420,000 to \$840,000. Razorback's high-capacity plants permitted Razorback to meet all the requirements of the Dement job as well as being able to supply concrete on other jobs.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Williams is a cotton farmer with a high school education. According to Brooks Cotton, on August 5, Mr. Williams entered into an oral contract to sell his cotton production to Brooks Cotton. The alleged contract was recorded in the Brooks Cotton purchase book on August 6 and provided that Mr. Williams would sell his entire 1000 acre cotton production to Brooks Cotton. The price allegedly agreed upon was \$0.74 per pound of cotton. At the time of the alleged agreement, Mr. Williams had not yet harvested his cotton. Mr. Williams ultimately produced approximately 1206 bales of cotton [1 bale=500 lbs.]. If the contract had been performed as allegedly agreed, the total contract price for Mr. Williams' cotton would have been approximately \$446,000. Brooks Cotton sent written confirmation of the alleged agreement to Mr. Williams on September 4, nearly thirty days after the contract was allegedly agreed to on the phone. Mr. Williams asserts that he never entered into an oral contract with Brooks Cotton, although he did not object to the terms sent to him.

On October 30, Mr. Williams partially performed, delivering 307 bales of cotton produced by his farm. Mr. Williams had been a cotton farmer for twenty-five years. In most of those years, Mr. Williams agreed to the contract in person at Brooks Cotton's office after the cotton had been harvested, rather than over the telephone prior to the harvest. Mr. Williams was familiar with the practice of "booking" cotton over the phone, as he had previously "booked" his cotton with Brooks Cotton [seven years earlier].

[Briefs in the case averred that "Mr. Brooks did not send written confirmation for approximately 29 days because he was waiting for Mr. Williams's farm numbers [identifying the crop to be sold] and because he was working the office alone without support staff." And "Mr. Williams' 2010 cotton crop was worth several hundreds of thousands of dollars [more than the contract price after] August 2010 based upon the market prices available for cotton." Brooks contracted to resell the crop to another firm.]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Stephen Tanzer and Audio Video Artistry (AVA) entered [a contract] for the sale and installation of electronic and entertainment equipment in Mr. Tanzer's home. The total price of \$78,567 was broken out as follows: Equipment: \$56,375; Labor/Programming; \$9,880; Cable/Misc. Parts: \$5,660; Tax: \$6,652.

Mr. Tanzer eventually became unsatisfied with AVA's work. Mr. Tanzer contends that he thought that the installation, programming, and debugging of the system would take less than three months. However, Mr. Tanzer claims that, after fifteen months, he was still having significant problems with the functionality of the system. As a result, Mr. Tanzer became "extremely frustrated and inconvenienced." [Some of the delay occurred because,] while AVA was trying to "debug" the system, the home was struck by lightning. The power surge from the lightning caused damage to the [equipment]. Mr. Tanzer fired AVA and requested a final billing.

[AVA submitted an invoice showing] an outstanding balance of \$43,824. Mr. Tanzer hired Marquis Home Solutions to make repairs [to the installation]. Tom Brown, an employee of Marquis, testified that there were numerous problems with AVA's installation of the systems. Marquis charged Mr. Tanzer \$67,587 for the repairs.

[W]ithin a reasonable time after delivery and installation of the equipment involved in the parties' contract, AVA had actual knowledge and notice that the music system and phone system did not perform properly even after repeated attempts by AVA to fix the problems complained of by Tanzer. Mr. Tanzer accepted the [other] goods that were delivered by AVA. Mr. Tanzer [argues for] the "divisible rule," whereby those portions of a hybrid contract dealing with a sale of goods [are] governed by the UCC, while portions addressing services [are] treated under common-law contract principles.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

END OF EXAMINATION

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Final Examination In

CONTRACTS II

(Course No. 6203-21; 3 credits)

Professor Gregory E. Maggs

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When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law (e.g., "Y might defend on grounds of non-occurrence of an express condition, asserting that Y's performance was conditioned on ... and that event did not happen.").

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In addition, as on all exams, you should plan before writing, budget your time, and consider all the facts. You should not waste time discussing subjects not at issue.

Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

In 1980, Mr. Deak was granted the exclusive right to develop Domino's Pizza stores in an area. [This right was repeatedly extended without controversy.] In 2001, the parties entered into an "Addendum to Area Agreement"; this agreement provided: "The Term of the Area Agreement shall be extended for an additional five (5) year term." In 2005, Domino's advised Mr. Deak the area agreement would not be renewed in substantially the same form. In response, Mr. Deak's attorney wrote Domino's urging it "not to accept applications to build stores in any location covered by his Area Agreements."

Mr. Deak believes representations were made to him regarding his ability to renew the contracts on the same terms. [He has an affidavit from Ms. Pagniano, a "former high level Domino's employee".] Ms. Pagniano's affidavit states: "It is my specific recollection there were no time limits placed on the area contracts. It was understood that [Mr. Deak's] right to be an Area Franchisee is for the duration of his ownership of Domino's Pizza Stores...." However, Domino's responds that the contract specifically set a time frame, and includes a valid merger clause.

Mr. Deak alleges that Domino's "is bound by the terms of a separate agreement which provided that the defendant's Area Agreements would be renewed upon substantially the same terms as the Area Agreements which he had operated under since approximately 1980." Mr. Deak also raises numerous other arguments, including but not limited to labeling Domino's conduct as "civil fraud." [But] no party alleges that what the parties intended was omitted from the written agreement by mistake or accident. Mr. Deak's brief avers that Domino's agents informed him that the Area Agreements were not necessarily controlling of his relationship with Domino's. [Domino's says] these allegations defy business and legal logic. It remains unexplained why Mr. Deak did not seek contractual terms that would reflect the assurances from Domino's that he would be entitled to renewals at the same terms.

Write an essay identifying and discussing any claims and defenses the parties might assert and any remedies they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Hutton Contracting Co. contracted to construct a fiber-optic line for the City of Coffeyville. Upon completion of the project the City refused to pay \$110,159.47 of the contract price, claiming liquidated damages because of Hutton's delays. The contract contemplated completion within 45 days of commencement. A clause provided: "The time for Completion shall be extended for any reasonable delay which is due exclusively to causes beyond the control and without the fault of [Hutton]."

Hutton commenced construction on October 23. Hutton noticed in November that some of the [utility] poles that had been delivered were defective. [Hutton] requested an extension because of the late delivery of the remaining poles. The lines were ready for use by March 22. The City sent Hutton a notice that it was retaining \$110,159.47 [for the delay under a valid liquidated damages clause].

Hutton argues that late delivery of utility poles was "beyond the control and without the fault of [Hutton]." [The City contested] this contention on the ground that Hutton could be charged with fault in selecting the supplier. The contract did not specify a source of the poles. The City [argued that it] was concerned only with the ultimate performance, not whom Hutton employed to reach the result. [The City also argues that] Hutton's interpretation would provide a perverse incentive for contractors to outsource work.

[In its brief, Hutton argued that "it was impossible for Hutton to satisfy the contract requirements that sufficient materials be on site by October 23." Hutton also argues that it understood the delay clause to excuse supplier delay and, for this reason, "Hutton requested a construction commencement date based upon the delivery of the first group of steel poles." Hutton also argued: "The contract, which was prepared by Coffeyville, was ambiguous as to what constituted delay."]

Write an essay identifying and discussing any claims and defenses the parties might assert and any remedies they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[A] representative of MDCT, Andrew Kha, met with Billion Tower to discuss a clothing production agreement. Mr. Kha showed samples of MDCT's products and discussed MDCT's production capabilities in Vietnam. Billion Tower was interested in Vietnamese manufacturers because it had relationships with Chinese manufacturers and did not want to [alienate them by using] others in China. Billion Tower required timely delivery to avoid mark-down allowances given to [Billion Tower's] retail customers whose shipments were late. After being assured that MDCT would meet these requirements, Billion Tower entered a contract requiring MDCT to produce 115,654 articles of clothing at a cost of \$651,085.

MDCT later agreed to deliver pre-production samples of the clothing to Billion Tower but it failed to do so. MDCT told Billion Tower it had shifted manufacturing to China. In anticipation of MDCT's performance, Billion Tower spent \$14,556 for hangers and \$737.76 for price tags [for the clothing].

Billion Tower paid MDCT \$5,410 in exchange for a shipment of clothing. The shipment of clothing was late and constituted less than five percent of the total MDCT was obligated to provide. [Billion Tower at this point cancelled the contract.] Due to MDCT's [breach], Billion Tower incurred mark-down allowances from its retail customers totaling \$111,507.

Billion Tower first seeks damages for (1) costs relating to [the] payment to MDCT that it should "forfeit" due to its breach of contract; (2) out-of-pocket expenses incurred by Billion Tower for hangers and price tags for the clothing MDCT failed to deliver; and (3) damages relating to mark-down allowances taken by Billion Tower's retail customers. Additionally, Billion Tower seeks lost profit damages in the amount of \$770,188. [Assume all contracts were made in the United States between United States companies, even though the manufacturing was to occur overseas.]

Write an essay identifying and discussing any claims and defenses the parties might assert and any remedies they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

A contract provided Koch would deliver xylene to Kolmar. [Kolmar chartered a ship called the Formosa Ten to take delivery from Koch at ports in Houston and Corpus Christi]. The scheduled delivery amount [was] 10,100 metric tons, split into 5,050 metric tons at each port. The price was \$2.50/gallon.

At Houston, Koch delivered only 4,748.25 metric tons of xylene. Continuing on its way to Corpus Christi, the Formosa Ten was supposed to tender a "Notice of Readiness" (i.e., ready for loading). Once it was clear the Formosa Ten would not tender its notice by the end of September, Koch proposed modifying the contract so that Kolmar would pay an extra 6 cents/gallon so long as the Formosa Ten arrived by October 2. Kolmar [agreed but] reserved its rights. The Formosa Ten failed to tender its notice. On October 4, Koch formally notified Kolmar that its shipment was cancelled, and instead loaded the shipment of xylene onto contingency barges Koch had procured.

Immediately after Koch cancelled this Corpus Christi delivery, Kolmar purchased 4,987.57 metric tons of mixed xylene from Flint Hills at the October market price of \$2.95/gallon. Kolmar [seeks] the difference between the contract price Kolmar would have paid Koch for the [Houston] shortfall and the market price prevailing at the time of breach (which is also the price Kolmar paid after Koch canceled the Corpus Christi shipment). Koch argues it offered to [replace] the Houston shortfall at the contract price at the next shipment, which would have left Kolmar with no loss.

Kolmar claims that it spent \$11,359 to obtain a letter of credit and pay a broker's commission for its transaction with Flint Hills. This transaction, however, was not intended primarily to cover the Houston shortfall. Rather, Kolmar contracted with Flint Hills only after Koch refused delivery. The price Koch was paying its supplier to supply xylene was higher than the price Kolmar was going to pay Koch.

Write an essay identifying and discussing any claims and defenses the parties might assert and any remedies they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Glasstech has developed a glass bending system. The system uses quench fans. Quench fans are generally expected to run a decade without problems. [Glasstech] emailed [Chicago Blower, a maker of quench fans,] a request for quote ("RFQ") containing construction requirements. Based on the RFQ, [Chicago Blower] selected fans to fill the quote. Glasstech issued its Purchase Order to Chicago Blower for 28 quench fans. The Order stated: "This purchase order is subject to the Glasstech Terms and Conditions [T&Cs]." Glasstech's T&Cs required that if Chicago Blower "wishes to take exception to any of these terms and conditions it shall do so in writing prior to performing this order." Chicago Blower acknowledged reviewing the T&Cs but indicated that it did not agree with some of them and offered its own "Warranty Terms which are printed on the reverse side of this letter ... and ... we cannot agree to any other warranty." The fans were shipped and installed.

[Soon afterward,] Glasstech was notified by [one of] its customers that a quench fan had cracked. This was followed by notifications from [other] customers that their quench fans were exhibiting cracks. Chicago Blower learned Glasstech's system uses rapidly cycling quench dampers that block off nearly all air flow. This increases the pressure beyond the peak pressure of the quench fans. Because these conditions were not in Glasstech's RFQ, Chicago Blower claimed its warranty did not cover the failures. Chicago Blower also alleges it was unaware of the purpose for which the quench fans would be used. However, Chicago Blower sent a salesman to tour the Glasstech facility. Chicago Blower [also] represented [it] could provide fans that "would be custom designed for the Glasstech application." Glasstech alleges it incurred the following damages: 14 replacement fan rotors; freight charges to ship replacement parts; travel expenses and salary for employees to assist customers with repairs; [and] credit issued to customers in settlement of claims.

Write an essay identifying and discussing any claims and defenses the parties might assert and any remedies they might seek.

END OF EXAMINATION

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Final Examination In

CONTRACTS II

(Course No. 6203-11; 3 credits)

Professor Gregory E. Maggs

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Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Carlos Arechiga began working as a janitor for Dolores Press, Inc. ("Employer") in January. Arechiga and Employer orally agreed he would work eleven hours a day, six days a week, for a total of 66 hours per week. Because Arechiga was a nonexempt employee under labor law, his work-schedule meant he earned 26 hours of overtime pay each week. Employer paid Arechiga \$880 a week. [The applicable labor code provides that "overtime pay shall be 1.5 times base pay."]

In October, Arechiga and Employer signed a written "Employment Agreement." Employer directed that they enter into [this] written agreement in order to institute privacy safeguards. Other than adding privacy provisions, the written employment agreement did not change the terms of Arechiga's employment. The written agreement stated "Employee shall be paid a salary/wage of \$880.00."

Three years later, Employer terminated Arechiga. Arechiga filed a complaint. Arechiga asserted that his salary of \$880 compensated him only for a regular 40-hour work-week at an imputed base pay of \$22 per hour ( $\$880 \div 40$  hours), and did not include his regularly scheduled 26 hours of overtime. Employer [argued] Arechiga's fixed salary of \$880 compensated him for both his regular and overtime work based on a regular hourly wage of \$11.14 and an hourly overtime wage of \$16.71. Arechiga asserts that he, as a Spanish speaker with a poor grasp of English, [had not] understood the written wage. Employer's witnesses testified that Arechiga's hiring supervisor told him his hourly rate was \$11.14 per hour.

[T]he agreement contained a clause stating: "This Agreement embodies the complete agreement between the Parties." [T]he record does not show Arechiga ever complained during the [period] he worked for Employer that his pay did not compensate him for overtime. Employer's expert economist submitted evidence of median wages for janitors. The evidence showed the median wage for janitors was \$7.90.

Write an essay identifying and discussing any claims and defenses the parties might assert and any remedies they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Stonington entered into a contract with Hodess for the construction of a condominium complex at a cost of \$20,095,100. National Fire, as surety, executed a performance bond. The bond sets forth that in the event Hodess defaults on the construction contract with Stonington, National Fire will assume responsibility to complete the project. The project experienced three delays. A fire broke out at the construction site, causing heavy damage. Stonington alleges the fire was caused by Hodess. A second delay occurred as a result of Hodess's use of defective windows. The third delay, caused by a burst sprinkler, lasted one month.

On March 13, Stonington sent a letter to National Fire notifying National that Stonington was considering declaring a default against Hodess and requesting a meeting. On March 31, Hodess, Stonington and National Fire met to discuss the project. Hodess informed the parties it did not have the necessary funds to complete the project [because of the increased costs incurred by reason of the delays]. National Fire asserts that 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. Four months later, Hodess ceased working on the project. Stonington notified National Fire that Stonington was declaring a contractor default.

National Fire responded that coverage would be denied because Stonington failed to comply with the requisite steps for invoking the bond. National Fire also stated that, because the project was substantially completed, Stonington was barred from declaring a default. The performance bond provides that in the event of a default, the surety's obligations shall arise after "the Owner has notified the Contractor and the Surety that the Owner is considering declaring a Contractor Default and has requested a conference with the Contractor and the Surety to be held not later than fifteen days after such notice." Stonington [has withheld some money from Hodess] and claims \$667,150 for incomplete work.

Write an essay identifying and discussing any claims and defenses the parties might assert and any remedies they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Doorenbos Poultry keeps chickens for egg production. Midwest Hatchery sells started pullets, which are hens that have reached the age of laying eggs [about 18 weeks]. Doorenbos Poultry entered into a contract with Midwest, to purchase 112,000 pullets to be delivered on December 28 for \$1.27 per pullet, plus the cost of feed from the time of hatching. The contract provided, "If Seller breaches this Contract, at Seller's option, customer is entitled to either replacement or refund of the price paid by Customer."

Prior to December 28, Midwest notified Doorenbos Poultry it would be unable to deliver the chickens on the date contemplated. Doorenbos Poultry agreed to the delay, and cancelled arrangements to slaughter the approximately 110,000 chickens in one of its facilities. Over January 16, 17, and 18, Midwest delivered 115,581 pullets to Doorenbos Poultry. As the new chicks arrived, old pullets were moved out. Scott Doorenbos, the president of Doorenbos Poultry, thought the new chickens were 13 to 14 weeks of age rather than 18 weeks. Doorenbos testified he could not cancel the order and return the chickens because his former flock had already been removed. He explained the barns in which the chickens are kept do not have heating. Because the buildings maintain their temperature from the body heat of the birds, Doorenbos believed water lines in the barn would have frozen if he had not kept the pullets. Doorenbos testified the pullets delivered by Midwest did not start laying eggs until February 18.

Midwest sent Doorenbos Poultry an invoice for \$267,916.76, [but Doorenbos Poultry did not pay]. In August, Midwest advised Doorenbos Poultry it wanted to pick up the pullets if payment was not made. Doorenbos Poultry was not interested in returning the birds. On August 19, Doorenbos Poultry sent Midwest a check for \$184,135.18. [E]ighty percent of the pullets were three weeks too young, and about twenty percent were four weeks too young. Doorenbos Poultry lost \$115,147 by moving the previous flock out before the new flock was ready to lay eggs.

Write an essay identifying and discussing any claims and defenses the parties might assert and any remedies they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Four Rivers is [a] corporation organized for the purpose of purchasing onions from growers, packing, and contracting to resell those onions nationwide. Randy Smith is the general manager of Four Rivers. In January, [Greg] Panike entered into a contract with Four Rivers. The contract required Panike to deliver 25,000 hundredweight (cwt) 75% three-inch minimum field run onions to Four Rivers from fields specified by Four Rivers, for the price of \$4.75 per cwt. The field selection clause stated "buyer will specify field(s)."

On August 15, Four Rivers sent a letter to Panike reiterating that it would designate the fields from which the onions were to be delivered. Four Rivers sent another letter to Panike on August 25 designating the fields, with a map attached that illustrated which fields Four Rivers had chosen. Mr. Panike believed those onions were a different variety and larger than those specified by the contract.

On October 3, Panike attempted to deliver two truck loads of onions to Four Rivers. When Mr. Panike arrived, Janine Smith, part owner of Four Rivers and wife of Mr. Smith, asked Mr. Panike whether the onions were from the specified fields. When he stated they were not, Mrs. Smith rejected the onions. Panike then had the onions inspected by the Department of Agriculture, which determined the onions were 89% three-inch minimum or larger.

Panike argues the onions it attempted to deliver to Four Rivers conformed to the contract in kind, quality, condition, and amount, and therefore exceeded every essential element of the contract. Four Rivers counters that the contract speaks in terms of minimum quality requirements and specifically allows Four Rivers to designate the fields. Four Rivers established through the testimony of Randy Smith that designation of fields in mid to late summer is the normal practice in the industry. [He] testified that his business monitors the fields of the growers it contracts with throughout the season and then requests certain fields.

Write an essay identifying and discussing any claims and defenses the parties might assert and any remedies they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[Ms.] Rivers shopped at Beauty Queen for scented candles for her home. She was assisted at the store by one of the employees, who dissuaded her from buying the candles, directing her instead to ceramic, scented-oil burners. Rivers selected a burner in the shape of an elephant, and because she was unaware of how to use the device, the employee explained to her that she would need to select an oil, purchase tea-light candles, and place the candle below an oil reservoir so that the flame would heat the oil when lit. Rivers deposed that the burner was not sold with instructions; however, she relied on the instructions on the scented oil in order to determine the amount of oil to use in the burner.

A few days later, Rivers used the device for the first time, placing it at face height on her mantel, but instead of a pleasing aroma, Rivers deposed that an unpleasant smell emanated from the burner, causing her to extinguish the flame by blowing out the candle. Rivers deposed that as she blew out the flame, it became very large, and "it exploded in her face." Rivers was transported to the emergency room and was treated for second-degree burns on her face, neck, and chest, as well as injuries to her eyes. [Separate companies manufactured the scented oil, the candle, and the ceramic elephant.]

Rivers has not presented any evidence that the item was inappropriate to use for its ordinary purpose as a ceramic oil burner other than the mere existence of her injury. Rivers contends that the item was not defective for its ordinary purpose as a ceramic decorative item, but became defective as sold because Beauty Queen inappropriately advertised the product as a scented-oil burner. Beauty Queen's owners and employees deposed that this item and others like it were marketed by the manufacturer as oil burners. [A] Beauty Queen employee deposed that customers could choose not to use the item as an oil burner. [T]he oil Rivers purchased to use in the oil burner clearly warned users not to allow the oil to contact open flame, the danger from which Rivers suffered injury.

Write an essay identifying and discussing any claims and defenses the parties might assert and any remedies they might seek.

END OF EXAMINATION

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Please note that paragraphs, sentences, and words were omitted from the preceding heavily edited quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes. For examination security purposes, the names and citations of the cases are not identified here. They will be revealed later.

Final Examination In

CONTRACTS II

(Course No. 203-11; 3 credits)

Professor Gregory E. Maggs

Instructions:

1. This examination consists of five problems of equal weight (i.e., 20% each).
2. Absent special arrangements, you have 3 hours to complete this examination. I recommend that you devote approximately 36 minutes to each problem, but you may allocate your time as you see fit.
3. Your answers for the five problems combined may not exceed a total of 4500 words.
4. This is an open-book examination. You may consult any written materials that you have brought with you.
5. You must write your answers in essay form, using complete sentences and proper paragraphs. Do not compose lists, outlines, or bullet points, or attempt to replicate the format of grading guides used to score previous examinations. The quality of your writing will affect your grade.
6. To make your answers easier to read, you must indent the first line of each paragraph and include a blank line between paragraphs.
7. You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, describe the ambiguity in your answer.
8. You may keep this copy of the examination at the end of the examination period.

### Tips for Writing Good Answers:

Each problem presents some facts and then asks you to "Write an essay identifying and discussing any claims and defenses that the parties might assert, and any remedies that they might seek."

When identifying and discussing claims, be very specific about who might assert them and what they might allege (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ..."). If you are not careful in addressing the possible claims, you will have difficulty discussing defenses and remedies.

When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law (e.g., "Y might defend on grounds of non-occurrence of an express condition, asserting that Y's performance was conditioned on ... and that event did not happen.").

When addressing remedies, identify the type or measure of relief that the parties might seek (e.g., "X might seek damages equal to ....") and any possible reasons for denying or limiting the relief.

As the instructions say, you must write your answers in essay form, using complete sentences and proper paragraphs. Do not compose lists, outlines, or bullet points, or attempt to replicate the format of grading guides used to score previous exams.

In addition, as on all exams, you should plan before writing, budget your time, and consider all the facts. You should not waste time discussing subjects not at issue.

Good luck!

**PROBLEM I.**

**(20 percent)**

The following highly edited excerpt comes from a recent case:

The main piece of paper in this case is the 2002 employment contract between Dr. Archer and his hospital-employer, QHG. The agreement was a detailed five-year contract. Dr. Archer's chief complaint [concerns] QHG's failure to provide rotating call coverage. With the exception of a few weeks, Dr. Archer was on call twenty-four hours a day, seven days a week for more than two years. [Dr. Archer also claims that] QHG terminated the employment relationship without cause. The hospital sent Dr. Archer a letter in January 2004, explaining his termination would be effective in July 2004. Dr. Archer [announced] in May 2004 he could no longer operate given problems with his hands. The next day, QHG terminated Dr. Archer.

The parties' agreement contained this provision: "Dr. Archer shall provide on-call coverage on a rotating basis and shall be on call as shall be determined from time to time by agreement between QHG and Dr. Archer." QHG's argument [is] that the agreement imposed no obligation to provide rotating call. [But a general policy at the hospital,] Policy # 201, could not be clearer: "No physician is required to be on call 24/7." According to the hospital, Dr. Archer could not accept the benefits of the contract, and then refuse to perform.

[T]he contract states Dr. Archer's annual salary for the first two years of the agreement would be \$300,000. Handwritten out to the side is the following statement: "The first 18 months of this agreement are guaranteed." Paragraph 3.2 of the contract allows either party to terminate the contract "without cause, at any time" upon 180-days' written notice. Dr. Archer argues that the two provisions were meant to run consecutively. Here Dr. Archer relies on a pre-contract letter from QHG's administrator. [QHG hired a well-paid replacement for Dr. Archer.]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following highly edited excerpt comes from a recent case:

Olympic's pipeline ruptured and 200,000 gallons of gasoline leaked into Hannah and Whatcom creeks. A fire ignited, killing three persons and causing extensive damage. Numerous claims have been brought against Olympic. Pending claims exceed half a billion dollars.

Olympic is a joint venture between three petroleum companies. At the time of the accident, ARCO owned 37% [of Olympic]. Olympic exhausted its \$50 million of liability insurance coverage. Olympic sought excess coverage under the policies of ARCO. ARCO's insurance policies [cover ARCO and any subsidiary of ARCO]. The [insurer] determined Olympic was not a "subsidiary" as used in the "Named Insured" clause of ARCO's policies.

John Henderson, the representative [of Arco's insurer], and Edward Moss, a broker, both testified the parties never discussed the "named insured" clause in the insurance policies or application. Representatives of ARCO, Robert Merrill and Paul Rocke, testified that they understood "subsidiary" to mean owning over 50 percent of a company. Barbara Bartoletti, the ARCO Assistant Corporate Secretary, and Mark Friedman, the ARCO Associate Corporate Secretary, both testified that Olympic was considered by ARCO to be a subsidiary, as indicated by how it was listed in [certain corporate documents]. But neither ARCO employee was directly involved in the acquisition of the insurance policies. Olympic also offered testimony that ARCO attached [the corporate documents] to its insurance submission to signal that it considered Olympic a subsidiary.

Subsidiary is not defined in the policies. Webster's Third New International Dictionary defines a subsidiary as "a company wholly controlled by another that owns more than half of its voting stock." [During the drafting of the insurance policies] ARCO removed the phrase "more than fifty percent" from a clause following the subsidiary clause. Olympic attempted to present evidence that employees of ARCO were concerned that ARCO was exposed to Olympic's liability.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following highly edited excerpt comes from a recent case:

Inna Khiterer began [dental treatment] with Dr. Mina Bell. The treatment included root canal therapy on two teeth and the fabrication and fitting of crowns for those teeth, as well as the fabrication and fitting of a replacement crown for a third tooth. Ms. Khiterer [saw] another dentist the following summer, and, according to her testimony, learned that the crowns with which she was fitted by Dr. Bell were not fabricated in accordance with their agreement. Specifically, the crowns were made totally of porcelain, rather than of porcelain on gold as they, allegedly, should have been.

Ms. Khiterer testified that she had previously been fitted with crowns made of porcelain on gold. Ms. Khiterer also offered the testimony of a friend, Sergei Leontev, who said that he made a similar agreement with Dr. Bell. Dr. Bell testified she had no independent recollection of any conversation with Ms. Khiterer about the composite material for the crowns. She testified further that an all-porcelain crown was superior to a crown containing any metal because the presence of metal created a risk of patient reaction.

Dr. Bell presented a copy of Ms. Khiterer's chart, showing an entry for "crowns metal-free." Ms. Khiterer presented a summary of treatment, showing the notations "crown / pfm." Dr. Bell explained that "pfm" stood for "porcelain fused metal." [T]here is no evidence that Dr. Bell intentionally substituted all porcelain for porcelain on gold as the material from which Ms. Khiterer's crowns were to be fabricated. The all-porcelain crowns were suitable functionally for the intended purpose. There is no evidence of physical harm to Ms. Khiterer from the all-porcelain crowns. And Ms. Khiterer was satisfied with the all-porcelain crowns from an aesthetic perspective. Dr. Bell [contends] Ms. Khiterer's use of the crowns for approximately two years would constitute acceptance of them. [Ms. Khiterer has paid part of the price.]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following highly edited excerpt comes from a recent case:

Schlumberger manufactures lead-coated cable. Greenwich is a trading company specializing in metals. Debby Roberts is Schlumberger's Procurement Specialist. Peter Appleby is Greenwich's owner. On May 10, Appleby called Roberts. Appleby and Roberts agreed that Schlumberger would purchase from Greenwich 1,200 metric tons (mts) of copper-bearing lead. They agreed on the price, delivery, and shipment. On May 26, Appleby sent a formal letter "confirming our sale of 1,200 mts of copper bearing Lead" and enclosed three sales contracts, one for each month of scheduled shipment [i.e., July, August, and September]. Each sales contract contained the quantity, pricing, shipment, delivery, payment terms, and comments. Schlumberger never signed the sales contracts.

On June 5, Roberts forwarded three purchase orders to Greenwich. Schlumberger's purchase orders included an almost verbatim copy of Greenwich's sales contracts. Appleby acknowledged his acceptance of them [as follows]: "Hi Debby. All seems in order although the delivery dates may be a little too ambitious. No need to make any changes; just don't hold our feet to the fire." Nobody at Greenwich signed the purchase orders.

Beginning on July 25, Greenwich began shipping to Schlumberger. Shortly afterward, Schlumberger encountered problems in its manufacturing process. On August 10, Schlumberger notified Greenwich of the problems and instructed Greenwich to stop deliveries. [Schlumberger] paid \$430,000 for the first delivery of lead. [Greenwich] reclaimed most of the lead and sold it and the lead from the other scheduled deliveries to third parties. When [Greenwich] resold the lead to third parties, [Greenwich] received \$1,460,000 more than the original contract price. [But Greenwich claims it could have received \$130,000 more if it had resold at the increased market price. Greenwich also claims \$690,000 for the material not reclaimed and for storage, trucking, and financing expenses.]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following highly edited excerpt comes from a recent case:

CVS decided to upgrade the hand-held bar code scanners for all of its stores. Data Capture contacted CVS about acquiring [CVS's used] scanners, referred to as "PDT" units. A major issue was whether the PDT units CVS was selling were model 6846WW or 6846US. CVS was not aware of the distinction between the models. Data Capture [has] claimed that the 6846WW had greater capabilities and its purchase was based on the belief all of the units were model 6846WW.

Data Capture prepared the "Asset Purchase Agreement." That agreement contained a description of the PDT units as "Model 6846 NIS 63 WW." This description further complicated the issue because there was no such model. CVS claimed that Joseph Teixeira, president of Data Capture, knew CVS did not have WW units, and took advantage of CVS by waiting until Data Capture had received the PDT units and then citing the WW/US model distinction as a basis to avoid paying the contract price for the PDT units.

There was evidence that Data Capture employees inspected the very first shipment and realized that it contained very few WW units. There were numerous e-mails exchanged between CVS employees and Data Capture employees. However, in none of the e-mails did anyone from Data Capture ever mention that the PDT units did not conform to the description in the Agreement.

CVS sought payment of [\$5,000,000] for the [12,500] PDT units which had been delivered. Mr. Teixeira responded that CVS owes \$100 for each [of the 11,000] US PDT units received instead of WW units. According to Data Capture's records the proceeds from the resale of 11,000 (US) units purchased from CVS was \$6,600,000. Data Capture retained 1,500 (WW) PDT units. [T]he remaining units could have been sold for an additional \$1,050,000.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

END OF EXAMINATION

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Please note that some sentences and words were omitted from the preceding quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes. The names and citations of the cases are not identified here. They will be revealed later.

Final Examination In

CONTRACTS II

(Course No. 203-13; 3 credits)

Professor Gregory E. Maggs

INSTRUCTIONS:

1. Content of the Examination. This examination consists of 5 problems of equal weight (i.e., 20 percent each).
2. Time for Completing. Absent special arrangements, you have three hours to complete this examination. You may divide your time as you see fit among the problems.
3. Answer Length. Your answers for all five problems may not exceed a total of 4500 words.
4. Answer Format. You must write your answers in essay form, using complete sentences and proper paragraphs. Do not compose lists, outlines, or bullet points, or attempt to replicate the format of grading guides used to score previous examinations. The quality of your writing will affect your grade. To make your answers easier to read, you must indent the first line of each paragraph and include a blank line between paragraphs.
5. Materials You May Use. This is an open-book examination. You may consult any written materials that you have brought with you.
6. Ambiguities. You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, address the ambiguity in your answer.
7. Retention of Examination. You may retain this copy of the examination at the end of the examination period.

### Tips for Writing Good Answers:

Each problem presents some facts and then asks you to "Write an essay identifying and discussing any claims and defenses that the parties might assert, and any remedies that they might seek."

When identifying and discussing claims, be very specific about who might assert them and what they might allege (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ..."). If you are not careful in addressing the possible claims, you will have difficulty discussing defenses and remedies.

When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law (e.g., "Y might defend on grounds of non-occurrence of an express condition, asserting that Y's performance was conditioned on ... and that event did not happen.").

When addressing remedies, identify the type or measure of relief that the parties might seek (e.g., "X might seek damages, equal to ....") and any possible reasons for denying or limiting the relief.

As the instructions say, you must write your answers in essay form, using complete sentences and proper paragraphs. Do not compose lists, outlines, or bullet points, or attempt to replicate the format of grading guides used to score previous exams.

In addition, as on all exams, you should plan before writing, budget your time, and consider all the facts. You should not waste time discussing subjects not at issue.

Good luck!

**PROBLEM I.**

**(20 percent)**

The following heavily edited excerpt comes from a recent case:

Robert Mays contracted with Tru-Built Garage Co. for the construction of a garage at a cost of \$11,284. [An addendum to the contract] called for nine-foot walls at an additional cost of \$425 and roof trusses rather than rafters at an additional cost of \$650. None of the documents specifically noted Mays' intent to use the garage for storage purposes although he contends he relayed this intent. Mays paid \$7,890 after the concrete was poured, with the remaining \$3,394 due upon completion. Although an error was made and a standard rafter roof was delivered rather than the trusses Mays requested, Mays allowed construction to commence with the roof rafters. The garage was inspected on July 2 by the Building Inspector, who issued a tag which stated: "Garage not approved for storage." Tru-Built billed Mays for the balance due.

When no payment was received after two months, Tru-Built's manager, Eric McGowen, contacted Mays, who stated he would not pay the balance due because the garage did not have the [roof trusses or] nine-foot walls he requested. McGowen thereafter sent Mays a letter offering either [to replace] the rafter roof with a truss roof at a cost of \$2,000 or to refund the \$650 extra charge for the trusses. Mays asserted he took off work in order for McGowan to inspect the garage, but McGowan did not show up. Thereafter, Mays refused to allow Tru-Built onto his property.

Tru-Built [argues against] admitting parol evidence. Tru-Built contends, and Mays concedes, that there is no reference in the agreement to Mays' intent to use the garage for storage. Tru-Built points out that standard trusses provide only minimal use of the attic for storage, and that the rafter system actually provided for greater storage space than standard trusses. Therefore, Tru-Built contends that Mays' [claimed desire] to use the garage for storage was in contravention to the original design.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following heavily edited excerpt comes from a recent case:

Leatha Farrell and James Tedeschi (hereinafter decedent) were married. [Later,] they entered into a separation agreement which stated, in relevant part: "The husband agrees to maintain ... the life insurance coverage currently in force through [TIAA], and maintain the wife as the beneficiary thereof so long as the husband has not remarried. In the event the husband does remarry ... the wife ... shall be the beneficiary of such coverage to the extent of 50% of the benefit payable."

In accordance with the terms of the separation agreement, decedent named Farrell his beneficiary. When decedent married Valentina Tedeschi, decedent executed a change of beneficiary form naming Farrell and Tedeschi each a 50% beneficiary. Thereafter, decedent unsuccessfully negotiated with Farrell to revise their economic distribution. When Farrell refused, decedent unilaterally changed the designation to Tedeschi as his sole beneficiary. The change was sent [to TIAA before] decedent died. When Tedeschi and Farrell submitted claims for benefits, [TIAA argued it] owed no duty to either Farrell or Tedeschi. Farrell contends that, as a third-party beneficiary [or assignee], she had enforceable rights.

The separation agreement [is said to have an] ambiguity in the provision addressing the apportionment of insurance benefits after remarriage. To evince decedent's intent, Farrell proffers documents in which decedent referred to the disputed provision of the separation agreement, requiring both Farrell and Tedeschi to share the proceeds equally once decedent remarried. Farrell further proffers evidence demonstrating decedent's negotiations with her, after his remarriage, to attempt to alter her entitlement.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following heavily edited excerpt comes from a recent case:

ISIS placed numerous orders for the purchase of electronic components from Mini-Circuits. To place an order, ISIS submitted to Mini-Circuits purchase order forms listing the items, quantity, price, and delivery date. In addition, each purchase order form contained the following language: "ISIS RESERVES THE RIGHT TO CHANGE THIS PURCHASE ORDER WITH 30 CALENDAR DAYS' NOTICE WITH NO LIABILITY TO ISIS." In response to ISIS's orders, Mini-Circuits sent acknowledgment forms listing the items ordered, quantity, price, and delivery date. Each acknowledgment form also stated: "ACCEPTANCE OF YOUR COMPANY'S ORDER IS EXPRESSLY MADE CONDITIONAL ON YOUR COMPANY'S ASSENT TO THE TERMS OF THIS ACKNOWLEDGMENT." The acknowledgment form stated, "Purchaser shall not have the right to cancel or otherwise modify delivery dates." ISIS never expressly assented to the terms set forth in Mini-Circuits' form.

On March 28, ISIS cancelled all open orders with Mini-Circuits, stating that "[Our customer] Western Multiplex has cancelled with us so we have no requirements." The price of the items cancelled was \$817,101.16. The components cancelled were standard catalogue items. Mini-Circuits re-sold many of the cancelled components to subcontractors engaged by Western Multiplex for the same project for which ISIS had been engaged. However, despite reasonable efforts, it was unable to re-sell some of the cancelled items. Mini-Circuits did not credit any re-sales against the amount it claimed ISIS owed.

ISIS appears to argue that, if Mini-Circuits' cancellation provision does not apply, ISIS escapes any liability at all. Mini-Circuits contends it should receive its lost profits [and other damages]. Mini-Circuits was [ultimately] able to sell, in some cases, far more of the cancelled components than the number ordered by ISIS. ISIS points out that Mini-Circuits required lead times of eleven to twelve months on ISIS's orders.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following heavily edited excerpt comes from a recent case:

Tacoma Fixture Company regularly ordered varnish products from Rudd Company for use in its cabinet manufacturing business. TFC generally placed its orders with Rudd by telephone, and Rudd would arrange for shipment of the products. Neither party would issue a written confirmation order, but Rudd did mail invoices to TFC after the goods were shipped. The invoices contained several terms that the parties did not negotiate or agree to, including a term disclaiming all warranties and limiting both Rudd's liability and TFC's remedies.

The warranty term stated as follows, in all capital letters: "Seller makes no warranty extending beyond the description of the goods on the face hereof. Claims of failure to meet specifications shall be deemed waived unless made in writing within ten (10) days of delivery. Seller's liability for any such failure shall be limited to the replacement of materials."

TFC experienced significant problems with Rudd's products, including discoloration and cracking of the cabinets it manufactured using those products. TFC claimed it notified Rudd as soon as there was a problem, but because the defects did not generally become apparent until one month after TFC received Rudd's products, TFC was unable to notify Rudd of the problem within 10 days. TFC claims damages in excess of \$1.5 million.

One of Rudd's arguments in its briefs [is] that no contract could be formed until the invoice was delivered, as the invoice contained the price term. Rudd [also] relies on the argument that additional terms in invoices or licensing agreements may become a part of the parties' contract without express assent to those additional terms.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following heavily edited excerpt comes from a recent case:

Milligan is a highway construction contractor. CIC is an asphalt supplier. Under Sales Order 1347, CIC agreed to supply asphalt to Milligan at a price of \$375 per ton for a project in Gray County. Under Sales Order 1348, CIC agreed to supply asphalt to Milligan at a price of \$375 per ton for a project in Armstrong County. Each Order included a payment term of "Net 10 Days," and a delivery term of "FOB MUSKOGEE."

CIC delivered seven asphalt shipments under Sales Order 1347 totaling \$64,372.50. CIC mailed Milligan an invoice dated June 30, requesting payment from Milligan for CIC's asphalt shipment. On July 10, Milligan mailed a check to CIC at its Muskogee office for \$9,041.25. CIC received the check on July 12.

On July 11, Milligan received another letter from CIC canceling all contracts. Milligan immediately began searching for another asphalt supplier for both projects. Due to rapidly escalating asphalt prices, however, Milligan could not find a supplier that would agree to provide the asphalt at a fixed price. Milligan had to contract with Valero Company to supply asphalt for both projects at "rack price," which fluctuates depending on market conditions. Milligan paid Valero \$495 per ton for the asphalt necessary to complete the Gray County project. Milligan [has] not yet needed asphalt for the Armstrong County project. When Milligan contracted with Valero, the rack price was \$470 per ton.

CIC argues it was justified in canceling because Milligan failed to comply with the payment term "Net 10 Days." [But] in Milligan's dealings with other asphalt suppliers, putting a check in the mail on the date payment was due constituted timely payment. CIC also appears to contend in its brief, the "time of cover" [for Order 1348 will be] some time in the future when Valero finally delivers the asphalt [but] that Milligan irrevocably elected remedies by covering.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

END OF EXAMINATION

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To make the problems more realistic, they are based on text taken from actual cases. Please note that words, sentences, and paragraphs were omitted from the preceding quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes. Minor punctuation, capitalization, and similar alterations were made without indication. The names and citations of the cases are not identified here. They will be revealed later.

Final Examination In

CONTRACTS II

(Course No. 203-11; 3 credits)

Professor Gregory E. Maggs

Instructions:

1. This examination consists of five problems of equal weight (i.e., 20% each).
2. Absent special arrangements, you have 3 hours to complete this examination. I recommend that you devote approximately 36 minutes to each problem, but you may allocate your time as you see fit.
3. Your answers for the five problems combined may not exceed a total of 4500 words.
4. This is an open-book examination. You may consult any written materials that you have brought with you.
5. You must write your answers in essay form, using complete sentences and proper paragraphs. Do not compose lists, outlines, or bullet points, or attempt to replicate the format of grading guides used to score previous exams. The quality of your writing will affect your grade.
6. To make your answers easier to read, you must indent the first line of each paragraph and include a blank line between paragraphs.
7. You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, describe the ambiguity in your answer.
8. You may keep this copy of the examination at the end of the examination period.

### Tips for Writing Good Answers:

Each problem presents some facts and then asks you to "Write an essay identifying and discussing any claims and defenses that the parties might assert, and any remedies that they might seek."

When identifying and discussing claims, be very specific about who might assert them and what they might allege (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ..."). If you are not careful in addressing the possible claims, you will have difficulty discussing defenses and remedies.

When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law (e.g., "Y might defend on grounds of non-occurrence of an express condition, asserting that Y's performance was conditioned on ... and that event did not happen.").

When addressing remedies, identify the type or measure of relief that the parties might seek (e.g., "X might seek damages, equal to ....") and any possible reasons for denying or limiting the relief.

As the instructions say, you must write your answers in essay form, using complete sentences and proper paragraphs. Do not compose lists, outlines, or bullet points, or attempt to replicate the format of grading guides used to score previous exams.

In addition, as on all exams, you should plan before writing, budget your time, and consider all the facts. You should not waste time discussing subjects not at issue.

Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[In renewing its lease in the Maplewood Mall], Advanced Wireless was concerned that competitors that sold wireless phones might lease space in the shopping center. According to Advanced Wireless, Maplewood Mall agreed [during negotiations] not to lease to competitors during the remainder of the lease. Maplewood Mall disputes that point. Section 8.1 [of the new lease] provides:

Tenant expressly understands and acknowledges that other tenants may sell items identical or similar to those sold by Tenant. If a Competing Tenant shall open for business under a Competing Lease, Tenant shall deliver to Landlord written notice. [S]tarting from the date after Landlord receives notice, Tenant shall pay monthly [rent] reduced by 25% for the remainder of the Lease Term, unless and until the Competing Lease expires.

Section 24.7 provides: "All notices to be given hereunder shall be sent by certified mail."

Advanced Wireless claims that the non-exclusive language was included in Section 8.1 because Maplewood Mall already had competitors in the shopping center. Section 24.3 of the lease contains a merger clause.

Approximately 11 competitors entered the shopping center [causing Advanced Wireless some loss of business]. Advanced Wireless sent a written notice to Maplewood Mall pursuant to Section 8.1. The letter was not sent by certified mail. Advanced Wireless stopped paying rent. Advanced Wireless contends that Section 8.1 of the lease unambiguously provides for a 25% reduction in rent each time Maplewood Mall leased to a wireless competitor. Maplewood Mall argues that only one 25% rent reduction is proper [and wants to present testimony that this is what the parties intended].

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Rogers-Usry Chevrolet is a car dealership. Rogers-Usry leased land from Facilities, Inc. for fifteen years. The lease provided that in addition to a base amount of rent, Rogers-Usry would pay Facilities bonus rent if new vehicle sales exceeded one hundred vehicles per month. [Evidence from the parties' negotiations suggests] this bonus rent provision was included to compensate for Facilities' acceptance of a rent below market value.

[Recently], Rogers-Usry expanded to add a tract of land a few hundred feet from its primary location. Rogers-Usry has moved its new car sales to the new location. Although Rogers-Usry continues to use the Facilities property, Rogers-Usry argues that it is under no obligation to continue paying Facilities bonus rent for new vehicle sales which occur on the new land.

[S]ection 3(c) of the lease reads as follows:  
"[i]f during any month the Lessee shall sell more than 100 new vehicles, the Lessee shall, in addition to the Basic Monthly Rental, pay as additional rent \$100.00 per new vehicle sold in excess of 100 vehicles."

Black's Law Dictionary defines "rent" as "consideration for the use or occupation of property." Section 3(c) specifically uses the term "rent" which, when considering the definition of rent above, logically ties those payments as consideration for use of the property which is the subject of the Lease--the leased premises. [The new] property is located nearby and Rogers-Usry will continue to use the Facilities property as part of its integrated operation. [T]he property is located within [the] geographic area of responsibility assigned to Rogers-Usry by [Chevrolet].

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Donald Oren runs Highway Sales, Inc. Oren decided to replace his recreational vehicle ("RV") with a new luxury RV manufactured by Blue Bird Corporation. Highway Sales purchased, for Oren's use, a Wanderlodge M380 from a dealer that does business under the name Shorewood RV. Highway Sales paid \$340,000 for the RV.

[N]umerous defects in the RV surfaced in the months following the sale. Oren returned the RV to Shorewood RV for repairs on several occasions. [After one year], Oren had given up hope that the RV could ever be put in satisfactory working condition. He cleaned out his personal belongings and dropped off the RV at Shorewood RV's sales lot. As Oren said, at that point, "I was just done with it." About a week later, Oren wrote to Blue Bird requesting a refund of the RV's purchase price and stating: "After almost a year of continued problems with this motor home, I have come to three conclusions. First, the Model M380 was released before it had been properly designed, tested, and debugged. Second, Shorewood RV could not overcome the inherent problems in the Model M380. Third, I have run out of patience, confidence, and trust that the problems can be fixed in a reasonable time, and I request that you return my purchase price . . . I'm not interested in further retrofits, patches, or excuses. I will never take this coach back."

Blue Bird refused to give Highway Sales a refund. Six months later, Oren agreed to sell the RV [which was still on Shorewood's lot] to Parliament Coach. Oren admits that he did not give Blue Bird notice before selling the RV to Parliament Coach.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

CoorsTek, Inc. manufactures ceramic products. In producing ceramic products, CoorsTek utilizes vacuum induction heating furnaces. EMSCO is a company that manufactures heat induction coils to be installed within furnaces such as those owned by CoorsTek.

On November 18, EMSCO issued to CoorsTek [a] quotation for one coil for \$66,632.00. The quotation contained EMSCO's Standard Conditions as an attachment. [These terms specified that the buyer could not recover consequential damages or any actual damages covered by the buyer's own insurance.]

On January 9, in response to EMSCO's quotation, CoorsTek issued a purchase order. The purchase order included CoorsTek's terms and conditions, which state: "Acceptance of this purchase order is expressly limited to the terms of this purchase order." [The purchase order said nothing about damages, but specified the coil was "for use with CoorsTek's existing Inductotherm 250 KW Power Supply and Control Unit and CoorsTek's existing water-cooled power cables."]

In response to CoorsTek's purchase order, EMSCO issued an Invoice which included the same terms and conditions as its [quotation]. There was no response from CoorsTek to the Invoice. EMSCO manufactured and shipped the product. CoorsTek accepted the product. On September 10, CoorsTek fired [a] furnace with the coil for the first time. In the process, the furnace underwent a significant increase in pressure, resulting in a fire rendering the furnace inoperable. It was determined that CoorsTek's water supply had provided significantly less water flow to the coil than that specified by EMSCO's water diagram, resulting in the overheating of the coil. [EMSCO argues among other things that a "tacit agreement precludes the recovery of consequential damages in this case." CoorsTek has not paid EMSCO for the product.]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Panning Farms [owns] an unirrigated 90-acre field. The field had been sprayed by a long-time supplier, Farm Service. Panning suspect[s] that Farm Service had not purged chemicals already in the [spraying rig], or that Farm Service had otherwise misapplied the proper chemicals to the affected areas.

Johnny Shaben, president of Farm Service, testified the company had sprayed the field with Velpar, an herbicide manufactured by DuPont, which is used to control grasses and broadleaf plants in alfalfa. He also testified, "by the label everything looked fine, and so that's why we used the product."

Shaben agreed at trial that there was a "good solid stand" of alfalfa before it was sprayed. [After spraying,] in problem areas, the field was yellow, which indicated the plants were dying. Shaben disagreed, however, that the pattern of the affected areas suggested an application problem. He "felt that it ... was a chemical problem," though he "didn't really understand why it happened the way it did."

DuPont paid Farm Service \$8,800 towards Panning's outstanding debt on his account [as a settlement for the cost of the chemicals that allegedly were defective]. According to Panning, this payment occurred because he talked to a DuPont representative about the affected areas "and we got that worked out a little bit."

Farm Service [sought payment from] Panning for "goods and/or services" alleging \$11,982.29 remained due on its account. Panning alleged lost income from the alfalfa [for] a net loss of \$15,937.50 [and] \$900 for manure applied, \$400 in labor and equipment costs to replant the acres, \$374 to apply lime for replanting, and \$1,360 for alfalfa seed to replant. [The parties did not have a written agreement.]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

END OF EXAMINATION

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Please note that some sentences and words were omitted from the preceding quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes. The names and citations of the cases are not identified here. They will be revealed later.

Final Examination In

CONTRACTS II

(Course No. 203-1A & 203-1B; 3 credits)

Professor Gregory E. Maggs

Instructions:

1. Absent special arrangements, you have three hours to complete this examination.
2. The examination contains 5 problems of equal weight (i.e., 20 percent). I recommend that you devote approximately 36 minutes to each problem, but you may divide your time as you see fit.
3. This is an open-book examination. You may consult any written materials that you have brought with you.
4. You must write your answers in essay form, using complete sentences and proper paragraphs. Do not compose lists, outlines, or bullet points, or attempt to replicate the format of grading guides used to score previous exams. The quality of your writing will affect your grade.
5. You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, describe the ambiguity in your answer.
6. Assume that the versions of U.C.C. article 1 and article 2 reprinted on pages 4 to 113 of the Burton & Eisenberg supplement (which we used in class) govern any contracts within their scope.
7. You may keep this copy of the examination at the end of the examination period.

### Tips for Writing Good Answers:

Each problem presents some facts and then asks you to "Write an essay identifying and discussing any claims and defenses that the parties might assert, and any remedies that they might seek."

When identifying and discussing claims, be very specific about who might assert them and what they might allege (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ..."). If you are not careful in addressing the possible claims, you will have difficulty discussing defenses and remedies.

When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law (e.g., "Y might defend on grounds of non-occurrence of an express condition, asserting that Y's performance was conditioned on ... and that event did not happen.").

When addressing remedies, identify the type or measure of relief that the parties might seek (e.g., "X might seek damages, equal to ....") and any possible reasons for denying or limiting the relief.

As the instructions say, you must write your answers in essay form, using complete sentences and proper paragraphs. Do not compose lists, outlines, or bullet points, or attempt to replicate the format of grading guides used to score previous exams. The quality of your writing will affect your grade.

In addition, as on all exams, you should plan before writing, budget your time, and consider all the facts. You should not waste time discussing subjects not at issue.

Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Misty L. Cooper [faults the] Board of Education for breach of a teaching contract she contends was entered into with her. At a meeting held on May 14 [the Board agreed] "to hire Misty Young Cooper as teacher and coach pending teacher certification at Claiborne County High School." On May 15, Ms. Cooper was awarded an interim teacher license. This license could have been renewed for two years.

Ms. Cooper had failed on five occasions to pass the National Teachers Examination, and was awaiting a report as to her most recent attempt to pass on May 14. Sometime between May 14 and June 11, it was determined Ms. Cooper had again failed to pass the examination, and a motion was made at a meeting of the Board on June 11 that her employment contract should be rescinded.

The Board contended the language "pending teacher certification" was a condition precedent to the contract becoming enforceable. Ms. Cooper, on the other hand, contends her interim teaching license met the requirements of the contract.

Evidence was introduced by the testimony of Bobby Williams, Chairman of the Board, that the term "pending teacher certification" meant passing the National Teachers Examination. Ms. Cooper takes exception to Williams's testimony on the ground that the term was drafted by the Board. Ms. Cooper [also] argues that the word "pending," as defined in the Random House Dictionary means: "while awaiting; until."

[The record includes] the following testimony from her: "Q You were aware, Ms. Cooper, that one interpretation that could have attached to that language that the board used was that it was requiring you to have passed the NTE before commencing teaching in August? A Yes."

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Marina Maslow sued Apparo Vanguri, M.D. for medical malpractice. During the course of a jury trial, the parties entered into what is colloquially referred to as a high-low settlement agreement (the "Agreement"). Pursuant to the Agreement, both parties agreed not to appeal the jury's verdict. Nevertheless, after the jury returned a verdict in favor of Dr. Vanguri, [Maslow appealed and lost]. Accordingly, Dr. Vanguri refused to pay the "low" of \$250,000 due under the Agreement.

The high-low agreement provided that if the pending case was won by the Plaintiff on the issue of liability, the most the Plaintiff would recover would be \$1,000,000. If the case resulted in a Defendant's verdict, Defendant would still pay \$250,000 to the Plaintiff. Both parties agreed that they were waiving the right of appeal. However, no forfeiture language was ever expressed in the settlement agreement.

[When Maslow's attorney, Paul Weber, refused to appeal, Maslow fired him and filed the appeal herself.] Weber has an interest in the \$250,000 payment, in the form of an attorney's lien. The record indicates that, while the appeal was pending, [Dr. Vanguri's] insurance carrier offered to pay the \$250,000, conditioned on abandonment of the appeal. [Maslow] declined. Dr. Vanguri did not enjoy the benefit of finality, of having the whole ordeal over and done with.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Momax distributes dietary products to grocery stores. Rockland is in the business of producing nutritional supplements. Max R. Greer, President of Momax, contacted Rockland with regard to manufacturing a liquid weight loss product that would replicate [and compete with] Body Solutions, a product already on the market. On July 20, Greer met with George Dust, Rockland's vice president. Greer informed Dust he wanted an ephedra-free product that would be identical to Body Solutions and wanted the product to meet the label claims on the Body Solutions bottle. Dust informed Greer that extensive testing would need to be done before production.

At the meeting, Rockland agreed to manufacture and deliver to Momax a weight loss product to be sold under the name "Beautiful Body." Three days later, Rockland received a purchase order from Momax for 2,344 bottles. Greer informed Wright that he wanted the product by August 20, and that it needed to ship to customers by August 27. Dust informed Greer that this deadline was impossible, as it left inadequate time for testing. Greer demanded every effort to meet his deadline. After numerous attempts, and without adequate time to conduct testing, Dust formulated a product based on Greer's specifications that ultimately met with Greer's approval. Shortly thereafter, Momax began placing more orders. Rockland accepted the orders and shipped several lots in September.

In December, Momax discovered that containers of Beautiful Body had begun to bulge, leak, and explode while on retailer's shelves and when consumers opened bottles of the product. Subsequent testing revealed the vast majority of Beautiful Body shipments had been contaminated with lactobacillus bacteria and that [the product] contained less than one-half of the protein claimed on its label. Rockland shipped replacement lots in January, which were later determined to contain lactobacillus bacteria. Momax notified its customers of a recall and arranged for the product to be destroyed.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

On December 2, Tom McElroy, MacSteel's Purchasing Manager, requested quotes for 1,500 tons of SiMn [silicomanganese] for its Jackson facility, to be delivered between January and June, and for its Fort Smith facility for use in April. On December 3, Thomas Pompili, Eramet's Vice President, sent an e-mail to McElroy. Pompili listed a price of \$.32 per pound.

On December 5, [MacSteel] mailed Purchase Order 040595 to Eramet [for] delivery of SiMn to MacSteel's Fort Smith facility beginning April. The front page indicates a price of \$0.3175 per pound and includes the following language: "Additional Material Option to be Finalized in May." Ten days later, McElroy mailed Purchase Order 47129 to Eramet [for] sale of SiMn to MacSteel's Jackson facility at \$0.32 per pound, to be delivered by June. The front page of the purchase order contains the following language: "MACSTEEL HAS THE OPTION TO EXTEND THIS CONTRACT TO COVER 2ND HALF [OF THE YEAR] REQUIREMENTS AT THIS SAME PRICE."

On January 12, Eramet shipped SiMn to MacSteel's Jackson facility pursuant to Purchase Order 47129. Eramet claims that about the same date, Eramet executives reviewed MacSteel's purchase orders and discovered that they contained terms not included in Pompili's e-mail--particularly, language giving MacSteel the option to purchase materials for the second half of [the year]. [Eramet] called McElroy on January 14, and informed [him] that Eramet considered the option clause in the purchase order for Jackson "null and void" and that Eramet would not honor the entire purchase order for Fort Smith.

MacSteel asserts that it subsequently secured from other suppliers the SiMn it needed for its Fort Smith facility and for its Jackson facility for the second half of [the year]. Because the cost of SiMn was increasing rapidly MacSteel alleges it incurred \$300,221 in cover damages for its Fort Smith facility and \$364,542 in cover damages for its Jackson facility.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Cedar Forest Products Company (CFP) manufactures pre-cut building packages for shelters, pavilions, gazebos, and other structures typically utilized in park, camp, and recreational facilities. The Federation of Greater Des Moines (Federation) contracted with CFP for the manufacture of a 3,500 square foot building with unique and customized schematics. With the signing of the Purchase and Sales Agreement, Federation sent CFP a deposit of \$53,605. Shortly thereafter, it prematurely sent the remaining balance of \$160,813 for a total contract price of \$214,418. After a series of redesign discussions and change orders, Federation informed CFP it was rescinding the contract and requested return of all monies paid. CFP returned \$160,530, but retained \$53,887 as lost profits.

Federation [contends based on the redesign discussions] the agreement was merely a quote based on preliminary schematic drawings.

In anticipation of the building project, CFP purchased cedar paneling, insulation, floor plywood and cedar timber. It had not begun to assemble the building. CFP was able to resell the purchased items to other customers for the same price as called for in the Federation contract.

CFP was capable of manufacturing the building for Federation as well as its numerous other customers. Federation argues that CFP had not begun to assemble the purchased items into the contracted for building at the time of breach [and only had expenses of] \$13,470.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

END OF EXAMINATION

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Please note that some sentences and words were omitted from the preceding heavily edited quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes. The names and citations of the cases are not identified here. They will be revealed later.

Final Examination In  
CONTRACTS II  
(Course No. 203-12; 3 credits)  
Professor Gregory E. Maggs

Instructions:

1. Absent special arrangements, you have three hours to complete this examination.
2. The examination contains 5 problems of equal weight (i.e., 20 percent). I recommend that you devote approximately 36 minutes to each problem, but you may divide your time as you see fit.
3. This is an open-book examination. You may consult any written materials that you have brought with you.
4. You must write your answers in essay form, using complete sentences and proper paragraphs. Do not compose lists, outlines, or bullet points, or attempt to replicate the format of grading guides used to score previous exams.
5. You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, describe the ambiguity in your answer.
6. Assume that the revised versions of U.C.C. article 1 and article 2 govern any contracts within their scope.
7. You may keep this copy of the examination at the end of the examination period.

### Tips for Writing Good Answers:

Each problem presents some facts and then asks you to "Write an essay identifying and discussing any claims and defenses that the parties might assert, and any remedies that they might seek."

When identifying and discussing claims, be very specific about who might assert them and what they might allege (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ..."). If you are not careful in addressing the possible claims, you will have difficulty discussing defenses and remedies.

When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law (e.g., "Y might defend on grounds of non-occurrence of an express condition, asserting that Y's performance was conditioned on ... and that event did not happen.").

When addressing remedies, identify the type or measure of relief that the parties might seek (e.g., "X might seek damages, equal to ....") and any possible reasons for denying or limiting the relief.

As the instructions say, you must write your answers in essay form, using complete sentences and proper paragraphs. Do not compose lists, outlines, or bullet points, or attempt to replicate the format of grading guides used to score previous exams.

In addition, as on all exams, you should plan before writing, budget your time, and consider all the facts. You should not waste time discussing subjects not at issue.

Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

IKO manufactures paper for use in roofing products. Asphalt is used in the manufacturing process. Both the asphalt and the paper production process cause IKO's plants to emit disagreeable odors.

IKO entered into insurance contracts with Royal Sun. The policy [required Royal Sun to defend and indemnify IKO in tort suits, but] stated that coverage did not extend to "claims arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants." The contract defines pollutant as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, odor, vapor, soot, fumes, acids, chemicals, and waste."

[The city government and a group of neighbors filed tort claims against IKO, claiming among other things] that IKO "had been emitting or causing foul, offensive, noxious, and/or disagreeable odors or stench which are extremely repulsive."

IKO asked Royal Sun to defend it against the claims. After reviewing the complaints, Royal Sun determined that both plaintiffs sought damages based on IKO's emission of "noxious odors." Royal Sun then notified IKO that under the pollution exclusion, it had no duty to defend either lawsuit.

IKO asserts that the term "odors" was intended to mean only toxic odors. Second, IKO claims that the term "pollution" was intended to mean only "true pollution."

Webster's Third New International Dictionary defines an "odor" as "a quality of something that affects the sense of smell ... a scent, fragrance, or aroma." [One reported case has said that] a pollution exclusion clause does not require that the insured cause traditional environmental pollution before triggering the exclusion.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[Stonegate Constructions Inc., through its President, Mr. Parks, entered a written contract to build a house for Mr. Nti for \$313,950.] Stonegate incurred expenses in constructing the house up to June when construction ceased. [Stonegate] claims that construction costs up to June totaled \$176,693.33.

Disputes arose between the parties. Parks indicated he was ready to complete the project, however, because of lack of cooperation by [Nti], he was forced to conclude the construction.

[Nti refused to make interim payments because] Peachtree windows were installed instead of Anderson windows. On this point, the proposal calls for Anderson windows. [But Parks] explained that Peachtree windows were more appropriate and better designed for the house to be built.

The contract that states, "if the homeowner defaults, homeowner agrees to pay all costs of collection, including reasonable attorneys fees, ... and a 1 1/2% per month service charge will be assessed for all payments not made within 10 days of due date per the schedule ..."

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[T]he Transit Authority of River City (TARC) solicited bids for improvements to its bus storage facility. A & A Mechanical bid on the work and solicited quotes from subcontractors to provide sixteen large air units, used to convey outside air into the building. Thomas & Betts submitted a sales quotation to supply the units.

A & A was awarded the contract. A & A submitted a purchase order [to Thomas & Betts]. Thomas & Betts delivered the units. The units, however, were not vertical as required by the purchase order so they were returned to Thomas & Betts who then sent reconfigured units accompanied by an invoice in the amount of \$181,346.56, representing an additional handling charge for the return of the first units. Soon after installation, the units began having leakage problems.

Almost immediately after the installation of the units, A & A became aware of the defect, after which followed attempts to repair the units. During this time, although there were threats of returning them, the units stayed in their location, and were in fact used. During that time A & A directed repair work be performed on the units. Also pursuant to its contract with TARC, A & A accepted payment for the units.

Thomas & Betts was informed of the particular use intended for the units. [A & A spent \$231,467 to repair the units. The delay caused TARC to incur \$134,878 in costs. A & A has not paid Thomas & Betts.]

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Richardson is self-employed by CMR, which "cleans up railroad cars and rails." CMR purchased a truck-mounted crane from Guiffre Brothers for \$79,895. [Shortly afterward] the bolts securing the crane turntable to the truck sheared, causing the boom to fall. Guiffre Brothers instructed CMR to take the damaged crane to RDO's shop for repair.

RDO disassembled the damaged boom and ordered a replacement boom. CMR [then] transported the damaged crane and replacement boom to Guiffre Brothers for completion of the repair work at a cost of \$1,300. Guiffre Brothers initially estimated the repair cost at \$8,005.53 and in a letter to CMR indicated the following: "[Guiffre Brothers is] accepting your verbal purchase order to proceed on the reassembly of the CMR Truck Crane . . . ."

Guiffre Brothers billed CMR \$10,128.89 for miscellaneous parts and labor, but did not bill CMR for the cost of the boom itself. CMR used the crane for a brief period after Guiffre Brothers completed the repairs, but the crane broke down again, and CMR ultimately sold the crane at auction for \$46,000.

RDO sent CMR a "work order invoice." The invoice shows costs of \$21,427.73. [CMR has not paid anything because CMR believes Guiffre Brothers is responsible for the repairs.] CMR began renting a replacement crane at \$4,400 per month.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[A] contract that Metro-North awarded to Sinco called for Sinco to be paid \$197,325 to install a "fall protection" system in Grand Central Terminal to ensure the safety of workers performing renovation work.

Sinco held a training session at the Terminal to demonstrate its safety equipment for Metro-North employees. Remarkably, during the session, a safety sleeve, which was an important part of the system, fell apart in a Metro-North employee's hands. Three additional Sinco sleeves also proved to be defective. As a consequence, Metro-North wrote to Sinco the following day to inform it that the entire fall protection system was "unacceptable."

Metro-North turned to the other original bidders in an effort to secure a replacement contractor as quickly as possible. The next lowest bidder was Surety Manufacturing & Testing Ltd. which proposed to do the required work for \$294,085. In addition to this amount, Surety requested \$29,600 to remove Sinco's previously-installed system and \$24,211 to provide protection from falling objects while its crews were working. [Metro-North accepted this proposal.]

Sinco contends that 172 of the 252 anchors required for the Sinco fall protection system were reused by Surety in its system, resulting in a lower cost. Sinco similarly contends that a number of expenses projected by Surety, such as the cost of removing the Sinco system and lodging and carfare for Surety's workers, are inflated. In addition, Surety's bid included \$13,270 for a two-year maintenance contract which was not part of Sinco's competing bid.

Write an essay identifying and discussing any claims and defenses that the parties might assert and any remedies that they might seek.

END OF EXAMINATION

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Please note that some sentences and words were omitted from the preceding quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes. The names and citations of the cases are not identified here. They will be revealed later.

Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Professor Gregory E. Maggs

Instructions:

1. Absent special arrangements, you have three hours to complete this examination.
2. The examination contains 5 problems of equal weight (i.e., 20 percent). I recommend that you devote approximately 36 minutes to each problem, but you may divide your time as you see fit.
3. This is an open-book examination. You may consult any written materials that you have brought with you.
4. You must write your answers in essay form, using complete sentences and proper paragraphs.
5. You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, describe the ambiguity in your answer.
6. Assume that the revised versions of article 1 and article 2 govern any contracts within their scope.
7. You may keep this copy of the examination at the end of the examination period.

## Tips for Writing Good Answers:

Each problem presents some facts and then asks you to "Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek."

When identifying and discussing claims, be very specific about who might assert them and what they might allege (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ....").

When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law (e.g., "Y might defend on grounds of non-occurrence of an express condition, asserting that Y's performance was conditioned on ... and that did not happen.").

When addressing remedies, identify the type or measure of relief that the parties might seek (e.g., "X might seek damages, equal to ....") and any possible reasons for denying or limiting the relief.

In addition, you should plan before writing, budget your time, and consider all the facts. You should not waste time discussing subjects not at issue.

Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Lodge, a building contractor, obtained a builder's risk insurance policy from Assurance. The policy provided coverage for a construction site [so long as Lodge reported the construction site to Assurance the same month as the construction's "starting date."] The policy said that the "starting date is the date when you first put the building materials on the construction site." Lodge poured the foundation for a building on October 24, and received lumber at the site on November 2. On December 4, fire destroyed the structure as it existed. Lodge [had] sent Assurance a report stating that construction had begun in November. Assurance took the position that construction began in October, and denied Lodge's claim.

The policy does not define the term "building materials." It is Lodge's position that the term can mean lumber and other flammable components used to construct a building. As defined in Webster's Dictionary, the word "material" means "the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, building, fabric) is made."

Assurance's brochure emphasized that "[o]nce material which will be part of the completed structure is delivered to the construction site (including foundation), it is considered a start." Lodge cites the brochure as proof of Assurance's recognition that the term "building materials," as used in the policy itself, reasonably could mean wooden framing materials only. Lodge's insurance adjuster states that insurance provided under other policies starts the date [of] construction above the basement floor. Lodge purchased insurance on the basis of cost [and] it is fair to assume a lesser cost means lesser coverage.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[Cinque Bambini signed a written contract to convey certain land to RMC upon RMC's payment of the purchase price.] The purchase price was payable in a series of four deposits. Specifically, the contract required the buyer to pay \$25,000 on execution of the contract, \$150,000 on the sixty-first day following the effective date, \$200,000 on the 151st day following the effective date, and \$300,000 on the 271st day following the effective date. The buyer was to deliver a survey of the property to Cinque Bambini within sixty days of the effective date of the contract. RMC assigned the contract to Favre. The assignment stated that Favre would assign the contract back upon RMC's repayment of [a loan] advanced by Favre.

Favre timely paid \$175,000 due under the contract [but withheld subsequent installments because] Cinque Bambini refused to provide Favre with a legal description of the property. Favre accused Cinque Bambini of failing to perform an oral agreement that Cinque Bambini would provide the survey instead of Favre. Favre further alleged that Cinque Bambini cut and removed timber from the property.

[Cinque Bambini told Favre that the contract was cancelled when it did not receive the \$200,000 deposit payment by December 27.] As the contract did not state its effective date, Cinque Bambini [produced] an affidavit of its general partner averring that the effective date of the contract was July 28.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

On April 8, Stamtec prepared a proposal for the sale of a mechanical press to ASCO for \$1,989,000. Stamtec's proposal [required] thirty percent payment with the purchase order. On April 25, ASCO placed purchase orders for two presses. The purchase orders [specified] a reduction in the down payment to \$200,000 per press. [Although] ASCO did not make the required down payment, Stamtec acted on ASCO's purchase orders.

Stamtec entered into a contract with Chin Fong [to have] the presses specially manufactured. The contract provided that Chin Fong would sell Stamtec the presses for \$1,600,000 each. Chin Fong [later worried about whether Stamtec would pay because it heard that Stamtec] had not received a down payment from ASCO. On August 30, Chin Fong notified [Stamtec] that it would discontinue manufacturing the presses until a down payment was made. At the time, Chin Fong had substantially completed one press and had begun work on the second press.

[After waiting a few months, Chin Fong cancelled its contract with Stamtec.] Chin Fong invoiced Stamtec \$213,996 for interest charges on the cancelled orders and \$560,000 in storage fees. Stamtec [then] received an order for two presses from Precision Tool. Stamtec contracted with Chin Fong to manufacture the presses. Chin Fong was able to use many of the parts that had been fabricated for the ASCO presses [but suffered] a \$272,000 salvage loss.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Brian and Clarice Keller owned Adcope Athletic Club. [T]he Kellers began receiving complaints that the air in the pool area was humid and had a bad odor. Seeking to remedy the problems, the Kellers solicited bids from contractors. Inland Metals submitted a bid to sell and install a 7 1/2-ton dehumidifier at a cost of \$30,081. Mr. Keller accepted the bid. Inland Metals installed the dehumidifier. At the time of the installation, the Kellers were out of town. Upon their return, their employees informed them that the dehumidifier was not working well. The Kellers informed Inland Metals that they would not pay until it was working. Inland Metals employees visited the club many times, but were unable to make the dehumidifier perform to the Kellers' satisfaction.

Inland Metals' president orally assured Mr. Keller that the 7 1/2-ton dehumidifier was large enough to remedy the problems. [In fact,] the 7 1/2-ton dehumidifier was inadequate according to the industry standard and Inland Metals had made incorrect calculations. The dehumidifier itself was not defective. It was simply not large enough to correct the odor and humidity problems.

[H]ad the Kellers simply turned the dehumidifier off, humidity would have increased to the point of causing structural damage to the club facilities. The Kellers' employees spent [\$2793] gathering humidity data [after] installation of the dehumidifier. [A 10-ton dehumidifier costing \$40,740 would have solved the humidity problems.]

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

A Japan Air Systems (JAS) aircraft experienced a hard landing. While the ensuing fire destroyed the aircraft, the engine remained intact and was salvaged from the wreckage. American Air Ventures (AAV), a broker, negotiated the sale of the engine to CIS for \$425,000. CIS had no knowledge of the hard landing and undertook a less expensive overhaul that was appropriate for used but not incident-related engines.

[CIS then sold the engine to Dallas Aerospace.] Dallas was not told about the hard landing in Japan or that [the] overhaul was other than adequate. Dallas's extensive physical inspection of the engine prior to purchase revealed no defects. Dallas's contract with CIS disclaimed that CIS had made any representations regarding the engine.

Dallas claims that at the time it wire-transferred payment, it also delivered to CIS a purchase order that purported to modify the contract by requiring CIS to deliver an airworthy engine that had "not been subjected to extreme stress or heat as in a major engine failure, accident, incident or fire." Dallas [later] attempted to sell the engine, but the buyer walked away from the negotiations after informing Dallas that the engine was incident-related.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

END OF EXAMINATION

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Final Examination In

CONTRACTS II

(Course No. 203-11; 3 credits)

Professor Gregory E. Maggs

Instructions:

1. Absent special arrangements, you have three hours to complete this examination.
2. The examination contains 5 problems of equal weight (i.e., 20 percent). I recommend that you devote approximately 36 minutes to each problem, but you may divide your time as you see fit.
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4. You must write your answers in essay form, using complete sentences and proper paragraphs.
5. You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, describe the ambiguity in your answer.
6. You may keep this copy of the examination at the end of the examination period.

## Tips for Writing Good Answers:

Each problem presents some facts and then asks you to "Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek."

When identifying and discussing claims, be very specific about who might assert them and what they might allege (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ....").

When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law (e.g., "Y might defend on grounds of mutual mistake, asserting both parties assumed ... when in fact .... X might respond ....").

When addressing remedies, identify the type or measure of relief that the parties might seek (e.g., "X might seek damages, equal to ....") and any possible reasons for denying or limiting the relief.

In addition, as on all exams, you should plan before writing, budget your time, and consider all the facts. You should not waste time discussing subjects not at issue.

Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Mervin Guidry, together with Luke Bourque and Lysekils Fryshus, formed the corporation Breaux Bridge Exports, Inc., which engaged in crawfish processing. Elmer Guidry went on salary as plant manager.

Mervin Guidry and Luke Bourque decided to sell their interest in Breaux Bridge Exports to Stefan Hedburg. On November 15, these three executed a Buy-Sell Agreement. As part of the Buy-Sell Agreement, Hedburg agreed to pay \$72,500 and assume responsibility for the debts of Breaux Bridge Exports. Paragraph 3 of the Buy-Sell Agreement [says]:

Breaux Bridge Exports, Inc., and Stefan Hedburg will pay all legal obligations or debts owed by Breaux Bridge Exports, Inc., which [are] set forth on a list marked Exhibit "A" and attached hereto.

One of the items listed on Exhibit A was back salary due Elmer in the amount of \$25,257.72.

Hedburg later refused to pay Elmer. [Hedburg's attorney] Vincent Saitta proffered testimony that Hedburg never intended to pay Elmer the back salary. Saitta testified that the language in the agreement that appeared to be a promise to pay Elmer was put there merely to protect Mervin, who was Elmer's brother, and let Mervin "off the hook" from having to answer to Elmer. In addition, there was also a proffer of an unsigned, undated "addendum" to the Buy-Sell Agreement. The "addendum" bluntly stated that no stipulation for any third party's benefit was intended. The addendum has no indicia of authenticity on its own.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Chin granted WPI an eight-year option to purchase certain real property in exchange for WPI's payment to Chin of an option fee in annual installments of \$10,000. WPI made the initial payment but balked at making the subsequent payments when they came due on the ground that Chin had been unable to obtain the consent of its mortgage lender to be bound by the terms of the option agreement. In raising this excuse for not making its payments, WPI relied on Section 12 of the contract, which reads:

12. Chin shall obtain the consent of the [mortgage lender] to be bound by the terms of this Agreement.

WPI's president testified that the purpose of Section 12 was to ensure that WPI's option would survive for a full eight years regardless of any foreclosure [by the mortgage lender]. Although no foreclosure had occurred or was threatened when WPI withheld its option payments, further payments would have increased the dollar amount of WPI's investment at risk in the event of a foreclosure. [WPI has attempted to buy the property, but Chin now refuses to sell.]

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Under two contracts, Blue Creek agreed to sell and Aurora agreed to buy 25,000 bushels of corn. Both contracts specified that the seller would deliver the corn to Aurora between March 1 and 31. Because of a shortage in railcar availability, however, Aurora was [unwilling] to take delivery in March.

Blue Creek's president, Larry Paschke, called Aurora on several occasions during March to obtain permission to deliver the corn. Each time, however, he was informed that Aurora could not accept delivery.

On March 29, Aurora sent a letter [to] Blue Creek. The letter stated: "Pursuant to paragraph 4 of the grain contracts ... we are extending such contracts for an additional 30 days due to the delay of rail carrier service. We are making efforts to accept delivery."

Paragraph 4 of the contracts provided that "[b]uyer's performance under this contract is contingent upon conditions beyond buyer's control, such as labor disputes, accidents, fire, delay of carriers, acts of god or war."

On April 1, railcars were available and Allen Boltz, an employee of Aurora, called Paschke to request that Blue Creek immediately begin its delivery. Paschke did not receive the message until too late in the day to do anything about it. On April 2, Aurora called Paschke to inform him that Blue Creek was not to deliver its corn because the railcars were now full. [Eleven days later, Aurora demanded delivery but Blue Creek insisted that the contract was terminated.]

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

[In June, Wagal and SIDT] agreed in writing that Wagal would buy laser equipment from SIDT. Wagal paid SIDT \$15,000 and promised to pay another \$15,000 six months later. The equipment remained on SIDT's property, and Wagal used it there.

In December, Wagal told SIDT that he could not pay the second \$15,000 installment and asked for more time. In return for more time, SIDT asked Wagal to pay rent for the use of its facilities, but Wagal refused. Wagal then took 18 pieces of equipment from SIDT's facilities. In January, SIDT sold the remaining equipment [to another buyer].

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Sheldorado Aluminum Products, Inc. installed an aluminum awning on the back of Marie Villette's home for use as a carport. On January 11, the awning collapsed on top of [her] new Mercedes automobile.

There was no formal written contract between the parties; the only writing is a one page order/bill designated a "contract," dated July 11 and signed by Ms. Villette. [N]o instructions or warnings were given to Ms. Villette as to care, maintenance or use of the awning.

Sheldorado took the position that the cause [of the collapse] was an accumulation of snow and high winds, and that it bore no responsibility for the loss.

Since there was no formal written contract between the parties, only the order/bill is available to indicate how the parties saw their transaction. The writing contains the handwritten description, "Supply and install one alum. roof," and adds dimensions, materials ("white posts steel"), design characteristics ("Flat roof with pitch"), and colors for the roof, stripes and fringe. [T]he total price was \$3,000.00. A line for installation says "included." [Ms. Villette has paid some of the price but refuses to pay more.]

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

END OF EXAMINATION

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Please note that some sentences and words were omitted from the preceding quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes. The names and citations of the cases are not identified here. They will be revealed later.

Final Examination In  
CONTRACTS II  
(Course No. 203-11/12; 3 credits)  
Professor Gregory E. Maggs

Instructions:

1. Absent special arrangements, you have three hours to complete this examination.
2. The examination contains 5 problems of equal weight (i.e., 20 percent). You should devote about 36 minutes to each problem.
3. This is an open-book examination. You may consult any written materials that you have brought with you.
4. You must write your answers in essay form, using complete sentences and proper paragraphs.
5. You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, describe the ambiguity in your answer.
6. You may keep this copy of the examination at the end of the examination period.

## Tips for Writing Good Answers:

Each problem presents some facts and then asks you to "Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek."

When identifying and discussing claims, be very specific about who might assert them and what they might allege (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ....").

When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law (e.g., "Y might defend on grounds of the statute of frauds, asserting .... X might respond ....").

When addressing remedies, identify the type or measure of relief that the parties might seek (e.g., "X might seek damages, equal to ....") and any possible reasons for denying or limiting the relief.

In addition, as on all exams, you should plan before writing, budget your time, and consider all the facts. You should not waste time discussing subjects not at issue.

Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from a recent case:

On May 11, [Reginald DeVaughn and Frank Doherty] entered into a contract for DeVaughn to purchase, and Doherty to sell, a ten-acre tract of land. DeVaughn deposited \$2,500 earnest money. Paragraph 4(D) of the contract provided:

Within 3 days after the date of this contract, Buyer shall apply for financing and shall make every reasonable effort to obtain financing. If financing is not obtained within 45 days, this contract shall terminate and the Earnest Money shall be refunded.

Paragraph 6(C)(1) of the contract provided:

Within 3 days after Buyer's receipt of a survey plat furnished at the expense of Buyer, Buyer may object in writing to any matter shown on the plat which constitutes a defect or encumbrance to title.

Shortly thereafter, Doherty telephoned [a surveyor named] Laney and told him a survey needed to be performed on the property. Laney prepared a survey plat and sent it to DeVaughn.

On June 14, DeVaughn submitted an application to Prime Bank for a loan to purchase the property. On June 16, Prime Bank notified DeVaughn that his loan application had been denied. Soon thereafter, DeVaughn submitted another loan application to the Park National Bank. This application was also denied. On July 17, 1995, after his attempts to obtain financing failed, DeVaughn requested the release of his earnest money. Doherty refused. Laney [never received] payment for services rendered in connection with the survey plat.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Although Dr. Goel maintained disability coverage with the Paul Revere Insurance Company, his rapidly rising income caused him to seek additional coverage. Dr. Goel contacted a Provident [Insurance Co.] agent to discuss increasing his coverage. In a "Personal History Interview" conducted in connection with his application, Dr. Goel disclosed his Paul Revere policy and further indicated he would not terminate his existing coverage.

Provident prepared an Amendment to Dr. Goel's application [saying that the Paul Revere Policy "will be permanently canceled within 30 days of the effective date of the insurance coverage issued pursuant to this application"]. Neither Dr. Goel nor the agent recalls the Amendment or when it was signed. But Provident did receive the signed Amendment. Provident approved and printed, along with the Amendment, a disability policy for Dr. Goel that provided a monthly benefit of \$15,000. Dr. Goel retained the policy as issued and paid the monthly premiums.

[Two years later,] Dr. Goel suffered a disabling injury to his hand that prevented him from performing surgery. He sought benefits under the Provident policy. During its investigation of his claim, Provident discovered Dr. Goel had not canceled his Paul Revere coverage. [Although Provident had made several monthly payments to Dr. Goel, it refused to make more.]

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from a recent case:

In April Roger Stalnaker [orally] agreed to pay Joseph Lustik \$40,000 for standing timber, which Stalnaker would cut and remove from Lustik's 300-acre farm. Stalnaker also agreed to cut down a specified tree located near the Lustik home and move a fence, gas and fuel tank, and farm equipment at no extra cost.

On May 18, Stalnaker cut down the tree adjacent to the Lustik home and performed the remaining acts as agreed. He did not, however, cut and remove the standing timber. In July, Lustik contacted Stalnaker to inform him that he had found another party to whom he intended to sell the standing timber.

Stalnaker [believes] that he lost profits, estimated at \$45,000, that he would have made on reselling the timber. Stalnaker arrived at this figure by taking the price he agreed to pay Lustik (\$40,000) from the alleged price that Lustik sold the timber to a third party (\$85,000). Stalnaker also [feels he deserves] \$3,500, representing the cost of cutting down and removing the tree next to the Lustik home, and \$10,000, representing the value of his additional work on the Lustik property.

Lustik died on November 29. Mrs. Lustik admitted [under oath] that an oral agreement existed between her deceased husband and Stalnaker.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Lickley entered a "Potato Growing and Sales Contract" with Herbold. Lickley agreed to plant, cultivate, harvest, and deliver 12,000 cwt. of potatoes. The contract set a price of \$6.15 per cwt.

Paragraph (C)(4)(b) of the [signed] contract set minimum quality standards providing:

Any load inspecting below fifty percent (50%) well shaped U.S. NO. 1, two inch or 4 ounce minimum will be rejected under the contract.

The contract also contemplated that an inspection might not be completed until after a load had been delivered and the potatoes commingled. In such instances, paragraph (C)(4)(e) provides:

The price for any load already delivered and subsequently determined by inspection to be rejectable under this contract will have to be renegotiated between Grower and Company.

Over six days, Lickley delivered twenty-three truckloads totaling just over 12,000 cwt. of potatoes. Herbold commingled the potatoes with deliveries from other growers. Results from inspections showed that the combination of loads delivered on each of the first four days failed to meet the minimum standards.

Herbold notified Lickley that the potatoes were substandard and [offered to pay] \$3.22 per cwt. Lickley sought to renegotiate the price insisting upon \$8.00 per cwt. Herbold rejected the offer [and has not paid Lickley anything.]

At the time Lickley delivered potatoes to Herbold, he also sold potatoes from the same field on the open market and received between \$7.50 and \$8.00 per cwt.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following edited excerpt comes from a recent case:

Landmark Graphics [is] the licensor of a software program called SeisVision. Hou-Tex [sought] to develop a prospective oil field. To help choose the best site for an oil well on the land, Hou-Tex hired Saguario Seismic Surveys. Saguario conducted a geophysical survey and interpreted its seismic data with a test version of SeisVision.

SeisVision helped select a site [that] was a dry hole. The well was 1,150 feet east and 650 feet north of the site where it should have been drilled. This deviation was the result of a defect in SeisVision that miscalculated data from plots of land with irregular boundaries. Landmark had corrected the problem in an updated version of SeisVision, which it had sent to only some of its clients. Saguario had [not] been told about the bug or sent the updated version.

Saguario received SeisVision under a Nondisclosure Agreement. This agreement included the following disclaimer:

Tester understands and acknowledges that the Software is a test product and its accuracy and reliability are not guaranteed. Tester waives any and all claims it may have against the Company arising out of the performance or nonperformance of the Software.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

END OF EXAMINATION

For reference, please note that sentences and words were omitted from the preceding quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes. In one instance, a party's actual name was substituted for the word "Appellant."

For examination security reasons, the names and citations of the cases are not identified here. They will be revealed in the grading guide.

Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Professor Gregory E. Maggs

Instructions:

1. This is an open-book examination. You may use any written materials that you have brought with you.
2. The examination contains 5 problems of equal weight (i.e., 20% each). Absent special arrangements, you have a total of 3 hours and should devote about 36 minutes to each problem.
3. You must write your answers in essay form, using complete sentences and proper paragraphs.
4. Each problem presents some facts and then asks you to "identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek."
  - a. When addressing claims, be specific about the facts and the parties' roles (e.g., "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing ....").
  - b. When addressing defenses, be specific about the applicable rules and facts (e.g., "Y might defend on grounds of the statute of frauds, asserting on these facts that ....").
  - c. When addressing remedies, be specific about the type or measure of relief sought (e.g., "X might seek damages, equal to ...."). Also discuss possible reasons for limiting the remedies.
5. You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, describe the ambiguity in your answer.
6. You should assume that the current official version of each article of the Uniform Commercial Code is in force in all of the problems, regardless of the jurisdictions indicated.
7. You may keep this copy of the examination at the end of the examination period. Good luck!

**PROBLEM I.**

**(20 percent)**

The following edited excerpt comes from Jerry Duncan Ford, Inc. v. Frost, 1999 WL 1273638 (Tenn. Ct. App.):

In December, the Duncans discussed with Frost the possibility of doing major additions to the [Jerry Duncan Ford] dealership's building. Upon Frost's recommendation, an engineer drafted a floorplan detailing the plans for the anticipated work. On January 20, 1996, Frost met with the Duncans at their home and gave them a four-page document [showing estimated] costs for the construction. Every page is signed by Frost. Frost orally guaranteed that the cost of the project would not exceed \$313,200.

Frost and his crew began work at the dealership the following week. By February, the Duncans began to notice deviations from the plans. The parties had agreed that concrete would be poured on floors in several areas of the building before tile or carpet was laid. Frost, however, installed wood strips and plywood instead of concrete in these areas. As a result, these floors squeaked, moved, and swelled. The plans also called for the two restrooms to be renovated. However, the restrooms were not renovated. In the shop area, exhaust ports were to be installed 30 feet from the wall. However, the exhaust ports were only 15 feet from the wall. [The] misplacement of the exhaust ports made access difficult and time-consuming.

On the morning of June 5, Duncan "fired" Frost. At the time of Frost's termination, the work was only 50 to 60 percent complete, and Jerry Duncan Ford had already expended \$227,564. On June 15, Frost submitted a group of invoices, totaling \$76,237.81, to Jerry Duncan Ford, but Mr. Duncan refused to pay them. Among these unpaid bills was an invoice for lights installed on the exterior of the dealership in May.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM II.**

**(20 percent)**

The following edited excerpt comes from *James v. Zurich-American Insurance Co.*, 203 F.3d 250 (3d Cir. 2000):

[This case involves an insurance policy] issued by Zurich to Hess Oil covering a construction project ("FCCU Project") at the Hess Oil refinery in St. Croix. As part of the FCCU Project, Hess Oil contracted with Meridian to pave some roads. While working under Meridian's supervision, James suffered an injury that resulted in a below-the-knee amputation of his right leg. James filed [a] personal injury action against Meridian.

Meridian stipulated to a \$1 million judgment and assigned whatever rights it had against Zurich to James. [In the insurance policy issued to Hess, Zurich agreed to insure:]

Hess Oil and any companies Hess is required to insure in respect of their involvement in the FCCU Project, and/or contractors; and suppliers as required.

[Zurich argues that this provision does not provide coverage for Meridian because Hess Oil was not required to insure Meridian.] James argues that the provision provided coverage for all contractors performing work on the FCCU Project because the "as required" phrase relates only to "suppliers."

Zurich and Hess Oil representatives testified that the intent of the provision was to provide coverage only for contractors that Hess Oil had contractually promised to insure.

On the other side of the dispute as to original intent, the policy premium was calculated on the total cost of the FCCU Project (which thus included the amounts payable on all of the subcontracts, including Meridian's).

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM III.**

**(20 percent)**

The following edited excerpt comes from *Zhong Ya Chemical v. Industrial Chemical Trading*, 2001 WL 69438 (S.D.N.Y.):

Frank Denasso, ICT's owner, telephoned Zhong Ya and ordered 5000 kilograms of vitamin E powder on July 2. Zhong Ya issued an invoice for \$77,329. ICT had a trucking company take delivery of the powder at [Zhong Ya's] warehouse in California. Denasso shipped the order from California to New York to be repackaged, and delivered to the San Antonio warehouse of its client, Rodco International. Denasso had to repackage every order received from Zhong Ya because the packaging could be punctured by the slightest touch.

Denasso retrieved the 5000 kg from his client Rodco when he learned that Rodco was going to file for bankruptcy. Denasso told [Zhong Ya] his client was "going out of business" and ICT would return the 5000 kg. Zhong Ya demanded payment [of the] invoice and asked rhetorically whether it was fair for ICT to return the 5000 kg. simply because ICT had not been paid. ICT has not paid for the 5000 kg and Zhong Ya has not taken any action with respect to the vitamin E.

ICT [also] ordered 2000 kilograms of vitamin E in February, and Zhong Ya issued an invoice for \$28,000. The 2000 kilograms were repackaged on Long Island and shipped to Rodco. Rodco discovered a contaminant in the 2000 kg. and thereafter ICT provided Zhong Ya with copies of lab reports which indicate the presence of dioxin. Denasso retrieved the 2000 kg from Rodco, shipped it to a warehouse outside Chicago, a city where many potential clients for vitamin E powder are located, and attempted [without success] to sell the 2000 kg to another party as a favor to Zhong Ya.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM IV.**

**(20 percent)**

The following edited excerpt comes from *Smith v. Paoli Popcorn Co.*, 618 N.W.2d 452 (Neb. 2000):

In March, Smith and Paoli entered a contract in which Paoli agreed to purchase popcorn grown by Smith for 10 cents per pound. Smith harvested the popcorn in late September.

Tom Harmon, an agent of Paoli's, visited the grain bins to which the popcorn was delivered on the day of the harvest. Harmon noticed [a fungus called] smut attached to the kernels. It was Harmon's belief that the smut could not be cleaned off and that the popcorn would be difficult to market. Although Harmon expressed concerns with the quality of the popcorn, he did not reject the popcorn at that time.

On April 4, Harmon called Smith and rejected the popcorn. After Smith received the rejection he contacted several popcorn companies that were likely to be in the market for popcorn. If a company showed any interest at all, Smith sent them a sample of the worst part of the popcorn because "they weren't interested in seeing what the best was, they wanted to know what the worst was."

Colorado Cereal, Inc. [offered] 6 cents per pound. This offer was communicated to Paoli, which offered 6.25 cents per pound. [In] May, Smith sold the popcorn to Colorado Cereal for 6 cents per pound.

Identify and discuss and claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM V.**

**(20 percent)**

The following statement of facts comes from *Moeller v. Huntting Elevator Co.*, 1999 WL 387320 (Minn. Ct. App):

Curtis Moeller is a farmer. Huntting sells and applies herbicides and fertilizers. In the spring, Moeller met with Huntting's manager, Paul Steier, who suggested herbicides Moeller should use on his fields. Huntting's agronomist, Bob Smith, told Moeller that Accent, a herbicide, "would work if everything else failed." Moeller agreed to notify the elevator when his fields were ready to be sprayed with herbicide.

Between May 5 and May 18, Moeller planted corn. On May 20, he told the secretary at Huntting that his fields were ready for spraying. After waiting ten days, Moeller returned to Huntting and again notified the company that his fields were ready for spraying. Moeller told Smith that he was concerned about the height of the foxtail [weed], because it would be uncontrollable if not sprayed very quickly.

On June 13, Huntting's staff sprayed Moeller's field with a mixture of Accent, another herbicide, and a nonionic surfactant. Moeller paid \$5,194.20 for the herbicides and separately paid \$638 for the spraying services.

On June 24, Moeller told Steier the foxtail was not dead. All of Moeller's fields were infested with foxtail during the entire growing season. That year, he produced 69 bushels of corn per acre. Because the bank required him to sell his entire crop to repay a portion of his loan, he sold his corn in December for \$2.70 per bushel, rather than selling it the following year when the price of corn was \$5 per bushel.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

END OF EXAMINATION

For reference, please note that some words were omitted from the preceding quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes.

Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Associate Professor Gregory E. Maggs

Instructions:

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You may keep this copy of the examination at the end of the examination period.

Good luck!

**PROBLEM I.**

**(36 minutes)**

The following edited excerpt comes from Webster v. A.I.A. Insurance, Inc., 1999 WL 452207 (Neb. Ct. App.):

[In] 1992, Jack and Joan Webster entered into a written contract to sell Webster Agency, Inc. (WAI), an insurance agency, to A.I.A. Insurance, Inc., which was owned by Patrick McCarthy. The contract provided that McCarthy would make a down payment of \$5,000 and would then pay 20 percent of the gross commissions "generated by [WAI's] casualty and property insurance business" for a period of 8 years. Jack died April 3, 1995.

After Jack's death, A.I.A. ceased making payments. A.I.A. alleged that the purchase agreement between the parties was part oral and part written and contended that as part of the purchase agreement, Jack had agreed to continue managing WAI. A.I.A. further alleged that Jack had expended WAI assets for questionable personal expenses, leaving a shortfall of approximately \$20,000.

A.I.A. [also] alleged that "with the oral consent and agreement of Jack Webster [it had bought a \$25,000 insurance policy on Webster's life] to pay off the future sums due under the 1992 agreement [if Jack died]." A.I.A. further contended that pursuant to the insurance policy, a \$25,000 payment was made to Joan.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM II.**

**(36 minutes)**

The following edited excerpt comes from *Mel Frank Tool & Supply, Inc. v. Di-Chem Co.*, 580 N.W.2d 802 (1998):

In May 1994, Di-Chem began negotiating with Mel Frank Tool & Supply, Inc. to lease a storage and distribution facility. Mel Frank's real estate agent handled the negotiations so there were no actual face-to-face negotiations between the parties. However, a day before the lease was executed, Frank talked with Di-Chem representatives who were touring the premises. Frank asked them what Di-Chem was going to be selling and was told chemicals. The agent brought the lease to Frank for his signature.

Some of the chemicals Di-Chem distributes are considered hazardous. There was no testimony Frank was aware of this at the time the lease was executed.

The lease requires Di-Chem to "make no unlawful use of the premises and ... to comply with all ... City Ordinances." On July 21, 1995, the city's fire chief inspected the premises. Following the inspection, the city's fire marshal wrote Di-Chem, [requiring] the hazardous materials be removed within seven days.

On August 2 Di-Chem informed Mel Frank by letter of the city's action. The letter in part stated: "The city's position that we cannot legally store all of our inventory at this site prior to extensive alteration of the building makes the structure useless to us as a chemical warehouse." True to its word, Di-Chem vacated the premises. [Di-Chem stopped paying rent, and Frank refused to pay the real estate agent, whose fee was to have been a percentage of the rent.]

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM III.**

**(36 minutes)**

The following edited excerpt comes from *Ultralite Container v. American Pres. Lines*, 170 F.3d 784 (7th Cir. 1999):

American President Lines (APL) and Stoughton Composites formed a joint venture, *Ultralite Container*, to manufacture shipping containers. Stoughton was to design and manufacture the containers. APL undertook to purchase 2,000 refrigerated containers [at price of \$17,367 apiece]; if it failed to meet this commitment, it was to forfeit its interest in the joint venture and pay Stoughton \$600,000. APL negotiated a side agreement with Transamerica Leasing to take 1,000 of these containers.

When *Ultralite* finished its first containers in 1995, APL was not happy. It asserted that the containers were prone to separation of the foam insulation from the wall. By the time APL registered this protest, *Ultralite* had made 127 refrigerated containers. APL and Stoughton renegotiated their agreement to provide that APL would pay for 62 containers and Transamerica would take the rest; Stoughton surrendered its right to the \$600,000 fee. *Ultralite* delivered 62 containers to APL, which despite this agreement sent them back as defective and refused to pay. Transamerica paid for its 65 containers and never complained about their quality.

Rob Sjostedt, Stoughton's president, tried to sell APL's 62 containers to Transamerica, which refused to purchase more than the agreed 65 units in light of APL's unhappiness with the product. Sjostedt offered the containers for \$14,500 apiece to some potential buyers but did not close any sales. He listed the containers on Stoughton's web site but did not attract a customer. APL contends that the world market price for refrigerated containers had fallen to \$13,800 by the time Stoughton [attempted to resell]. Perhaps Sjostedt could have overcome customers' reluctance by quoting prices of \$10,000 or even \$5,000.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM IV.**

**(36 minutes)**

The following edited excerpt comes from *Savage Industries v. American Pulverizer*, 1996 WL 726889 (10th Cir.):

Charles T. Main, Inc. contracted with Savage Industries for Savage Industries to build a coal [crushing] system. The contract required [the system] to provide 200 tons per hour of coal sized less than 1/4 inch to fuel the Sunnyside Cogeneration Facility.

Thereafter, American Pulverizer manufactured and sold to Savage Industries a "double roll crusher" to process coal as part of Savage Industries' obligation under its contract with Charles T. Main, Inc. [Savage Industries paid the price.] However, the double roll crusher proved unsatisfactory when it produced a large amount of oversized material which could not be used as fuel for the Sunnyside Cogeneration Facility. In an attempt to solve the problem, Savage Industries and American Pulverizer executed a contract which required American Pulverizer to "[r]efurbish the Double Roll Crusher" to recirculate oversized material back into the system for [additional] crushing.

Three days after entering the agreement, American Pulverizer notified Savage Industries it was not financially able to perform its obligations under the contract. In order to satisfy its contractual obligation to Charles T. Main, Inc., Savage Industries searched for an economical crusher to replace the double roll crusher. Ultimately, Savage Industries purchased a vertical impact crusher which met the output requirements for the Sunnyside Facility.

[W]hile modifications were being made to accommodate the new crusher, Savage Industries rented a temporary crusher to meet the fuel requirements at the Sunnyside Facility. In order to handle the stockpile of oversized material [that had accumulated, and to reduce its liability to Charles T. Main for late performance], Savage Industries employed additional workers and operated two shifts instead of one.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM V.**

**(36 minutes)**

The following edited excerpt comes from Puritan Systems, Inc. v. M.G. Industries, 1997 WL 775681 (Ohio App.):

Puritan is in the business of recycling rubber, using large quantities of liquid nitrogen in its reclamation process. From 1987 to 1993, Puritan obtained liquid nitrogen from Air Products, Inc. In July 1993, [despite having a requirements contract with Air Products,] Puritan entered into negotiations with MGI with regard to MGI supplying Puritan's liquid nitrogen needs. Puritan alleges that on July 23, 1993, representatives of both parties entered into an oral requirements contract for a period of five years. That same day, Puritan faxed a purchase order to MGI which said, "Supply liquid nitrogen for a period of two years beginning August 1, 1993."

After the purchase order was faxed, Puritan notified Air Products. Air Products then refused to deal with Puritan.

On July 27, 1993, a representative of MGI presented Puritan with a form service agreement. The MGI representative signed as a "sales representative," while Puritan's president Ron Anderson signed for Puritan. However, the service agreement stated that it was subject to acceptance by an executive officer of MGI. This acceptance was never made, and MGI ceased to sell liquid nitrogen to Puritan after about July 30, 1993. Puritan then was forced to renegotiate with Air Products, resulting in Puritan paying a higher price for liquid nitrogen than it [previously paid Air Products or would have paid MGI].

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

END OF EXAMINATION

For reference, please note that some text was omitted from the preceding quotations without indication by ellipses. Words appearing in brackets were added to the quotations for clarification or other purposes.

The George Washington  
University Law School

April 28, 1998

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

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You may keep this copy of the examination at the end of the examination period.

Good luck!

**Problem I.**

**(36 minutes)**

The following statement of facts comes from *Tavormina v. Timmeny*, 561 So.2d 681 (Fla. Dist. Ct. App. 1990):

In 1984 Tropical Botanicals hired William F. Timmeny to serve as manager of Tropical's Costa Rican business. Effective June 1, 1986, the parties entered into a one-year employment agreement for Timmeny's services. The agreement provided, in part:

1.2 Term of Employment ... The Employer may terminate this Agreement on sixty (60) days written notice to the Employee, in which event the Employee will be entitled to be paid his normal compensation for the balance of the term of the Agreement or for twelve (12) monthly payments, whichever is longer.

. . .

2.1 Extent of Services ... If the Employee refuses without reasonable cause to provide services in accordance with the customs and practices established since November of 1984 said refusal will be deemed a material breach of this agreement and the Employer will be entitled, notwithstanding any clause contained in this contract to the contrary, to discharge the Employee upon written notice and payment of two-weeks' salary....

In February, 1987 Timmeny became seriously ill and was unable to continue his work. In May, 1987 Tropical terminated Timmeny and ceased paying him at that time. In June, 1987 Timmeny began receiving monthly disability benefits pursuant to [a] disability insurance policy [that Tropical had provided Timmeny under another paragraph of the Agreement].

[Several] preliminary drafts of the Employment Agreement had specifically mentioned "ill health," [showing] that the possibility of ill health was within the contemplation of the parties at the time the Agreement was entered into.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**Problem II.**

**(36 minutes)**

The following statement of facts comes from Flores v. Baca, 871 P.2d 962 (N.M. 1994):

Hipolito Flores died on July 9, 1989, survived by his widow, Maria Luisa Flores, and by thirteen children. In March 1989, Hipolito and Maria executed individual contracts for prospective funeral and burial services to be provided by Baca Funeral Homes. [In the contracts, Baca Funeral Homes agreed to provide the services for a fixed price, payable at the time of the funeral.] The bottom of Hipolito's "Statement of Goods and Services" reflected a handwritten notation stating: "Embalming authorized." Maria testified that [they] insisted upon embalming when she and her husband arranged their pre-need funeral contracts because of strong negative memories of her father's death and funeral. A disclaimer in the contract states: "No claims were made to me as to ... the effect that embalming ... would delay the decomposition of the remains for a long term or indefinite time ...."

After Hipolito's death, [his daughter] Rachel made all of the funeral arrangements based upon the pre-need contract. She paid the funeral costs [to Baca Funeral Homes under her father's contract]. Rachel's sisters and brothers shared equally in those costs.

Maria and the children testified that the funeral and burial services were satisfactory. Fifteen days after the funeral, Hipolito's body was exhumed for an autopsy. Some of Hipolito's sons were present at the disinterment. They saw mold on the hands and a bloody purge of fluid from the mouth, nose, and ears of the deceased and smelled the stench of decay. The autopsy revealed that the embalming ended at about the waist. Decomposition included the sloughing of skin over the entire lower part of the body. When the body was returned to the funeral home for reinterment, Maria could not view Hipolito's body again because of the overpowering smell.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**Problem III.**

**(36 minutes)**

The following statement of facts comes from M.K.C. Equipment Co. v. M.A.I.L. Code, Inc., 843 F. Supp. 679 (D. Kan. 1994):

On January 16, 1991, John Grauberger [of M.K.C. Equipment] visited the offices of M.A.I.L. and expressed an interest in becoming a dealer for M.A.I.L.'s ZBC-10000 barcoding machine. M.A.I.L. sent a dealer packet/questionnaire to Grauberger. This packet included information about the requirements to be accepted as a dealer.

Grauberger completed the dealer questionnaire [on behalf of M.K.C.] and returned it to M.A.I.L. no later than January 23. On March 19, M.K.C. purchased from M.A.I.L. a barcoding machine for \$30,250. This machine was delivered to M.K.C. in April 1991. The price paid for the machine represented the dealer purchase price which was 40% off the list price.

M.A.I.L. sent to M.K.C. a completed Dealer Agreement around June 3, 1991, but this agreement was never signed by either party. At some time between April and June, 1991, M.K.C. determined that the machine was defective. Also at some time between April and June, 1991, M.K.C. decided that it would not enter into an agreement to act as a dealer of the machine.

Nevertheless, before and after the delivery of the machine, Grauberger made statements that indicated [M.K.C.] intended to act as a dealer. These included statements that he was showing the machine to people in order to promote it. M.A.I.L. had delivered brochures and order forms to M.K.C. for its marketing efforts. After M.K.C. applied for its dealership, M.A.I.L. rejected the application of another individual who had applied for a dealership in the same area.

The dealer agreement requires the dealer to purchase at least one machine each calendar quarter during the term of the agreement. It also requires the dealer to use its best efforts to promote, sell, and service the product and also requires dealers to attend sales and service training seminars.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**Problem IV.**

**(36 minutes)**

The following statement of facts comes from *The Colonel's Inc, v. Cincinnati Milacron Marketing Co.*, 910 F. Supp. 323 (E.D. Mich. 1996):

The Colonel's is in the business of manufacturing automobile replacement parts. In July of 1993, The Colonel's executed a purchase order for two injection molding machines from Cincinnati. The machines were to be "reverse image" machines as specified by The Colonel's special order.

The price for each machine was to be \$1,290,871. Delivery of Machine I was to be in December, 1993, and delivery of Machine II was to be in February, 1994. The Colonel's made an advance payment on each machine.

On December 20, 1993, a Sale Agreement was at least partially executed for each machine. Each Agreement incorporated the terms and conditions of the purchase order. The Colonel's executed both, but Cincinnati only signed and dated the agreement for Machine I. Because Machine II was not ready to be shipped, The Colonel's had agreed that the date of shipping would be entered when Machine II was ready. On December 27, 1993, Cincinnati shipped Machine I to The Colonel's. Payment on Machine I was due to Cincinnati 30 days from installation. On January 28, 1994, before Machine II was shipped, The Colonel's rejected both Machine I and Machine II. The second Sale Agreement was never completed as had been agreed. [The Colonel's retained possession of Machine I.]

Nationwide efforts to resell Machine II were unsuccessful. The Colonel's order for a reverse image machine had been the first such machine Cincinnati had ever built. The National Sales Manager testified that the machine could not be sold, reversed as it was, at any price, unless he virtually gave it away.

Cincinnati proceeded to rebuild Machine II, to fill the previous order of an existing customer, Davidson Textron[, ] by tearing down all specifications built for The Colonel's and rebuilding to different specifications. Machine II was sold to Davidson Textron at a purchase price of \$1,398,592.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM V.**

**(36 minutes)**

The following statement of facts comes from *Hobart Machined Products, Inc. v. Saeilo Machinery Washington, Inc.*, 1997 WL 428336 (Wash. App. Div.):

In December 1990, Hobart Machined Products, Inc. agreed to buy a new computerized lathe from Saeilo Machinery Washington, Inc. for \$75,900. Hobart financed its purchase through [a loan from] Far West Commercial Finance. In mid-January 1991, Saeilo delivered a demonstrator computerized lathe that had been imported into the United States over two years earlier and had experienced significant usage." The lathe arrived dirty and rusted; its computer control was yellowed from use. Furthermore, Saeilo had drilled holes in the lathe, to accommodate a robot loading device that Hobart did not order. Four days later, Hobart's attorney told Saeilo that Hobart was dissatisfied.

After negotiation, the parties modified their agreement. Saeilo agreed to "act promptly" to deliver a new lathe "as soon as possible." It also agreed that Hobart could use the demonstrator lathe at no cost while awaiting delivery. But Saeilo secretly hoped that it could foist the demonstrator on Hobart in exchange for a price reduction. So it took no steps to meet its new promise.

In March 1991, Hobart made a payment on its obligation to Far West; it never made another payment. In late April 1991, Hobart told Saeilo that it would not accept a new lathe because [Saeilo's lathes] lacked sufficient horsepower for Hobart's needs. Nevertheless, Hobart continued to use the [demonstrator] lathe until May 1992, when Far West repossessed and sold it. [Far West is still owed a portion of the] purchase price, plus interest and financing charges.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

END OF EXAMINATION

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The George Washington  
University Law School

May 9, 1997

Final Examination In

CONTRACTS II

(Course No. 203-14; 3 credits)

Associate Professor Gregory E. Maggs

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Good luck!

**Problem I.**

**(36 minutes)**

The following statement of facts comes from Charter Oil Co. v. American Employer's Ins. Co., 69 F.3d 1160 (D.C. Cir. 1994):

In the early 1970s Charter Oil was in the business of selling petrochemical products. It arranged on several occasions for the disposal of waste oil by a St. Louis waste oil hauler, Bliss Oil, understanding that Bliss would take the oil to a waste disposal site. In fact, Bliss sprayed it as a dust suppressant at various locations throughout Missouri. The waste oil turned out to contain dioxin, a chemical compound alleged to cause harm to humans, animals, and plants. The discharge of the dioxin-contaminated oil gave rise to [liability against Charter of over \$100 million.]

[Charter has four liability insurance policies. Although each policy generally excludes coverage for pollution-related liability,] three of the forms create an exception to the exclusion--i.e., affirmatively cover--harm from pollution releases that are "sudden and accidental." The fourth form replaces the "sudden and accidental" language with a requirement that the discharge of pollutants be neither "expected" nor "intended."

Charter says that "sudden" may be interpreted to mean "unexpected and unintended." In support of its position, Charter points to dictionary definitions of "sudden" that emphasize the element of unexpectedness and downplay or ignore that of abruptness. [The insurers contend] that the word "sudden," when joined with "accidental," imposes a requirement of temporal abruptness.

Extrinsic evidence proffered by Charter concerns representations made to insurance regulators regarding the scope of the pollution exclusion. The insurers stated in various fora that because damages from pollution tended to be expected or intended [such liability was appropriately] excluded from coverage. According to Charter, this evidence demonstrates that the "sudden and accidental" language in the pollution exclusion was not interpreted or understood to impose conditions beyond the traditional "unexpected and unintended" requirement.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**Problem II.**

**(36 minutes)**

The following statement of facts comes from 7200 Scottsdale Road General Partners v. Kuhn Farm Machinery, Inc., 909 P.2d 408 (Ariz. Ct. App. 1995):

Kuhn Farm Machinery, Inc. contracted with [the] Scottsdale Plaza Resort to use the resort's facilities for a convention at which Kuhn's European personnel were to present new products to Kuhn's dealers and employees.

The agreement required the resort to reserve a block of 190 guest rooms and banquet and meeting rooms for the period from March 26, 1991, to March 30, 1991. Kuhn, in turn, guaranteed rental of the guest rooms and food and beverage revenue of at least \$8,000 from the use of the meeting and banquet rooms. [Independently-owned shops located in the plaza expected the guests to spend several thousand dollars during their stay.]

Kuhn considered the overseas personnel crucial to the presentation and success of the dealers' meeting. Of all of Kuhn's personnel, they were the most familiar with the design, manufacture, and production of the new products.

On January 16, 1991, the United States and allied forces, in Operation Desert Storm, engaged in war with Iraq. As a result, Saddam Hussein and other high-ranking Iraqi officials threatened terrorist acts against the countries that sought to prevent Iraq's takeover of Kuwait.

Kuhn discovered that, apparently because of the war, convention attendance would not meet expectations. Many of Kuhn's employees who were to attend the meeting were concerned about the safety of air travel.

On February 18, 1991, Kuhn notified all potential convention participants that the dealers' meeting had been postponed. Although Kuhn and the resort did attempt to reschedule the meeting for the following year, the rescheduling negotiations broke down. The convention was never held at the resort. [The resort has not returned a deposit paid by Kuhn.]

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**Problem III.**

**(36 minutes)**

The following statement of facts comes from *Beehive Brick Co. v. Robinson Brick Co.*, 780 P.2d 827 (Utah Ct. App. 1989):

On October 14, 1985, Beehive's sales manager, Dee Young, placed a telephone order with Robco for one million bricks on behalf of his customer, Emerson Larkin. These bricks were to be delivered over a period of twelve to fourteen months, and were to be specially manufactured because Larkin wanted a particular color and texture which Robco had previously manufactured but did not currently carry in stock.

[A Robco official] testified that a distributor would normally place an order of this size over the telephone, but the fact that a distributor called in such an order did not necessarily mean that Robco had accepted the order.

Between October 1985 and February 1986, Robco attempted to manufacture the special color of brick three times. Young asserted that Larkin accepted and used both the 50,000 brick first batch and the 150,000 brick second batch in their entirety. After the second batch, Robco explained to Beehive that it would be unable to produce the special color because manufacture required use of radioactive materials which were not available. Nevertheless, Robco tried a third time. Larkin rejected the 200,000 brick third batch because the color was "bland." However, Beehive was able to sell 26,000 bricks from that batch on consignment.

On April 15, 1986, Young asked about the million brick order. Robco [said that it] could not produce the brick, that Robco was willing to substitute other colors, and there had to be an end sometime.

On April 17, 1986, Robco sent Beehive a letter confirming that Robco was unable to produce the special color brick for Larkin, and that Larkin could substitute other colors of brick to fill the million brick order. Beehive did not attempt to fill the remainder of the million brick order with the proffered substitute bricks. [Beehive has not paid Robco and has not returned any bricks.]

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**PROBLEM IV.**

**(36 minutes)**

The following statement of facts comes from *Arkla Energy Resources v. Roye Realty, Inc.*, 9 F.3d 855 (10th Cir. 1993):

AER owns and operates natural gas pipelines; Roye produces and provides natural gas. The parties signed an agreement on February 6, 1989. The agreement required AER to pay Roye \$2,935,000 for the right to purchase gas and \$.96 per Mcf (thousand cubic feet) for 1.05 Bcf (billion cubic feet) of gas that AER could request during the contract period. At the end of the contract period AER had to pay for the entire 1.05 Bcf regardless of how much gas it had requested. The agreement also prohibited disclosure of its terms.

The agreement's two-year term began in February, 1989, but AER did not request any gas through September, 1989. Effective October 1, 1989, AER assigned its rights under the agreement to Blue Jay Gas Company. Blue Jay requested daily deliveries of gas from Roye for the month of October. In response, Roye suspended performance of the agreement on September 29, 1989, and demanded adequate assurances of performance from AER and Blue Jay. On October 10, Blue Jay notified Roye that the assignment was terminated effective November 1, 1989, and on October 26, AER sent letters assuring Roye that both AER and Blue Jay would perform. Roye never delivered any gas to Blue Jay.

AER itself first requested gas on December 15, 1989, when it sent Roye a letter requesting 3,000 Mcf a day during January and February, 1990. Roye was unable to deliver [because the pressure in AER's pipeline exceeded the pressure in Roye's pipelines during these months.] Although the agreement required Roye to deliver gas against a prevailing pipeline pressure up to 800 psi, [Roye had believed 450 psi would suffice.]

Roye then offered to deliver to AER, effective March 1, 1990, daily allotments of gas up to five times as high as [originally planned] in order to deliver the entire 1.05 Bcf of gas available to AER under the agreement. AER rejected this offer. During the remainder of the two-year term, AER requested nearly all the rest of the 1.05 Bcf of gas, but did not request again the amounts that Roye had not delivered in October, 1989, and January and February, 1990.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**Problem V.**

**(36 minutes)**

The following statement of facts comes from *Stair v. Gaylord*, 659 P.2d 178 (Kan. 1983):

Bill Stair is a strawberry grower. In June 1976, Stair purchased an irrigation system from Gaylord Enterprises. The system is composed of a travel gun connected to five hundred feet of three inch hose.

Gaylord Enterprises was a dealer for the General Irrigation Company, which was in the business of assembling irrigation systems. The hose was manufactured by Goodyear Tire & Rubber Company.

Stair used the irrigation system without incident during the 1977 strawberry season. On September 4, 1978, however, a pencil-sized hole developed in the hose. This caused a loss of water pressure resulting in a shutdown of the system. [Stair patched the hose and, with difficulty, made it through 1978 season.]

At the time the hose burst, Gaylord was no longer a dealer for General Irrigation, causing Stair to go directly to General Irrigation through the person in charge of product complaints, Mr. Diggs. [Diggs told Stair to return the hose to Goodyear.] Before sending it Stair wanted to make sure he would have it or a replacement hose by April 15, 1979, because after that date his strawberries would be needing irrigation. Mr. Diggs got in touch with Goodyear, then called Stair back and assured him there would be no problem.

Goodyear received the hose on March 14. On April 17, 1979, Goodyear wrote to Diggs advising him that an eighty per cent credit or \$1207.12 would be issued on the hose. Diggs informed Stair Goodyear would ship a replacement hose as soon as Stair paid General Irrigation \$337.88. Stair accepted the proposal. General Irrigation received his check on April 26.

Goodyear shipped the replacement hose by common carrier on May 8, 1979. It was not delivered until June 14. Stair refused to accept delivery due to lateness. In the meantime, to make sure he had water to save his strawberry plants Stair had ordered a new hose from another company during the first part of June. He received that hose June 13, 1979. Mr. Stair used the new hose the rest of the season. The 1979 crop was severely damaged.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

END OF EXAMINATION

For reference, please note that some words were omitted from the preceding quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes.

Final Examination In

CONTRACTS II

(Course No. 203-13; 3 credits)

Associate Professor Gregory E. Maggs

Instructions:

You have 3 hours to complete this examination.

The examination consists of 5 problems of equal weight. You should allocate approximately 36 minutes to each question (5 questions x 36 minutes per question = 180 minutes).

Please write your answers in test booklets or type them on separate paper.

In completing the examination, you may use the two textbooks, the supplement, the syllabus, and any notes that you have prepared substantially yourself. You may not use commercial outlines.

You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, describe the ambiguity in your answer.

You should assume that the official version of each article of the Uniform Commercial Code is in force in all of the problems, regardless of the dates or jurisdictions indicated.

You may keep this copy of the examination at the end of the examination period.

Good luck!

**Problem I.**

**(36 minutes)**

The following statement of facts comes from *Brown v. Brown*, 630 N.E.2d 763 (Ohio App. 1993):

On January 10, 1992, Eleanor and Chester filed a petition for the dissolution of their marriage. Attached to this petition was a separation agreement, which the couple had signed two days earlier.

In relation to the marital residence, the separation agreement provided that Eleanor had agreed to immediately quitclaim her interest in the property to Chester. To then "equalize" the property distribution, the agreement further provided that Chester would pay Eleanor the sum of \$80,000 "on or before January 14, 1992." In addition, the agreement specifically stated that this "exchange" of money for the marital residence "will be binding on the heirs and executors or administrators of the parties."

On January 17, 1992, Chester committed suicide. Prior to taking his life, Chester had not complied with the separation agreement, in that he had not paid Eleanor the \$80,000. However, upon being appointed, the coexecutors of Chester's estate offered to pay Eleanor the sum. When Eleanor refused to accept the offer, the coexecutors brought the instant action, seeking an order declaring that the separation agreement was still binding upon Eleanor and the estate.

. . . In this case, the provision at issue did not contain a stipulation [about the importance of the purchase date]; instead, it merely indicated that the sum was to be paid before January 14, 1992.

In responding to the coexecutors' motion for summary judgment, Eleanor submitted her own affidavit for consideration. While this document contained many conclusory statements which lacked any evidential value, Eleanor did state that in negotiating the separation agreement, she told Chester and his attorney that she had to have the funds in question by January 14.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**Problem II.**

**(36 minutes)**

The following statement of facts comes from Hansen v. Ford Motor Co., 900 P.2d 952 (N.M. 1995):

Brenda Hansen was injured in January 1990 when the car she was driving collided with a car driven by Della Irene Pease. In settlement of her claims against Pease, Hansen executed a general release in April 1991. Two years later Hansen sued Ford Motor Co., claiming that the air bag in her automobile malfunctioned during the collision, causing her injury. . . .

The release in question--a standard form which includes blanks for entering the amount of consideration paid, the names of releasees, and the date and location of the accident--provides:

For the Sole Consideration of [\$29,000] to be paid the undersigned hereby releases and forever discharges Paul M. Pease, Della Irene Pease, and American National Property and Casualty Company, their heirs, executors, administrators, agents and assigns, and all other persons, firms or corporation liable or, who might be claimed to be liable from any and all claims, demands, damages, actions, causes of action or suits on account of all injuries which have resulted or may in the future develop from an accident which occurred on or about the 31st day of January. . . . Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the express purpose of precluding forever any further or additional claims arising out of the aforesaid accident.

Hansen has conceded that she had seen releases of this type before and routinely used them as part of her job as an insurance claims adjuster for State Farm. She [explains] . . . that she in fact had intended to release only the persons specifically named in the release--Paul Pease, Della Pease, and the Peases' insurance company, American National Property and Casualty Company. Hansen proffered her deposition testimony as to her intent and also requested the court to hold an evidentiary hearing to determine the intent of the parties to the release. . . . Ford neither took part in the settlement negotiations that culminated in the execution of this release nor contributed any money to the consideration paid for the release.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**Problem III.**

**(36 minutes)**

The following statement of facts comes from *Daughtrey v. Ashe*, 413 S.E.2d 336 (Va. 1992):

In October 1985, W. Hayes Daughtrey consulted Sidney Ashe (Ashe), a jeweler, about the purchase of a diamond bracelet as a Christmas gift for his wife, Fenton C. Daughtrey. Ashe exhibited, and offered to sell, a diamond bracelet to Daughtrey for \$15,000. Although Ashe "knew" and "classified" the bracelet diamonds as v.v.s. grade (v.v.s. is one of the highest ratings in a quality classification system employed by gemologists and jewelers), he merely described the diamonds as "nice" in his conversation with Daughtrey. Ashe told Daughtrey that if he was later dissatisfied with the bracelet, he would refund the purchase price upon its return. When Daughtrey later telephoned Ashe and told him he would buy the bracelet, Ashe had Adele Ashe, his business associate, complete an appraisal form which he signed. The form contained the following pertinent language:

. . . platinum diamond bracelet, set with 28 brilliant full ct diamonds weighing a total of 10 carats. H color and v.v.s. quality.

When Daughtrey came with his daughter to close the sale, he showed the bracelet to his daughter and then paid Ashe for it. As Ashe was counting the money, Daughtrey handed the bracelet to Adele Ashe, who put it in a box together with the appraisal and delivered the box to Daughtrey. Daughtrey later gave the bracelet to his wife as a Christmas present. In February 1989, Daughtrey discovered that the diamonds were not of v.v.s. quality when another jeweler looked at the bracelet. Shortly thereafter, Daughtrey complained to Ashe, who refused to replace the bracelet with one mounted with diamonds of v.v.s. quality but offered to refund the purchase price upon return of the bracelet. Because the value of diamonds generally had increased in the meantime, Daughtrey declined Ashe's offer.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

(Hint: Consult the official comments for guidance.)

**Problem IV.**

**(36 minutes)**

The following statement of facts comes from Lambert v. Kysar, 983 F.2d 1110 (1st Cir. 1993):

Lambert owns and operates the Rainbow Fruit Company in Boston, Massachusetts, which sells Christmas trees and wreaths at retail during the holiday season. Sam and Joan Kysar operate a Christmas tree farm in Woodland, Washington. . . .

In July 1989, the Kysars visited Boston to discuss Lambert's needs for the upcoming Christmas season. On their return to Washington, they sent Lambert an order form, filled out and signed by Joan Kysar. The numbers handwritten on the form by Joan Kysar provided for an order of 2600 Christmas trees at \$11.60 apiece. At the bottom of the form, in the space marked "other," Kysar wrote that the order was "[b]ased on 4 loads of 650 trees each. All trucks will be loaded to capacity. 25% deposit . . . balance due on or before 12/10/89."

Lambert received the order form in late July, but apparently thought that it overstated the quantity of trees needed for the next season. Writing on the same order form submitted by the Kysars, he changed the notation "4 loads of 650 trees each," to read "3 loads of 550 trees," and changed the total number ordered from "2600" to "1650." Lambert also recomputed the total amount due and the amount of the required 25% deposit. He inserted the new figures over Joan Kysar's handwritten figures at the bottom of the form, and returned the form to the Kysars. He made no change to the \$11.60 unit price or to any other contract provision.

. . . Following delivery of [1650] trees on November 25, 29, and December 1, Lambert's inspection allegedly revealed that the trees "were dry, not fresh, and appeared old." [The Kysars believe that the trees were not defective when delivered but that Lambert damaged them by storing them outside in extremely cold weather.]

Assume that it is now December 1, 1989, and that the contract requires delivery by December 10, 1989. Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

**Problem V.**

**(36 minutes)**

The following statement of facts comes from Dixon v. Roberts, 853 P.2d 235 (Okla. Ct. App. 1993):

Ken Roberts contracted with Steve Gross and Benny Dixon for the purchase and sale of adult ostriches and ostrich chicks. Part of their agreement was apparently oral, and part was the subject of a written contract dated October 31, 1987. The written contract recited that Roberts was purchasing four adult ostriches from Gross and Dixon; and, as a part of the total purchase price, Roberts gave Gross and Dixon an option to purchase 20 ostrich chicks in 1988 for \$750 each, and 20 more ostrich chicks in 1989 for the then "going market price." The adult ostrich part of the agreements was fully executed with the birds being delivered to Roberts, and the cash portion of the purchase price being paid. If and when the option or options were exercised, the chicks were to be delivered in pairs of one male and one female. . . .

Roberts was in the business of breeding and raising ostriches for profit, and had some expertise in that area. Gross and Dixon had little, if any, experience or expertise in the ostrich business. They were amateurs or entrepreneurs who desired to become involved in this relatively new, and hopefully profitable field. . . . [T]he purchase and sale to Roberts of the 4 adult ostriches was the only previous ostrich transaction or activity of Gross or Dixon.

Gross and Dixon attempted to exercise their option to buy chicks at \$750.00 each in 1988, but Roberts did not deliver the chicks. This caused the parties to have conversations and negotiations with reference to performance of the agreement. In November, 1988, Gross sent a letter to Roberts. The letter was as follows:

"Re: Ostrich Agreement Dated October 31, 1987. . . . The following is what I understand the status of the agreement to be, as a result of [our] phone conversations. You intend to honor the agreement and fulfill your obligations covered in the agreement, with the 89' hatch. Our order will be one of the first orders you fill out of the 89' hatch, if not the first order filled. The only change in the agreement is that the 88' chick order will be filled out of the 89' hatch, with all other terms of the agreement remaining the same. If the points covered above do not represent the present status of the agreement, let me know

as soon as possible."

It was undisputed that Roberts received the letter, and that he did not respond or contact Gross and Dixon as to its terms.

In the Spring of 1989, Gross and Dixon attempted to secure delivery of 10 pair of chicks, at \$1,500.00 per pair, to fulfill the 1988 order. Roberts had the chicks but he declined to sell at the rate of \$1,500 per pair. He contended this 10 pair would be "1989" chicks and demanded the current market price.

. . . The parties stipulated in the pre-trial conference order that the market price for 8 week old ostrich chicks was \$5,000 per pair in November, 1988, and \$6,000 per pair in 1989.

Identify and discuss any claims and defenses that the parties might assert, and any remedies that they might seek.

END OF EXAMINATION

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N.B.: In a few of the quotations above, the parties' names were substituted for identifiers such as "plaintiff" or "defendant."

Final Examination In

CONTRACTS II

(Course No. 204-11; 3 credits)

Associate Professor Gregory E. Maggs

Instructions:

You have 3 hours to complete this examination.

The examination consists of 6 problems worth a total of 180 points. You should budget your time according to the points assigned to each problem (1 point = 1 minute).

As you will see, some of the problems include several specific questions. Points will be allocated among the questions within a problem according to their difficulty.

Please write your answers in test booklets or type them on separate paper.

In completing the examination, you may use the two textbooks, the supplement, the syllabus, and any notes that you have prepared substantially yourself. You may not use commercial outlines.

You should make reasonable assumptions about any facts not stated in the problems. If you find the problems ambiguous in any sense, describe the ambiguity in your answer.

You should assume that the official version of each article of the Uniform Commercial Code is in force in all of the problems, regardless of the dates or jurisdictions indicated.

You may keep this copy of the examination at the end of the examination period.

Good luck!

**PROBLEM I.**

**(30 points)**

The following statement of facts comes from *Slodov v. Animal Protective League*, 628 N.E.2d 117 (Ohio App. 1993):

On March 18, 1991, appellant [Hannah Slodov] adopted a four-month-old puppy from the APL for a fee of \$45. Appellant signed an adoption agreement which stipulated that the APL would treat the dog at no cost to appellant for two weeks after the adoption. According to the agreement, the APL would not be held responsible for any treatment of the dog outside the APL clinic.

[The court noted: "The record shows that the \$45 paid by appellant was simply a fee for the adoption of the dog, which covered spaying or neutering the dog, initial shots, collar, starter kit, and two weeks of veterinary care."]

One day after the adoption, the dog became ill and was taken to an independent veterinarian for medical services.

On March 31, 1991, two weeks after the adoption, the dog became ill again. Appellant contacted the APL, which informed her that it would treat the dog according to the agreement if she could bring it the next day to its clinic. Appellant instead took the dog to an independent veterinarian. She then requested that the APL pay the veterinary bills, including advertising costs of placing the dog for adoption, because her landlord would not allow dogs in the apartment. The APL refused. [Slodov sued the APL under U.C.C. 2-314.]

Evaluate Slodov's claim and any arguments that the APL might raise in its defense.

**PROBLEM II.**

**(30 points)**

The following statement of facts comes from Scholz v. Montgomery Ward & Co., 468 N.W.2d 845 (Mich. 1991):

Plaintiff [Jane Scholz] was hired by defendant [Montgomery Ward] as a sales person on August 31, 1970. . . . In 1982, defendant issued a policy manual. On the face of the manual, there was a sheet entitled "new employees sign-off sheet," which plaintiff signed on May 10, 1982. That sheet contained, inter alia, the following paragraph:

". . . I agree to employment with Montgomery Ward under the conditions explained [in this manual]. I understand these conditions can be changed by the Company, without notice, at any time. I also understand and agree that my employment is for no definite period and may, regardless of the time and manner of payment of my wages and salary, be terminated at any time, with or without cause, and without any previous notice."

In 1983, plaintiff was informed that if she refused to work on Sundays, she would be terminated. She responded by letter that it was her understanding at the time of hiring that she would not be required to work on Sundays. She was scheduled for work on Sundays, she refused to work on Sundays, and she was terminated. [Plaintiff sued for breach of contract.]

Answer the following questions and briefly explain your answers:

- A. Before signing the policy manual, Mrs. Scholz told her manager she would not work on Sundays. The manager said "there would be no difficulty honoring" her preference. How, if at all, do these facts help Mrs. Scholz?
- B. Mrs. Scholz argued that, after she signed the manual, "the defendant acquiesced in her refusal to work [on] Sundays" for over a year. Does this argument help her?
- C. Suppose that Mrs. Scholz had thought that the term permitting termination "with or without cause" was included only to make clear that the store could lay off employees for economic reasons. Would this fact make a difference?
- D. Mrs. Scholz argued that her refusal to work on Sundays was not material, whatever the contract meant, because "the controversy concerned no more than 40 hours a year." How should the court evaluate this argument?

**PROBLEM III.**

**(30 points)**

The following statement of facts comes from M.J. Oldenstedt Plumbing Co. v. K Mart Corp., 629 N.E.2d 214 (1994):

During the summer of 1991, K-Mart Corporation built a new K-Mart store in Bollingbrook, Illinois. Defendant [Leopardo Construction Co.] acted as the general contractor during construction, and plaintiff [M.J. Oldenstedt Plumbing Co.] was a subcontractor of defendant. In March, 1991, plaintiff received certain drawings describing the site utilities (the water main, storm sewer and sanitary sewer) and interior plumbing. Plaintiff agreed to install the site utilities and interior plumbing for \$709,500. . . .

[Plaintiff failed to complete the work by July 18th as required by the contract. On July 29th, defendant] delivered a termination letter to plaintiff. The letter stated that plaintiff had breached the contract and that the contract was therefore cancelled.

Following the termination of the contract, defendant hired Elmwood Sewer & Water to complete the site utility work and Cecchin Plumbing & Heating to complete the interior plumbing. Defendant presented evidence that these two companies had to do substantial remedial work to correct deficient work performed by plaintiff, as well as complete the project. . . . [D]efendant paid Elmwood \$350,000 for labor and materials. Defendant paid Cecchin approximately \$86,500. . . . The reasonable value of the work and services performed by the plaintiff is \$471,571, of which it has been paid the sum of \$10,000.

Answer the following questions and briefly explain your answers:

- A. Assume plaintiff and defendant made an enforceable contract. What, if anything, may plaintiff recover?
- B. How, if at all, would the following facts (which plaintiff attempted to prove) have helped plaintiff's case?
  - 1. Plaintiff could have completed all of the work in just four more days by adding two work crews.
  - 2. K Mart slowed down the work by forcing plaintiff to wait until it made a decision about pipe size.
- C. Did the contract in this case have to be in writing?

**PROBLEM IV.**

**(30 points)**

The following statement of facts comes from *Kvassay v. Murray*,  
808 P.2d 896 (Kan. App. 1991):

On February 22, 1984, Kvassay, who had been an independent insurance adjuster, contracted to sell 24,000 cases of baklava to Great American [a restaurant chain] at \$19.00 per case. Under the contract, the sales were to occur over a one-year period and Great American was to be Kvassay's only customer. The contract included a clause which provided: "If Buyer refuses to accept or repudiates delivery of the goods sold to him, under this Agreement, Seller shall be entitled to damages, at the rate of \$5.00 per case, for each case remaining to be delivered under this Contract." . . . After producing approximately 3,000 cases, Kvassay stopped producing the baklava because [Great American] refused to purchase any more of the product. . . .

. . . [B]efore the contract was signed between Kvassay and Great American, Kvassay's accountant had calculated the baklava production costs. The resulting figure showed that, if each case sold for \$19, Kvassay would earn a net profit of \$3.55 per case after paying himself for time and labor. If he did not pay himself, the projected profit was \$4.29 per case. [Before quitting his job as an insurance adjuster and starting his new business, Kvassay earned 20,000 a year.]

Answer the following questions and briefly explain your answers:

- A. Assume the contract did not contain a liquidated damages clause. On this evidence, how much could Kvassay recover under the various damage measurements available to sellers?
- B. How much, if anything, may Kvassay collect under the liquidated damages clause?

[Note: The trial court found the disparity between Kvassay's previous income and the liquidated damages "so great as to make the clause unenforceable."]

- C. Would Kvassay's recovery differ if he had sold 21,000 cases to someone else at \$19 per case after the breach?

**PROBLEM V.**

**(30 points)**

The following statement of facts comes from Valley Timber Sales, Inc. v. Midway Forest Products, Inc., 563 So.2d 612 (Ala. Civ. App. 1990):

[Midway agreed to sell fourteen carloads of timber to Valley. The contract required Midway to ship one carload (or "order") every two weeks for seven months.] After payment on the first two shipments was not received within Midway's terms of payment, Midway contacted Valley to inquire about the delay. . . . Valley's vice president and general manager [replied]: "We ask the vendor for a little extra time because we are a small business and occasionally run into these type of problems." In response, Midway diverted and sold, at a higher price, the next three timber orders to a third party. Valley was informed of the diverted orders.

Subsequently, Midway resumed shipping orders to Valley. Valley held back payment on one shipment until the next shipment was received in Virginia [its place of business] to insure that the next shipment would be forthcoming. . . .

After ten shipments were made, Valley sent a letter to Midway and demanded four additional orders at the same price as that in the parties' agreement. . . . Those orders were never filled by Midway. Valley, after further inquiry of Midway, purchased from another source at a higher price per thousand feet. Valley withheld \$5,806.08 from its last payment to Midway, representing Valley's additional cost of procuring this "cover." [Midway then sued Valley for \$5,806.08.]

Answer the following questions and briefly explain your answers:

- A. What rights did Midway have when Valley failed to pay on time for the first two shipments?
- B. Did Valley have a right to hold back any payments after Midway resumed shipping?
- C. Did Midway have a duty to ship any of the last four carloads ordered by Valley?
- D. Midway did not make the last four shipments in part because no rail transportation was available and Valley refused to accept shipment by truck. Was Valley's refusal permissible?

**PROBLEM VI.**

**(30 points)**

The following statement of facts comes from *Big Farmer, Inc. v. Agridata Resources, Inc.*, 581 N.E.2d 783 (Ill. App. 1991):

[Agridata needed a mailing list of farmers to use in soliciting new subscribers to its magazine *Farm Futures*. *Big Farmer* had such a list. Richard Olmstead of Agridata thus approached Ralph Dralle of *Big Farmer*.] Olmstead indicated that his company might be interested in making a deal with *Big Farmer* and advised Dralle to contact Chris Krajcir, a circulation manager for Agridata.

Dralle then sent Krajcir a letter outlining his discussion with Olmstead. According to the letter, Dralle reflected the price would be "\$.50 per name added," and he enclosed [a] rate card he had previously given Olmstead. The rate card reflected the price would be "\$.50 per net name added." . . . The parties agree, "per net name added" is a term of art which means the total number of names provided to a publication. "Per name added" means the number of names added to the magazine's circulation list. Krajcir testified she discussed the term "per name added" when talking with Dralle by phone in April of 1987. Dralle asserts the agreement between the parties contemplated the payment of \$.50 "per net name."

In July of 1987, Dralle forwarded 61,807 names to the attention of Krajcir at Agridata along with an invoice showing a balance due of \$30,916. The invoice calculated the amount due based upon a "per net name" basis. Krajcir testified that the day after she received the invoice she called Dralle and said "Ralph, I just got an invoice for \$30,000 dollars, what the heck is this for." According to Krajcir, Dralle responded "Don't worry, they have probably billed you for the whole amount." Krajcir never sent *Big Farmer* a written protest in response to the invoice. Agridata used the 61,807 names [in a solicitation] and sent *Big Farmer* a check for \$3,589.50. [The check was for the names of 7,179 farmers who responded to the solicitation.] *Big Farmer* returned the check to Agridata.

[*Big Farmer* sued for breach of contract, seeking \$30,916.] At trial, . . . a competitor of *Big Farmer* . . . testified that if he would have supplied the names to Agridata, the contract price would have been \$17,320.

Discuss the issues presented by the breach of contract claim.