

GRADING GUIDES FOR PAST EXAMINATIONS IN CONTRACTS I

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Last updated: June 7, 2021

CONTENT:

This document contains grading guides for Contracts I exams given by me on the following dates:

Dec. 5, 2018	Dec. 5, 2008
Dec. 6, 2017	Dec. 7, 2007
Dec. 9, 2016	Dec. 6, 2006
Dec. 8, 2015	Dec. 16, 2004
Dec. 10, 2013	Dec. 11, 2003
Oct. 21, 2013 (midterm)	Dec. 10, 2002
Dec. 5, 2012	Dec. 18, 2001
Oct. 16, 2012 (midterm)	Dec. 7, 2000
Dec. 7, 2011	Dec. 19, 1999
Oct. 18, 2011 (midterm)	Dec. 17, 1997
Dec. 8, 2010	Dec. 10, 1996
Dec. 17, 2009	Dec. 19, 1995

VERY IMPORTANT NOTES:

(1) I did not teach Contracts I in 2014, 2005, or 1998. No grading guides are available for exams given before 1995. I gave a midterm examination in 2013, 2012, and 2011 but in no other years.

(2) Each of the problems on the final exams presented a fact pattern based on an actual case and asked for identification and discussion of the claims and defenses that the parties might assert, and the remedies that they might seek. In grading answers, I awarded points based on how well the answers identified and discussed the claims, defenses, and remedies.

(3) The grading guides for the final exams are merely checklists that I used in grading answers. **THESE CHECKLISTS ARE NOT MODEL ANSWERS!** They are not model answers because the instructions require all answers to be written in essay form, using complete sentences and proper paragraphs. **THEREFORE, WHEN YOU TAKE THE EXAMINATION, DO NOT ATTEMPT TO REPLICATE THE FORMAT OF THESE CHECKLISTS.** Instead, write your answers in essay form!

(4) The grading guides are not meant to be definitive solutions. Everyone sees things in a slightly different way. I attempt to be as flexible and generous as possible when grading. I usually find ways of awarding points when answers discuss issues not specifically listed on the grading guide or when they characterize issues differently from the grading guide.

(5) When you take your examination, read the instructions very carefully because the instructions may change from year to year.

Grading Guide for the Final Examination in

CONTRACTS I

(Course No. 6202-20)

Professional Lecturer Gregory E. Maggs

This document contains the grading guide that I used in scoring your examinations. Each of the five problems was worth 34 points, for a total of 170 points. I awarded points for each problem based on how well you wrote essays identifying and discussing the claims and defenses that the parties might assert and the remedies that they might seek. I then translated the total scores into letter grades in accordance with the Law School's mandatory grading guidelines for first-year classes. As a whole, the class did very well.

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

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

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

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

The problems on this examination were inspired by these cases: I. Kunde v. Bowman, 2018 WL 5730146 (Ia.); II. Foros Advisors v. Digital Globe, 2018 WL 4521200 (S.D.N.Y.); III. North American Brokers v. Howell Public Schools, 502 Mich. 882 (Mich. 2018); IV. Purry v. State Farm Fire and Casualty Co., 2018 WL

PROBLEM I.

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

ALVIN v. BARBARA'S ESTATE

Claim:

1. Breach of contract. Alvin might sue Barbara's estate for breach of contract, claiming that the estate broke a promise to sell him the farmland for \$300,000.

Defenses:

2. No offer. The "suspicious" executor may assert as a defense that there is insufficient proof that Barbara ever offered to sell the property. The executor will point to the lack of written evidence of the offer and note that Barbara cannot confirm the existence of the offer because she is dead. Cf. Dyer v. Nat'l By-Products, Inc. (example of a case in which one defense was denying a promise had been made).
3. Termination of the offer. The executor may assert as a defense that any offer that Barbara might have made terminated when Barbara died before Alvin accepted it. Rest. § 48. The executor will argue that Alvin could not have accepted the offer before Barbara died because the offer contemplated that he would buy the land from her estate. Cf. Earle v. Angell.

Alvin may reply that the offer did not terminate at Barbara's death because it was kept open by an implied option contract. Rest. §§ 37, 48 cmt. d. Alvin will assert that Barbara implicitly promised that the offer would stay open after her death because otherwise the offer would make no sense. Cf. Drennen v. Star Paving. He further will assert that this implicit promise is enforceable under a theory of promissory estoppel because he relied on the implied promise by improving the drainage. Cf. Dickinson v. Dodds.

4. Statute of frauds (land provision). The executor might assert as a defense that the statute of frauds prevents enforcement of the alleged promise to sell the farm because it is a promise to sell land and it is not evidenced by a writing signed by Barbara. Rest. 125(1).

Alvin might reply that the "part performance" exception should apply because he was in possession of the property and made improvements. Rest. § 129; Beaver v. Brumlow. But the executor will respond that the possession and improvements occurred before Alvin attempted to accept the alleged offer. The executor also will assert that Alvin has not paid any of the purchase price.

Alvin also might reply that he can overcome the statute of frauds under a theory of reliance because he made improvements thinking he could buy the property. Rest. § 139; Monarco v. Lo Greco. But the executor will respond that Alvin made the improvements before he purported to accept the alleged offer.

Remedy:

5. Expectation Damages/Specific Performance. Alvin might seek specific performance, requiring the executor to convey the property upon Alvin's payment of \$300,000. The executor may respond that specific performance is not available because the bargain is unfair given the low price compared to the assessed value. Rest. § 364(1)(c); McKinnon v. Benedict. But Alvin might reply that the price was fair when the contract was made. Tuckwiller v. Tuckwiller.

Alternatively, Alvin might seek expectation damages equal to his loss in value (the market value of the property) plus other loss (lost profits from not being able to plant crops) minus his costs avoided (the \$300,000 price that he did not pay) minus his other loss avoided (unspecified). Rest. § 347. Turning the executor's words against her, Alvin will argue that the market value of the property is at least \$1 million (i.e., twice \$500,000). The executor may respond that Alvin could have avoided some of the lost profit by planting elsewhere. Rest. § 350.

ALVIN v. BARBARA'S ESTATE

Claim & Remedy:

6. Restitution. If Alvin cannot recover for breach of contract, Alvin might sue Barbara's estate under a theory of restitution, claiming that the estate has been unjustly enriched at his expense by his improvements to the drainage of the farmland. Rest. of Restitution § 1; Cotnam v. Wisdom. He would seek restitution damages equal to the reasonable value of the improvements. Id. § 155(1). Alvin will assert that he was not a volunteer because he did not intend to give the improvements to Barbara, id. § 57; that he is not an officious intermeddler because he made the improvements for his own benefits while he was leasing the property, id. § 2; and he does not have other remedies if he cannot enforce the contract, Callano v. Oak Wood Park Homes.

COSME v. BARBARA'S ESTATE

Claim:

7. Breach of contract. Cosme might sue Barbara's estate for breach of contract, claiming that Barbara agreed to sell the property to him for its appraised value, which turned out to be \$500,000, and the estate refused to sell the farm.

Defenses:

8. No acceptance. The estate might assert as a defense that the executor did not accept Cosme's offer to buy the land. A careful examination of the communications between Cosme and the executor reveals that Cosme offered to buy the property for the appraised price and asked the executor to contact him and tell him the appraised price. The executor merely promised to contact Cosme; she did not explicitly communicate that she was accepting his offer. Rest. § 59; cf. Harvey v. Facey. Cosme, however, may argue that her acceptance was implied. If she did not want to accept, she would have made that clearer.
9. Mutual mistake. The estate appears to be asserting as a defense that even if a bargain was formed, the executor's promise would be voidable because it was induced by a mutual mistake about Dalila's appraisal skills. Rest. § 152; Sherwood v. Walker. But Cosme will respond that there was no mistake of fact; the problem is that the executor simply made a poor prediction about her skills or about the value of the property. Cf. Wood v. Boynton.

10. Unconscionability. The estate appears to be asserting as a defense that selling the land for \$500,000 would be unconscionable (i.e., it would "bother her conscience"). Rest. § 208. But Cosme will respond that selling land for its appraised price is neither procedurally nor substantively oppressive. [Note: The executor also might raise unconscionability as a defense in the lawsuit by Alvin against the estate in which Alvin alleges Barbara agreed to an even lower price.]
11. Statute of frauds/certainty of essential terms. The estate might assert the statute of frauds applicable to the sale of land as a defense. Rest. § 125(1). The executor will argue the email exchange between Cosme and the executor does not satisfy the requisites of writing because it does not specify the exact price. Id. § 131(c). But Cosme will respond that only reasonable certainty about the essential terms is required and that this requirement was met by saying he would paid the price appraised by Dalila. Cf. Toys Inc. v. F.M. Burlington (finding the "prevailing rate" to be sufficiently certain). The estate also might question whether the executor "signed" the email that she sent; more facts are necessary to assess this argument.

Remedy:

12. Expectation Damages/Specific Performance. Cosme will seek specific performance or expectation damages in a manner similar to Alvin (see above).

OTHER

13. Other

NOTES:

Some answers suggested that Alvin and Barbara formed a bargain for the sale of the property before she died. But the facts say that Barbara assured Alvin that he could buy the property from the estate. Alvin could not form a contract with the estate before Barbara died.

Some answers suggested that Alvin and Cosme cannot prove their lost profit from the land with reasonable certainty. But 30 years of farming experience probably provides evidence of the likely profits.

Some answers suggested that Barbara might sue Dalila for breach of contract, claiming that Dalila broke her promise to appraise the property competently. More facts would be necessary to determine the validity of such a claim.

PROBLEM II.

[Maximum points: Item #1=3; #2=5; #3=2; #4=2; #5=2; #6=2; #7=2; #8=2; #9=1; #10=3; #11=2; #12=2; #13=2; #14=n/a]

FLOSSIE v. ERICK

Claim:

1. Breach of contract. Flossie might sue Erick for breach of contract, claiming that Erick promised to pay her a bonus of \$5000 if certain investment goals were met, and did not pay her even though the goals were met.

Defenses:

2. No Consideration. Erick might assert as a defense that his new promise to pay an additional \$5000 lacks consideration because Flossie and he had already agreed that Flossie's compensation was to be \$2000 for each meeting. Rest. § 73; Alaska Packers v. Domenico.

Flossie might reply that the new consideration for Erick's promise to pay her \$5000 is her performance of meeting certain investment goals which did not exist before. Alternatively, Flossie may argue that the original contract was canceled and a new one was formed in which Erick would continue to make the original \$2000 payments and also make a \$5000 payment if certain investment goals were made. Cf. Schwartzreich v. Bauman-Basch.

Flossie also might reply that the new consideration for Erick's promise to pay \$5000 is her promise not to sue him for restitution. Erick will reply that this promise cannot be consideration because Flossie's claim was not only invalid but also so "ridiculous" that she could not have had a reasonable and good faith belief in its possible validity. (Note: Some states require only a good faith belief. See Rest. § 74(1); Dyer v. Nat'l By-Products, Inc.) He will explain that the restitution claim is invalid because he cannot have been unjustly enriched by receiving benefits for which he paid the agreed contract price.

Flossie also might reply that Erick's promise is enforceable on the basis of promissory estoppel because she relied on it by continuing to work for him after he made the promise to pay her \$5000 if certain investment goals were met even though she could have terminated the arrangement at any time. Rest. § 90.

Flossie also appears to be arguing that Erick's promise is enforceable on the basis of moral obligation because she accused him of acting "immorally" in breaking the promise. But moral obligation is not a general basis for enforcing promises. See Mills v. Wyman. And this case does not involve any of the few special cases in which moral obligation is recognized as a basis for enforcement. See Rest. §§ 82, 83, 85, 86.

Flossie also might argue that, even if there is no actual bargain, her continuing to work for him under their at-will relationship is consideration under the unorthodox theory adopted in Lake Land Employment v. Columber.

3. No assent. Erick has asserted as a defense that he did not assent to be bound by the promise. But Flossie will respond that both she and a reasonable person would think that he did assent, especially given his handshake. Rest. § 21; Lucy v. Zehmer.
4. Nondisclosure/confidential relations. Erick might assert as a defense that his promise is voidable because Flossie did not disclose that she charges other clients only \$1500 per meeting. He will argue that Flossie had a duty to disclose this fact because of the long standing relation of trust between him, his parents, and Flossie. Rest. § 161(d). Flossie will assert that she and Erick dealt at arms length and that she therefore had no duty to disclose any facts. Swinton v. Whitinsville Savings Bank. [Note: If successful with this argument, Erick could also seek to rescind the contract to pay \$20000 per meeting and get his money back, although she could recover from him in restitution if the contract is voided.]
5. Statute of frauds. Erick might assert the statute of frauds as a defense. He will argue that his promise to pay "a \$5000 bonus after a year" (a) could not possibly have been completed in exactly one year or

less, and (b) was not evidenced by a writing signed by him. Rest. § 130(1). But Flossie will respond that the one-year provision does not prevent enforcement of Erick's promise because she has now completed her performance. Rest. § 130(1). Also, it is imaginable that she could have met the investment goals in less than a year. C.R. Klewin v. Flagship Properties.

6. Duress. Erick might assert as a defense that his promise is voidable on the basis of duress because it was induced by an improper threat, namely, a threat to bring a frivolous restitution lawsuit against him in bad faith. Rest. §§ 175; 176(1)(c). But Flossie will reply that she acted in good faith and that Erick had other reasonable alternatives besides making the promise. For example, he could have told her he would not pay more, and found a different investment adviser.
7. Undue Influence/Overreaching. In asserting that Flossie tried to "take unfair advantage of him," Erick might be arguing that his promise is voidable because it was induced by undue influence or overreaching. Rest. § 177, Odorizzi v. Bloomfield School Dist.; or duress, § 175. But Flossie will assert that she was not in a position of domination and the other factors indicating undue influence were also not present.

Remedy:

8. Expectation Damages. Flossie will seek expectation damages equal to her loss in value (\$5000) plus other loss (likely none even though she could not pay Gil) minus any costs and other loss avoided (none). Erick will assert that the damages that she has to pay Gil were unforeseeable because they arose from special circumstances of which he was unaware. Rest. § 351; Hadley v. Baxendale. He will further assert that they were mostly avoidable if, for example, she could have borrowed the money to pay Gil. Rest. § 350; Rockingham Co. v. Luton Bridge.

FLOSSIE v. ERICK

Claim & Remedy:

9. Restitution. As she has threatened, Flossie might sue Erick for restitution, claiming that he was unjustly enriched at her expense because her advice was worth far more than the \$2000 per meeting that Erick paid her. Rest. of Restitution § 1; cf. Cotnam v. Wisdom. Erick will respond that he was not unjustly enriched because he paid her what they agreed.

GIL v. FLOSSIE

Claim:

10. Breach of contract. Gil might sue Flossie for breach of contract, claiming that she promised to pay him for the renovation and did not pay him.

Defenses:

11. Satisfaction clause. Flossie will assert as a defense that the satisfaction clause excuses her because she said she was not satisfied. But Gil will respond that their contract contains an implied duty to act in good faith in its performance. Rest. § 205; Mattei v. Hopper. He will assert that Flossie is not acting in good faith because she is not being honest when she says that she is not satisfied.

12. Public policy. Flossie will argue that it would violate public policy to enforce a promise to pay for construction that was undertaken without a required building permit. Rest. § 178. (Indeed, the city might require the work to be undone.)

Remedy:

13. Liquidated Damages. Gil will seek the contract price plus liquidated damages of \$1000. Flossie will argue that the purported liquidated damages are not recoverable because they are actually a penalty. Rest. § 356(1). They are unreasonably large in comparison to the actual or anticipated damages because they are not graduated according to the length of delay. Dave Gustafson v. State.

OTHER

14. Other

NOTES:

Some answers suggested Erick could raise the defense of uncertainty because of concerns about what the "investment goals" were. But the Problem says the the goals were "certain," and the parties agreed that they were met; they just were not specified in the problem.

PROBLEM III.

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

IVO v. HENRIETTE

Claim:

1. Breach of contract. Ivo might sue Henriette for breach of contract, claiming that Henriette promised to pay him a fee of 6% of the sales price of her home if the home was sold during the rental period, and did not pay him even though her home was sold.

Defenses:

2. Misrepresentation. Henriette might assert as a defense that her promise is voidable because Ivo made a material misrepresentation when he told her that she would not get a good price if she tried to sell the property without professional help. Rest. § 162(1). She will assert that the statement is not in accord with the facts because she got a good price in a sale that Ivo did nothing to facilitate. Ivo will respond that what he said was an opinion or a prediction, not a misstatement of fact. Id. § 159.
3. Statute of Frauds. Henriette might assert as a defense that a statute of frauds in her state makes her promise unenforceable because it is a promise to pay a commission for the sale of real estate. Cf. Farnsworth et al. at 273. Ivo might reply that he can enforce the promise notwithstanding the statute of frauds because he relied on the promise by spending several weeks showing the home to potential buyers. Rest. § 139; Monarco v. Lo Greco. But only some jurisdictions recognize reliance as an exception to the statute of frauds.
4. Uncertainty/Indefiniteness. Henriette might assert as a defense that a key term, the "period of the contract," was not defined and that the

contract was therefore too uncertain to enforce. She will argue that determining whether a breach occurred is not possible because whether the sale to Juliette took place during the "period of the contract" cannot be determined. Rest. § 33; Varney v. Ditmars.

5. Implied Term. Henriette might assert as a defense that she did not breach the contract because the contract contained a term, implied in fact, that she would only have to pay Ivo 6% of the sale if Ivo helped to make the sale. See Wood v. Lucy, Lady Duff-Gordon. But Ivo may respond that the only implied term was that he would use reasonable efforts, which he did by spending several weeks showing the home to many potential buyers.
6. Unconscionability. Henriette might assert as a defense that a term requiring her to pay a commission for a sale that Ivo had done nothing to facilitate is unconscionable. Rest. § 208. But Ivo may respond that the commission is reasonable given the efforts that he put into making a sale.

Remedy:

7. Expectation Damages. Ivo will seek expectation damages equal to his loss in value (6% of the sales price) plus other loss (none) minus his costs avoided (perhaps what he would have had to spend to sell the property himself) minus other loss avoided (perhaps his ability to earn other commissions now that Henriette's house has been sold).

JULIETTE v. HENRIETTE

Claims:

8. Breach of contract. Juliette might sue Henriette for breach of contract, claiming that she implicitly promised her a house with convenient subway service but provided a house with inconvenient subway service.
9. Rescission. Alternatively, Juliette might sue Henriette to rescind their contract, claiming that Henriette induced her to buy the property with a half-truth which rendered her promise to buy the house voidable. Kannavos v. Annino; Rest. §§ 7 cmt. b; 161 cmt. a. She will assert that Juliette told her the property was located near a subway (which was true) but did not tell her that the subway was to have limited service.

Defenses:

10. No breach and no half truth. Henriette may assert as a defense to the breach of contract claim that she did not make an implicit promise about the subway service and as a defense to the rescission action that she did not tell a half-truth. What she said was true and there were no additional implied connotations because problems with the subway were so well known that "almost everyone in town [was] complaining about the situation." But Juliette may respond that this defense sounds like Ms. Annino's argument that she did not have to mention the zoning rules because they were a matter of public record. Kannavos v. Annino.

Remedy for a breach of contract claim:

11. Expectation damages. If Juliette prevails on her breach of contract claim, she might seek expectation damages equal to her loss in value (the difference in value of a house with convenient subway service and one without) plus other loss (the increased cost of transportation),

minus her costs and other loss avoided (probably nothing because she paid for the house). Rest. § 347.

Remedy for the rescission Claim:

12. Rescission & Restitution. Alternatively, if Juliette prevails on her rescission claim, she would seek rescission of the contract and restitution of the purchase price of the house, but would have to return the house to Henriette. Rest. § 7 cmt. c.

OTHER

13. Other

NOTES:

Some answers suggested that Henriette might assert that her promise to pay 6% to Ivo lacks a basis for enforcement. But the promise would appear to be enforceable either on the basis of reliance (Ivo made efforts to sell the house) or consideration (Ivo made an implied promise to use reasonable efforts, Wood v. Lucy).

Some answers conflated Juliette's claims for rescission and breach of contract. If the contract is rescinded, then Juliette cannot obtain expectation damages. And if Juliette obtains expectation damages, she cannot obtain rescission and restitution.

PROBLEM IV.

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

KIKO v. LORENA

Claim:

1. Breach of contract. Kiko might sue Lorena for breach of contract, claiming Lorena promised to convey a specific house to him but did not do it.

Defenses:

2. Exculpation clause. Lorena will assert as a defense that the contract expressly waives all claims against her for defects. She will assert that her lack of ownership of the house is a defect in the title.

Replies:

3. Strict Construction. Kiko might reply that the clause should be strictly construed against Lorena. Rest. § 202; Galligan v. Arovitch. The Problem suggests Lorena drafted the contract because it says that Kiko never read it. Kiko will assert that he is not complaining of a "defect" in the house but instead that Lorena did not convey the house.
4. Adequate notice. Kiko might reply that he is not bound by the exculpation clause because he did not have adequate notice that the sales form contained contract terms beyond merely stating the purchase price. Klar v. H & M Parcel. But Lorena may respond that Kiko had reason to know that like writings (i.e., documents exchanged in land sales transactions) are regularly used to embody contract terms. Rest. § 211(3).

5. Unconscionability. Kiko also might argue that an exculpation clause that would allow Lorena to escape liability after taking his money and conveying him nothing is unconscionable. Rest. § 208; cf. Henningsen v. Bloomfield Motors.

Remedy:

6. Expectation damages. Kiko may seek expectation damages equal to his loss in value (the value of the house) plus his loss in value (what he has to pay to the owner and any unreimbursed repair costs) minus his costs avoided (nothing because he paid the full price for the house) minus his other loss avoided (perhaps the rent he would have otherwise paid if he had not stayed in the house).

KIKO v. MARIO FIRE INSURANCE CO.

Claim:

7. Breach of contract. Kiko might sue the Mario Fire Insurance Co. (Mario) for breach of contract, claiming that Mario promised in the fire insurance policy that it would indemnify Kiko for damage caused by the fire but has refused to do so.

Defenses:

8. Misrepresentation (or mutual mistake). The Problem indicates that Mario has asserted as a defense that its promise to pay is voidable because it was induced by a misrepresentation, namely, that Kiko owned the property when he did not. Rest. § 164(1). Mario might reply that his misrepresentation was not fraudulent because he thought he owned the property. Id. § 162(1). He also might reply that his misrepresentation was not material because it did not affect the risk of a fire; although he did not in fact own the house, he was careful with the house because he thought he owned it. Id. § 162(2). [Note: Mario also might assert mutual mistake as a defense, but Mario would have a similar difficulty showing that the mistake of fact about who owned the property had a "material effect." Id. § 152(1).]

Reply:

9. Public policy/unconscionability. The Problem says that "Kiko also thinks that the state should not allow fire insurance companies to refuse payment for a misstatement unrelated to the risk of a fire." If Mario's refusal to pay is based on a clause in the insurance contract that excuses Mario from paying even if Kiko's false statement did not have a material effect, Kiko might argue that the clause violates public policy or is unconscionable. Rest. §§ 178, 208. Although precedent may not support this argument, parties may ask courts to recognize public policies that have not been recognized before. Bush v. Black Indus.

Remedy:

10. Expectation Damages. Kiko will seek expectation damages equal to his loss in value (the promised reimbursement) plus other loss (none) minus costs avoided and other loss avoided (none because he has paid the insurance premiums). Rest. § 347.

KIKO v. MARIO

Claim & Remedy:

11. Restitution. If Mario succeeds in voiding the contract, then Kiko will seek restitution of the premiums that he paid for his insurance policy. He will assert that Mario would be unjustly enriched by retaining premiums that Kiko paid for an insurance policy that was not enforceable. Restatement of Restitution § 1; Cotnam v. Wisdom. Mario might assert as a defense that retaining the premiums is not unjust because Kiko caused the problem by making a false statement.

ACTUAL HOMEOWNER v. KIKO

Claim & Remedy:

12. Restitution. The actual homeowner may sue Kiko for restitution, claiming that Kiko was unjustly enriched by staying in her house without permission. Restatement of Restitution § 1; Cotnam v. Wisdom. She might seek a reasonable amount of rent. Restatement of Restitution § 155.

OTHER

13. Other

NOTES:

Some answers asserted that Kiko would seek specific performance from Lorena, but Lorena already conveyed the property to another owner.

Some answers asserted that Kiko would sue the actual owner for restitution. But Kiko did not improve the house. Kiko merely repaired damage that occurred while he was unlawfully staying in the house.

PROBLEM V.

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

OCTAVE v. NARDA (or PRISCILLA as her successor)

Claim:

1. Breach of contract. In the low-cost arbitration procedure, Octave might assert that Narda (or Priscilla as the successor of Narda) is liable for breach of contract, claiming that Narda promised to pay him \$15 per hour and broke that promise by only paying him \$10 per hour.

Defenses:

2. Rejection by counter offer. Narda might assert as a defense that, although she initially offered to pay Octave \$15 per hour, Octave rejected this offer when he made a counter offer to work for \$20 per hour. Rest. § 39; Columbus Rolling Mill v. Mn. & St. L. Rwy. Octave will respond that he merely made an inquiry, not a counter offer, and that he implicitly accepted the initial offer by starting work.
3. Uncertainty. Narda might assert as a defense that an implicit bargain formed by conduct after rejection of her counter offer would be too uncertain to enforce because she and Octave did not agree on a price. Rest. § 33; Varney v. Ditmars.

Reply:

4. Implied wage. Octave will reply that a wage of \$15 per hour is implied in fact. Wood v. Lucy. He will assert that the context of the negotiations rules out the minimum wage of \$10 per hour because both he and Narda indicated that they believed that \$10 per hour was too low.

Remedy:

5. Expectation damages. Octave will seek expectation damages equal to his loss in value (the difference between the \$15 per hour that he claims he was promised and the \$10 that he was paid for all the hours he has worked) plus other loss (nothing) minus his costs and other loss avoided (nothing). Rest. § 347.

PRISCILLA v. NARDA

Claim:

6. Breach of contract. Priscilla might sue Narda for breach of contract, claiming that Narda promised to reimburse her for fees that she might have to pay to labor lawyers during the next two years and now has refused to pay.

Defenses:

7. Pre-existing duty rule. Narda might assert as a defense that her promise is not enforceable because it lacks consideration under the pre-existing duty rule. Alaska Packers v. Domenico; Rest. § 73. Narda will assert that she received no additional consideration for her promise to reimburse Priscilla.
8. Statute of frauds. Narda might assert as a defense that she does not have to keep her promise if the promise is not evidenced by a signed writing. Citing the one-year provision of the statute of frauds, see Rest. § 130(1), Narda will argue that her promise cannot be fully completed within one year because it will take two years to determine the fees that Priscilla will pay labor lawyers.

Remedy:

9. Expectation damages. Priscilla might seek expectation damages equal to her loss in value (the promised reimbursement of fees) plus other loss (nothing) minus her costs and other loss avoided (nothing). Rest. § 347. But Narda will contend that Priscilla could have avoided some of her loss without undue risk, burden, or humiliation by simply settling the claims. Rest. § 350(1); Luten Bridge v. Rockingham County.

OTHER

10. Other

Grading Guide for the Final Examination in

CONTRACTS I

(Course No. 6202-20)

Prof. Gregory E. Maggs

This document contains the grading guide that I used in scoring your examinations. Each of the five problems was worth 34 points, for a total of 170 points. I awarded points for each problem based on how well you wrote essays identifying and discussing the claims and defenses that the parties might assert and the remedies that they might seek. I added the scores on the final examination to the scores on the midterm and then translated to the total scores into letter grades in accordance with the Law School's mandatory grading guidelines for first-year classes. As a whole, the class did very well.

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

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

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

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

The problems on this examination were inspired by these cases: I. Thies v. Wheelock, 2017 Ohio 8605; II. Design Partners, Inc. v. Five Star Elec. Corp., 2017 WL 818364 (E.D.N.Y.); III. North Am. Brokers, LLC v. Howell Pub. Sch., 2017 WL 535555 (Mich. Ct. App.); IV. Bouknight v. KW Assocs., 2016 WL 3344336 (D.S.C.); V. Weidner v. McCann Educ. Centers, Inc., 2015 WL 7260344 (Pa. Super. Ct.).

PROBLEM I.

[Maximum points: Item #1=4; 2=4; 3=4; 4=4; 5=4; 6=4; 7=4; 8=4; 9=2; 10=no max.]

BEATRIZ v. ADRIAN

Claim:

1. Breach of contract. Beatriz might sue Adrian for breach of contract, claiming that Adrian promised to sell plots 4 and 5 to her for \$110,000, and then broke this promise when he refused to convey the plots.

Defenses:

2. No offer/acceptance. Adrian has argued that he did not "agree" (i.e., enter a bargain) to sell plots 4 and 5. He will deny that he offered to sell the plots for \$110,000, asserting that his expression of interest and statement of the lowest price was not a manifestation of a willingness to sell the plots at that price. Rest. § 26; Owen v. Tunison, Harvey v. Facey.
3. Statute of frauds. Adrian might argue that the alleged promise to sell plots 4 and 5 is not enforceable because it is not evidenced by a signed writing as required by the statute of frauds applicable to land contracts. Rest. § 125(1). But Beatriz may argue that Adrian's promise is enforceable not withstanding the statute of frauds because she relied on the promise when she stopped bidding. Rest. § 139; Monarco v. Lo Greco. Only some states, however, allow reliance to overcome the statute of frauds.
4. Indefiniteness. Adrian might argue that the alleged promise to sell plots 4 and 5 is too indefinite to enforce. Rest. § 30; Varney v. Ditmars. He will assert that the parties did not agree on material terms like how Beatriz would pay him or how Adrian would transfer title. Beatriz will respond that the promise is sufficiently definite to enforce because there is a reasonable basis for determining whether there was a breach (i.e., Adrian does not convey the property) and for providing an appropriate remedy (i.e., specific performance).

Remedy:

5. Specific performance. Beatriz will seek an order of specific performance, requiring Adrian to deliver plots 4 and 5. Adrian will argue that the court should deny specific performance because the bargain is unfair. The plots are worth \$150,000, but Beatriz only will pay \$110,000 for them. Rest. § 364(c); McKinnon v. Benedict.
6. Expectation damages. Alternatively, Beatriz might seek expectation damages equal to her loss in value (the value of the plots, which Adrian imprudently has alleged to be \$150,000) plus her other loss (none alleged here) minus her costs avoided (\$110,000) and other loss avoided (none alleged here), which would give her \$40,000 in damages. Rest. § 347.

CALVIN v. ADRIAN

Claim:

7. Breach of contract. Calvin might sue Adrian for breach of contract, claiming that Adrian promised to pay him an additional \$10,000 but did not pay him this money.

Defenses:

8. No consideration (pre-existing duty rule). Adrian might argue in defense that there was no consideration for the additional promise to pay \$10,000 because Calvin had a pre-existing duty to convey the property to him for \$330,000. Rest. § 73; Alaska Packers v. Domenico.

But Calvin will assert that he did not have a pre-existing duty because the original sale was voidable. Calvin appears to believe that he did not have to keep his original promise to sell because Adrian did not disclose his arrangement with Beatriz. Cf. Schwartzreich v. Bauman-Basch. Adrian will reply that a bare non-disclosure of facts does not make the promise to sell voidable. Swinton v. Whitinsville Savings Bank.

Remedy:

9. Expectation damages. Calvin will seek expectation damages equal to his loss in value (\$10,000). Rest. § 347. He has suffered no other loss and has avoided no costs or losses.

OTHER

10. Other

NOTES:

(1) Many answers did not apply the law to the facts (e.g., they did not explain why a promise was indefinite). (2) Adrian won't sue Calvin because Calvin has already conveyed the property. (2) Adrian's promise to pay an additional \$10,000 is not within the statute of frauds applicable to land contracts because Calvin has already conveyed the property. Rest. § 125(3).

PROBLEM II.

[Maximum points: Item #1=5; 2=4; 3=4; 4=4; 5=4; 6=4; 7=4; 8=4; 9=1; 10=no max.]

EUGENE v. DORA

Claim:

1. Breach of contract. Eugene might sue Dora for breach of contract, claiming that Dora promised to pay him \$600 a day for the installation work, and broke that promise when she terminated the contract and did not pay him anything.

Defenses:

2. Revocation of offer before acceptance. Dora will contend that she revoked her offer (by saying "I revoke my offer") before Eugene accepted it. See Rest. § 42; White v. Corlies & Tift. Eugene will respond that Dora could not revoke her offer because he had already accepted it. He

will assert that he made an implicit promise to do the work on the terms offered by Dora by hiring Fernanda and having Fernanda commence the work. See Ever-Tite Roofing v. Green. Eugene further will argue that Dora received notice of the acceptance when she observed Fernanda working and when Fernanda told Dora what she was doing. See id. Dora may respond that merely taking notes on the office configuration did not imply acceptance because a contractor might do that before acceptance.

3. Misrepresentation. Dora may argue that her promise to pay is not enforceable because it was induced by a material misrepresentation, namely, that the rate of \$600 was fair when it was not. Rest. § 164. Eugene will respond that his statement about fairness was merely an opinion or puffing and rather than a statement which is not in accord with the facts. Rest. § 159.
4. Settlement. Dora may argue that Eugene promised not to sue her when she gave up her tort claims against him. Eugene will respond that his promise not to bring a claim lacks consideration because Dora's tort claims were invalid. This argument, however, is only valid if Dora did not have a good faith belief in the possible validity of her claims. Dyer v. National Byproducts.

Remedies:

5. Liquidated damages. Eugene's statement that "I will require full payment as a remedy if you improperly terminate the contract," indicated that Eugene will seek liquidated damages equal to \$600 per day times the number of days that Fernanda worked. But Dora will argue Eugene cannot recover full payment because full payment would amount to a penalty. Although the number of days the work would take was uncertain when the contract was formed, full payment would be unreasonably large in comparison to actual or anticipated damages given that he hired Fernanda to do the work for half the price. Rest. § 356(1); Dave Gustafson v. State.
6. Expectation damages. Eugene will seek expectation damages equal to his loss in value (\$600 times the number of days it took Fernanda to do the work) minus costs avoided (\$300 times the number of days it took Fernanda to do the work). Rest. § 347. The facts do not indicate any other loss or other loss avoided.

DORA v. FERNANDA

Claim:

7. Breach of contract. Dora might sue Fernanda for breach of contract, claiming that she promised to install the electronic equipment, and broke that promise when she installed it improperly (i.e., upside down).

Remedy:

8. Expectation damages. Dora will seek expectation damages equal to her loss in value, which she will claim is \$3000 because that is the cost to remedy the defective construction. But Fernanda will respond that \$3000 is grossly disproportionate to the probable loss in value to Dora because the electronic equipment functions properly and no facts show that Dora would care much about the defective appearance. Rest. § 348(2); Jacob & Youngs v. Kent. As a result, Fernanda will assert that Dora can recover only the loss in market value, which appears to be none given that the equipment functions properly.

EUGENE v. FERNANDA

Claim:

9. Breach of Contract/Damages. If Eugene cannot recover from Dora, Eugene might sue Fernanda for breach of contract, claiming that Dora promised to work for him and then implicitly repudiated that promise when she agreed to work for Fernanda. Eugene might seek expectation damages equal to his loss of value (i.e., the value of Dora's work to him, which would be what it would have cost to find a substitute) plus consequential damages (i.e., the profit he would have made on the contract), minus his costs avoided (i.e., what he would have had to pay Dora). Rest. § 347.

OTHER

10. Other

PROBLEM III.

[Maximum points: Item #1=5; 2=3; 3=3; 4=3; 5=3; 6=5; 7=6; 8=2; 9=1; 10=3; 11=no max.]

GREG v. IRWIN

Claim:

1. Breach of contract. Greg might sue Irwin for breach of contract. Greg would claim that Irwin expressly promised in the letter of intent that he would withdraw the store property from the rental market and negotiate a lease transaction with Greg to completion and that he also implicitly promised to act in good faith. Rest. § 205. Greg would assert that Irwin broke those promises by leasing the store property to a different merchant before the negotiations had a chance to succeed.

Defense:

2. No assent to be bound. Like the defendant in Channel Home Centers v. Grossman, Irwin might argue that he did not assent to be bound by the letter of intent. Whether promises in a letter of intent are intended to be binding depends on the circumstances of the case. See id. Greg might assert that the discussion of prices and the formal nature of the letter of intent suggest that the parties thought that it was enforceable.
3. No basis for enforcement. Also like the defendant in Channel Home Centers v. Grossman, Irwin might argue that there was no consideration for his promise to withdraw the store from the rental market, asserting that Greg gave nothing in exchange for the letter of intent and there is no evidence of reliance. Greg might respond that by signing the letter, he made a return promise that he also would negotiate the leasing transaction to completion in good faith. Rest. § 205; Mattei v. Hopper.
4. Indefiniteness. Again, like the defendant in Channel Home Centers v. Grossman, Irwin also might argue that the promise is too indefinite to enforce because he and Greg did not discuss the details of the kind of lease they were seeking. Rest. § 33.

Remedy:

5. Expectation Damages. Greg will seek expectation damages. His loss in value is the value of the promise to negotiate the lease to completion, which may be hard to measure. But Greg will assert that his other loss equals the value of the lease that he would have gotten from the negotiation (i.e., perhaps measured by what a substitute would cost) and the lost profits that he would have gotten if he had the lease (i.e., \$240,000 profits over the lease period). His costs and other losses avoided would be the rent that he did not have to pay (\$30,000 a month for three years). Irwin will argue that the loss is avoidable because he could have found another store to rent. He also will argue that Greg cannot prove his damages with reasonable certainty. But some cases allow experts to testify about lost profits. Fera v. Village Plaza.

HILARY v. GREG

Claims:

6. Breach of contract. Hilary might sue Greg for breach of contract, claiming that Greg promised to reward her handsomely and did not reward her.

Defenses:

7. No basis for enforcement. Greg will argue that there is no basis for enforcing his promise. He will contend there is no consideration because Hilary's promise was not sought and given in exchange for Greg's promise. Rest. § 71(2); Feinberg v. Pfeiffer. He will contend that reliance is not a basis for enforcement because Greg's promise did not induce Hilary to take any action. Rest. § 90; *cf.* Feinberg v. Pfeiffer. And he will contend that moral obligation is not a basis for enforcement. Although Hilary might argue that Greg made his promise in recognition of a material benefit, *see* Rest. § 86(1); Webb v. McGowin, Greg will assert that (1) most courts do not accept this theory, *see* Harrington v. Taylor; (2) Hilary's suggestion has not produced any material benefit; and (3) Hilary made the suggestion as a gift without expecting compensation, *see* Dementas v. Tallas.
8. Indefiniteness/Uncertainty. Greg will argue that his promise to reward Hilary handsomely is too indefinite to enforce. Rest. § 30; Varney v. Ditmars. The term "handsomely" might mean anything from a "nominal sum to a material" amount. *See id.* Accordingly, Greg will argue, that there is no basis for determining whether a breach has occurred or for awarding an appropriate remedy. The facts do not suggest any industry standard compensation for business suggestions.

Remedy:

9. Expectation damages. Hilary will seek expectation damages equal to her loss of value, which would be the "handsome reward" she was promised. Rest. § 347. But as explained above, there is no basis for determining what that is with reasonable certainty. Rest. § 352.

HILARY v. GREG

Claim, defense, and remedy:

10. Restitution. Alternatively, Hilary will sue Greg, claiming that he has been unjustly enriched at her expense, and should be required to make restitution to her. Restatement of Restitution § 1; Cotnam v. Wisdom. But Greg will argue that there was no unjust enrichment because Hilary made her promise as a volunteer.

OTHER

11. Other

PROBLEM IV.

[Maximum points: Item #1=4; 2=3; 3=3; 4=3; 5=2; 6=4; 7=4; 8=3; 9=3; 10=3; 11=2; 12=no max.]

KENNETH v. JOVA

Claim:

1. Breach of contract. Kenneth might sue Jova for breach of contract, claiming that Jova promised to employ him for two more years and broke that promise when she terminated his employment.

Defense:

2. No breach. Jova will assert that she did not breach the contract by firing Kenneth because the employee handbook allowed her to dismiss an employee for hiring counsel.

Replies:

3. Strict Construction. Kenneth will argue that the clause allowing her to dismiss employees does not apply. Strictly construed, the clause only applies to employees when they make "claims regarding employment conditions." Kenneth will argue that employment conditions refer to the working environment, times of employment, and so forth. He will assert that he is not challenging working conditions but instead seeking compensation for an injury that he received. Rest. § 206; Galligan v. Arovitch.
4. Public Policy/Unconscionability. Kenneth has argued that an employment contract cannot allow the employer to fire an employee for seeking legal advice. He might base this claim on grounds of public policy, arguing that there is a strong public policy in favor of allowing everyone who needs legal advice to have the right to hire an attorney. Cf. Bush v. Black Indus. Alternatively, he might argue that the clause is unconscionable because it would shock the conscience not to allow an employee to know his legal rights. Rest. § 208.
5. Adequate Notice. Kenneth may argue that he did not have adequate notice that the employee handbook contained contract terms because he did not read it. But Jova may argue that Kenneth had adequate notice that the employee handbook contained contract terms because "like writings are regularly used to embody terms of agreements of the same type." Rest. 211. See, e.g., Douglas v. Pflueger Hawaii.

Remedy:

6. Expectation damages. Kenneth will seek expectation damages. His loss in value is his salary for two years. His costs avoided are his costs expected (24 months of labor) minus his costs incurred. Kenneth will argue that his costs incurred equal 19 months of actual labor and 5 months of constructive labor. Parker v. 20th Century Fox; Rest. § 351. But Jova may respond that Kenneth can recover for only 3 months of constructive labor because he wasted 2 months trying to get his job back instead of looking for reasonably comparable substitute employment.

LIDIA v. KENNETH

Claim:

7. Breach of contract. Lidia might sue Kenneth for breach of contract, claiming that he promised to pay her \$200 per hour for the time she worked, and he broke that promise when he refused to pay her anything.

Defenses:

8. Confidential relationship. Kenneth will argue that he does not have to keep his promise because Lidia did not disclose to him that he would recover less than \$2000. He will assert that their attorney-client relationship was a relation of trust and confidence that required disclosure. Rest. § 161(d). But Lidia will respond that she did not withhold any facts known to her; she was unsure of what he would recover.
9. Unilateral mistake. Kenneth will argue that he does not have to keep his promise because it was induced by a unilateral mistake. Rest. § 153. He assumed that he would recover \$20,000, but in fact recovered only \$2000. Lidia will respond that Kenneth made a poor prediction, not a mistake of fact. Only some states recognize unilateral mistake as a defense.
10. Unconscionability. Kenneth will argue that he does not have to keep his promise because it is unconscionable that he would have to pay \$2000 to receive \$2000 in benefits. Rest. § 208. But Lidia will respond that clients often receive no recovery, and it is not unconscionable for a lawyer to be paid at the agree rate for her work.

Remedy:

11. Expectation damages. Lidia will seek expectation damages equal to her loss in value (\$2000). She will argue that she had no costs avoided or other loss avoided. Rest. § 347.

OTHER

12. Other

PROBLEM V.

Note: A word is missing in the second clause of the sixth sentence of the last paragraph. The sentence should say: ". . . Max then took and passed the examination." I made allowances for anyone confused by this error.

[Maximum points: Item #1=2; 2=2; 3=2; 4=2; 5=2; 6=1; 7=2; 8=2; 9=2; 10=2; 11=2; 12=2; 13=1; 14=2; 15=2; 16=2; 17=2; 18=2; 19=no max.]

MAX v. NORMA

Claim:

1. Breach of contract. Max might sue Norma, claiming that she implicitly promised to provide him instruction that would qualify him for the laboratory certification examination and broke that promise because her instruction did not include the required practical training. Max will say that the promise was implied by what the website said about graduates passing the exam and by industry standards.

Defense:

2. No implied promise. Norma's defense will be that she never made the implied promise. She will assert that it was obvious that an online course could not provide practical training.

Remedy:

3. Expectation damages. Max might seek expectation damages. His loss in value would be the value of a course that would prepare him for certification minus the value of Norma's course. This could be measured by the difference in tuition of such courses. His costs avoided are the costs that he expected (\$7000) and the costs that he incurred \$4000. Rest. § 347. Norma may respond that his loss in value is nothing because he was able to receive the necessary training for free through his internship.

MAX v. NORMA

4. Rescission based on infancy. Alternatively, if Max agreed to pay for Norma's course when he was an infant (as many recent high school graduates are, see, e.g., Douglass v. Pflueger Hawaii), he might sue Norma to rescind their contract and obtain a refund of the \$4000. Although an infant ordinarily must make restitution when rescinding a contract, restitution is not required when the subject matter is no longer available. See Restatement of Restitution § 62 cmt. b. In this case, Max cannot return the education he has received.

NORMA v. MAX

Claim:

5. Breach of contract. Norma might sue Max for breach of contract, claiming that Max promised to pay her \$7000, and broke that promise by paying only \$4000 and withholding the last \$3000.

Defenses:

6. Infancy. Max may argue that he does not have to keep his promise if he made the promise as an infant. Many high school graduates are not eighteen. See, e.g., Douglass v. Pflueger Hawaii.
7. Half-truth. Max may argue that he does not have to keep his promise because it was induced by a half-truth. Norma's website said that graduates of the program routinely pass the examination, but did not say that they need an additional 120 hours of experience. Kannavos v. Annino.
8. Unilateral mistake. Max may argue that he does not have to keep his promise because it was induced by a unilateral mistake, namely, that he would qualify to take the examination after completing the course. Rest. § 153.
9. Unconscionability. Max may argue that he does not have to keep his promise to pay \$7000 because the price is unconscionable -- shockingly unfair. Rest. § 208.
10. Material breach. Max will argue that Norma's material breach of her implied promise to provide him a course that would qualify him for the certification examination excuses his performance. See Rockingham County v. Lutten Bridge (county's repudiation excused performance by

bridge company). Note: We will see more about this defense next semester.

Remedy:

11. Expectation damages. Norma will seek expectation damages equal to her loss in value, which is the difference between what Max promised (\$7000) and what he delivered (\$4000). Rest. § 347. On these facts, Norma has no other loss, costs avoided, or other loss avoided.

OTIS v. MAX

Claim:

12. Claim. Otis might sue Max for breach of contract, claiming that Max promised not to compete for two years and broke that promise when he immediately went to work for a competitor.

Defenses:

13. Infancy. Again, Max may argue that he does not have to keep his promise if he was an infant when he made it. Rest. § 14.
14. Statute of Frauds. Max has argued that he does not have to keep his promise because he did not sign anything. Although Max could not complete his promise not to compete in less than two years, Otis will respond that the one-year provision does not apply because Otis has already completed his performance. Rest. § 130(2).
15. Duress. Max has indicated that he will argue that he does not have to keep his promise because it was induced by duress. Rest. § 175(1). Max will argue that when he went to work for Otis as an unpaid intern for the purpose of gaining the experience needed to qualify for the examination, Otis made an implicit promise to sign the certification that Max needed and then threatened to breach that implied promise in bad faith. Rest. § 176. But Otis will respond that he did not make the implied promise.
16. Overreaching/Undue Influence. Alternatively, he may argue that he does not have to keep his promise because it was induced by undue influence or overreaching. Rest. § 177, Odorizzi v. Bloomfield School Dist.
17. Lack of consideration. Max may argue that he received no consideration for his promise not to compete. Although Otis may argue that Otis's signing of the form was consideration, Max may respond that Otis had a pre-existing duty to sign the form. He will assert that the whole reason for doing the unpaid internship was to qualify for the examination, and that it was implicit that Otis would sign the form. But Otis may respond that he made no express or implied promise when he allowed Max to do his internship.

Remedy:

18. Specific Performance. Otis will seek specific performance arguing that damages would not be an adequate remedy because proving damages would be too uncertain. But Max will respond that specific performance should be denied because the bargain was unfair. Rest. § 364; McKinnon v. Bennedict. All Max received for this promise not to compete was a signature on a piece of paper. Otis, however, may argue that fairness should be judged in context. It is not unfair because Otis gave Max an internship.

OTHER

19. Other

Grading Guide for the Final Examination in

CONTRACTS I

(Course No. 6202-13)

Prof. Gregory E. Maggs

This document contains the grading guide that I used in scoring your examinations. Each problem was worth 30 points, for a total of 150 points. In accordance with the instructions at the bottom of each of the five problems, I awarded points based on how well you wrote essays identifying and discussing the claims and defenses that the parties might assert and the remedies that they might seek. What follows is a list of the claims, defenses, and remedies that you should have discussed in answering each problem. Please note that these lists are not "model answers" because they are not written in essay form using proper paragraphs as the instructions require and because they contain explanations, headings, and other additional details that model answers would not.

Everyone sees things a little differently. Accordingly, nearly all answers earned partial credit even if they were not completely correct or they varied from this guide. The most common ways to lose points were (1) to overlook claims and defenses that the parties might assert or remedies that they might seek; (2) to indicate an incorrect understanding of the applicable legal rules; (3) to discuss insufficiently the application of the law to the facts; and (4) to run out of time at the end of the examination. Many of the problems contained facts that were very similar to the facts of cases that we had read but that nonetheless had important differences; answers often overlooked these differences and therefore did not receive the full points. The raw scores were translated into letter grades in accordance with the Law School's mandatory grading guidelines for first-year classes.

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

PROBLEM I.

[Max. points per item: #1=3 pts.; #2=2 pts.; #3=2 pts.; #4=2 pts.; #5=2 pts.; #6=2 pts.; #7=2 pts.; #8=2 pts.; #9=3 pts.; #10=2 pts.; #11=2 pts.; #12=2 pts.; #13=2 pts.; #14=2 pts.]

ALETTA v. BUD

Claim:

1. Breach of contract. Aletta might sue Bud for breach of contract, claiming that he promised to lend her \$50,000 without interest for five years, and then broke this promise when he told her that he could not make the loan.

Defenses:

2. Statute of frauds. Bud appears to be raising the statute of frauds as a defense because he has asserted that his promise is not enforceable because he "never signed anything." But Aletta will respond that no provision of the statute of frauds covers his promise to lend money because he can fully perform his promise within one year and she can also fully perform her promise in one year. Rest. § 125(1). Her promise to repay the loan over a multi-year period is not within the one-year provision of the statute of frauds because she could repay the money early. Syllabus Appendix No. 5, pt. 2.
3. Lapse of the offer. In saying that he would not perform because his "proposal expired," Bud appears to be arguing that his offer to lend Aletta money lapsed before Aletta attempted to accept it. Aletta will respond that, because no time was stated, Bud's offer would lapse after a reasonable time. Rest. § 41. She will assert that because she told him that she needed to think about the offer before getting back to him, and he did not object, she responded within a reasonable time.
4. Revocation of the offer. Bud may argue that he revoked the offer either by telling her, "I cannot make the loan" or by sending her the birthday card in which he explained why he could not lend the money. In the absence of an option contract, the offeror is free to revoke the offer at any time before the offer is accepted. But Aletta will respond that neither of these two attempts to revoke were effective because she received them after she had already accepted. Rest. § 42. She said "I accept your generous offer" before he told her that he could not make the loan and before she received the birthday card. (The mailbox rule only applies to dispatches of acceptances; it does not apply to revocations. Rest. §§ 42, 63.)
5. Rejection of the offer by counteroffer (Mirror Image Rule). Bud may argue that Aletta's attempted acceptance was not effective because it was not the mirror image of his alleged offer. Rest. § 59; Minn. & St. Louis Railroad v. Columbus Rolling Mill. He will assert that he offered to lend the money for five years but Aletta promised to repay it in two years. Aletta may respond that she was not trying to change what the bargain required but instead just indicating that she would perform more quickly than required.
6. No Consideration. Bud may argue that his alleged promise to lend money to Aletta lacks consideration because he would not receive any benefit from making the interest-free loan. But Aletta may respond that no benefit to Bud is required for his promise to be enforceable. Rest. § 79(a); Hamer v. Sidway. She will argue that the consideration for his promise to lend her money was her return promise to repay the money.

Rest. §§ 71, 72. Although this bargain ultimately may not have provided any economic benefit to Bud, it was not a sham; Bud entered the bargain because he thought that he would receive a tax deduction. (Note: Aletta also might respond that Bud's promise to lend her the money could be enforced on the basis of promissory estoppel because she relied on Bud's promise when she entered into a contract with Carlotta. Rest. § 90; Feinberg v. Pfeiffer.)

7. Unilateral mistake. Bud may argue that his promise is not enforceable because it was induced by a unilateral mistake, namely, that he would be able to take a tax deduction for the interest-free loan. Rest. § 153. Depending on the jurisdiction, Aletta may respond that unilateral mistake is not a defense (which is the case in half of the states). Aletta also may deny the "effect of [Bud's] mistake is such that enforcement of contract would be an unconscionable result." Enforcement would result only in the loss of a small amount of lost interest.

Remedies:

8. Expectation damages. Aletta may seek expectation damages equal to her loss in value (receiving \$50,000 now from Bud) plus her other loss (damages she must pay to Carlotta and any injury from delaying her graduate studies) minus her costs avoided (repaying Bud \$50,000 in five years). Bud will respond that her other loss is avoidable by borrowing the money from someone else, Rest. § 350, and that the loss for delaying her studies cannot be proved with reasonable certainty, Rest. § 352. (Notes: (1) Some answers suggested that Aletta suffered no loss because her loss in value (receiving the loan) would equal her costs avoided (repaying the loan). But this suggestion is incorrect because Aletta would receive the money now and pay it back in five years. See McKinnon v. Benedict for a discussion of the value of an interest-free loan. (2) Any claim for specific performance would be frivolous given that money damages would be an adequate remedy for a promised loan.)

CARLOTTA v. ALETTA

Claim:

9. Breach of contract. Carlotta may sue Aletta for breach of contract, claiming that Aletta promised that in two years she would borrow from Carlotta "whatever [she] need[s] to repay Bud," at an interest rate of 1% above the prevailing rate. Carlotta will allege that Aletta broke this promise when Aletta implicitly indicated that she would not borrow any money from Carlotta by telling Carlotta "to find some other investment."

Defenses:

10. No breach or repudiation. Aletta may argue that she did not break or repudiate her a promise to borrow the money that she "need[s] to repay Bud." She does not need any money to repay Bud because Bud has refused to lend her any money. (Note: Some answers suggested that the parties were mutually mistaken in assuming Aletta would obtain a loan from Bud or that the purpose of the contact was frustrated. These alternative analyses are possibly correct but seem more complicated than necessary.)
11. Statute of frauds. Aletta may argue that her promise is not enforceable because it was not evidenced by a signed writing as required by the one-year provision of the statute of frauds. Rest. § 125. She will argue that Carlotta's return promise to lend the money that she needs to repay Bud in two years could not possibly be performed in one year because the amount of the loan will not be determined for two years. But Carlotta

may respond that it would have been no breach of her promise if she had immediately made the maximum possible loan Aletta might need in two years.

12. No basis for enforcement/illusory promise. Aletta may argue that there is no consideration for her promise to borrow money from Carlotta because all she received in exchange from Carlotta was an illusory promise. Because Carlotta only promised to make the the loan "until [she] find[s] a better investment," Aletta will assert that she could request the money back at any time. Strong v. Sheffield. But Carlotta will assert that she did make a commitment to lend until she found an investment that would earn more than 1% above the prevailing rate of interest.
13. Indefiniteness/uncertainty. Aletta also may argue that the stated interest rate is too indefinite or uncertain to enforce because there is no way to determine the "prevailing rate" given all the different interest rates charged for different types of loans. Rest. § 33. But Carlotta may respond that the rate should match the interest rate that other similarly situated borrowers are paying for student loans. Toys Inc. v. F.M. Burlington.

Remedy:

14. Expectation damages. Carlotta will seek expectation damages equal to her loss in value (Aletta's promised future payments with interest) plus her other loss (none) minus her costs avoided (the amount of her loan to Aletta). Rest. § 347. Aletta will argue that these damages cannot be proved with reasonable certainty because both the amount of the loan and the interest rates are unknown. Rest. § 352. She will also argue that Carlotta could avoid some or all her damages by finding another investment within the next two years. Rest. § 350.

OTHER

15. Other

PROBLEM II.

[Max. points per item: #1=4 pts.; #2=3 pts.; #3=6 pts.; #4=3 pts.; #5=5 pts.; #6=2 pts.; #7=3 pts.; #8=4 pts.]

DANIEL v. EMILIA INSURANCE CO.

Claim:

1. Breach of contract. Daniel might sue the Emilia Insurance Co. (Emilia) for breach of contract, claiming that Emilia promised in the insurance policy to pay for the fire damage to his home up to the \$250,000 limits of his policy, and then refused to pay.

Defenses:

2. Concealment. Emilia has argued that it does not have to pay because Daniel "concealed" the age of his furnace. But Daniel will assert that he did not "conceal" anything in the sense of taking any action that would prevent Emilia from discovery the truth. Rest. § 156. He will also assert that he did not make any misrepresentation or half-truth but instead merely made a bare nondisclosure by not answering question. Swinton v. Whitinsville Savings Bank. Daniel further will argue that nothing in the facts suggests that the parties were in a confidential relation requiring full disclosure. In addition, Daniel will respond

that Emilia cannot show that the alleged "concealment" induced Emilia to issue the policy because Emilia did not even notice the omission.

3. Exculpation Clause. Amelia also may argue that it does not have to pay because of the exculpation clause excusing the company from paying for damage from fires caused by an appliance more than 20 years old. Daniel may respond in two ways. First, Daniel may assert that the exculpation clause does not apply to a furnace. He will assert that, in common usage, the term "household appliance" refers to smaller machines, like toasters, blenders, or microwave ovens. And if there is any ambiguity about the meaning of the term, he will assert that the term should be construed against Emilia because Emilia drafted the contract. Rest. § 206; Galligan v. Arovitch. Second, Daniel might argue that excluding liability is unconscionable given the extensive damages to his home. Rest § 208. But Emilia will respond that denying coverage should not shock the court's conscience. Insuring against the risks posed by old furnaces would increase insurance rates for everyone. And denying coverage will motivate homeowners to buy new, safer furnaces if they want insurance.

Remedies:

4. Expectation damages. Daniel will seek expectation damages equal to his loss in value (payment for the damage from the fire, which would include the \$100,000 cost to repair the home) plus other loss (none) minus his costs avoided (also none, if he has paid all of the past insurance premiums). Rest. § 347.

DANIEL v. FABIO

Claim:

5. Breach of contract. Daniel might sue Fabio for breach of contract, claiming that Fabio (1) promised to use high quality wire in repairing his house and broke this promise when he used ordinary wire; and (2) promised to complete his repairs by a certain time and broke that promise by taking two months longer.

Defenses:

6. No offer and acceptance. Fabio will assert that (1) Daniel's demand for high quality wire was an offer to modify the contract to require high quality wire; (2) Fabio rejected (and terminated) this offer when he initially said that he would not change the plan; (3) Fabio later proposed to modify the plan when he "relented"; but (4) Daniel never accepted Fabio's proposal.
7. No basis for enforcement (Pre-existing Duty Rule). Fabio will further argue that his subsequent promise to use high quality wire lacks consideration because nothing was bargained for in exchange for this promise. Daniel had a pre-existing duty to pay the contract price, so none of that price could be the consideration. Rest. § 73; Alaska Packers v. Domenico. Fabio will argue that nothing in the facts suggest that the parties mutually agreed to cancel the original agreement and form a new one. On the contrary, as described above, when Daniel asked Fabio to change the contract, he initially refused. His subsequent promise was undertaken by Fabio alone for nothing in return.

Remedy:

8. Expectation damages. Daniel will seek expectation damages equal to the loss in value (the difference between a house with regular wiring and a

house with high quality wiring) plus other loss (the additional costs of renting an apartment and hotel room caused by the delay) minus the costs avoided (whatever Daniel promised to pay Fabio but has not yet paid). In calculating the difference between a house with regular wiring and a house with high quality wiring, Daniel might seek the cost to remedy or repair. But Fabio may argue that the cost to remedy or repair is excessive in comparison to the probable loss in value of Daniel. Rest. § 348(2); Jacob & Youngs v. Kent. Fabio also may argue that the cost to rent the hotel room was unforeseeable. But Daniel will argue that the annual Christmas party could have been foreseen.

OTHER

9. Other

Note: Some answers suggested that Emilia would sue Daniel to rescind their insurance contract. But if Emilia has not paid Daniel anything, Emilia would have little incentive to initiate a lawsuit for rescission. The company might have to return the insurance premiums that Daniel had paid.

PROBLEM III.

[Max. points per item: #1=4 pts.; #2=2 pts.; #3=2 pts.; #4=3 pts.; #5=3 pts.; #6=4 pts.; #7=2 pts.; #8=2 pts.; #9=2 pts.; #10=2 pts.; #11=4 pts.]

HECTOR v. GILMA

Claim:

1. Breach of contract. Hector might sue Gilma for breach of contract, presenting alternative claims that (1) Gilma promised to pay rent of \$8000 a month for four years, and broke this promise when she stopped paying after two years and one month; or, if that promise is not enforceable, that (2) she promised to pay rent of \$8000 a month for the first two years and \$6000 a month for the second two years, and broke this promise when she stopped paying rent after two years and one month.

Defenses:

2. Mutual mistake. Gilma may argue that her initial promise to pay \$8000 per month for is voidable because she and Hector made a mutual mistake in assuming that her business would increase by 10%. Rest. § 152; Sherwood v. Walker. Hector will respond that they merely made a poor prediction about the amount of additional business, and not a mutual mistake of fact.
3. Misrepresentation. Gilma also may argue that her initial promise to pay \$8000 for 3 years is voidable because Hector misrepresented to her that the building was "certifiably the best value" in town. Rest. § 161. Hector will respond that he was merely puffing.
4. Waiver/modification. Gilma may argue that Hector waived any right to receive more than \$6000 for the third and fourth years of the lease when he agreed to lower the rent from \$8000 to \$6000. Hector will respond that this alleged waiver is voidable because it was induced by duress when Gilma threatened to breach the original contract in bad faith. Rest. §§ 175, 176. (Note: Some answers suggested that Hector would argue that there was no consideration for reducing the rent from \$8000 to \$6000, but courts generally do not require consideration for waivers of rights.)

Remedies:

5. Expectation damages. Hector will seek expectation damages equal to his loss in value (either \$8000 or \$6000 a month for 23 months) minus his costs avoided (which he will contend are none because he did not rent the apartment to anyone else). Gilma will respond that, instead of arguing with her, Hector could have avoided some costs by finding another tenant during the 23 months in which the building was vacant. Rest. § 350; Rockingham County v. Luten Bridge.

ILEANA v. GILMA

Claim:

6. Breach of contract. Ileana might sue Gilma for breach of contract, claiming that Gilma promised to pay rent and broke this promise when she did not pay any rent.

Defenses:

7. No offer and acceptance. Gilma will argue that she and Ileana never formed a bargain. She will contend that their leaving open the amount of the rent and the period of the lease shows that there was no offer or acceptance. Rest. § 33(3).
8. Indefiniteness/uncertainty. Gilma also will argue that even if the parties formed a bargain, her promise to pay rent is too indefinite to enforce because the parties did not agree on the amount of the rent or the duration of the lease. Accordingly, a court could not determine whether a breach had occurred or what an appropriate remedy would be. Ileana might reply that a court could determine that the lease was to be continued month-to-month at the prevailing rate so long as that rate was "substantially less" than what she was paying Hector.
9. Public policy. Gilma might argue that her promise to pay rent to Ileana is void as against public policy. The alleged public policy is that landlords should not encourage tenants to breach their leases with competing landlords. Ileana may respond that there is no such public policy; if tenants breach their contracts, the law deals with that by making them pay damages.

Remedy:

10. Expectation damages. Ileana will seek expectation damages equal to the loss in value (the rent that Gilma was to pay) minus her costs avoided (none for the time that Gilma was in Ileana's offices).

ILEANA v. GILMA

11. Restitution. If Ileana cannot recover from Gilma for breach of contract, then she might sue Gilma under a theory of restitution, claiming that Gilma would be unjustly enriched if she could stay in the offices without paying rent. Ileana will ask Gilma to pay rent at the prevailing rate. Restatement of Restitution § 1; Cotnam v. Wisdom.

OTHER

12. Other

PROBLEM IV.

[Max. points per item: #1=6 pts.; #2=2 pts.; #3=2 pts.; #4=2 pts.; #5=2 pts.; #6=2 pts.; #7=2 pts.; #8=4 pts.; #9=2 pts.; #10=3 pts.; #11=3 pts.]

KRISTY'S ESTATE v. JOHN

Claim and Defense:

1. Restitution. The executor of Kristy's Estate might sue John under a theory of restitution, claiming that John would be unjustly enriched by retaining the \$70,000 deposit. The executor will seek return of the deposit. Restatement of Restitution § 1; Cotnam v. Wisdom.

No Unjust Enrichment. John will argue in defense that he has not been unjustly enriched because he had a contractual right to retain the deposit. He will assert that Kristy and he formed a contract in which Kristy promised -- in so many words -- to pay \$700,000 for his house or forfeit her "non-refundable" deposit.

Replies:

- John's defense that he has a contractual right to retain the deposit would be invalid if (a) John and Kristy never formed a contract, (b) they formed a contract but the contract was voidable by Kristy, or (c) they formed a contract but the contract did not allow John to keep the deposit. The executor therefore might make the following replies:
2. Termination of the offer. The executor might argue John and Kristy did not form a contract because Kristy's death "terminated her offer." It is true that death terminates an unaccepted offer. See Rest. § 48. But John will respond that he made the offer to Kristy and she accepted it before she died.
 3. "Inadvisably high" price. The executor might argue that Kristy's alleged promise to pay \$700,000 or forfeit her deposit is voidable because the contract price was "inadvisably high." But John will respond that a high price does not make a promise unenforceable. If the requirement of consideration is met (i.e., if there is a bargain), there is no requirement that the values exchange be equal. Rest. § 79(b). The price also does not appear to be unconscionable given that John quickly resold the property for \$670,000, which was only about 5% less than the \$700,000 contract price.
 4. Statute of Frauds. The executor has argued that Kristy's promise to buy the property or forfeit the deposit is unenforceable because John did not sign anything. But the statute of frauds requires only the person against whom enforcement is sought to sign, and in this case Kristy did sign the letter that she sent John.
 5. Rejection by Counter Offer (Mirror Image Rule). The executor also might argue that John and Kristy never formed a contract because Kristy's acceptance was not a mirror image of the offer. She said that the \$70,000 deposit was non-refundable but nothing in the facts suggest that term was in John's original offer. More information would be necessary to determine the validity of this defense.
 6. Incapacity. In asserting that John was "taking Advantage of Kristy's weakened condition in her final illness," the executor appears to be arguing that Kristy's promise to pay \$700,000 or forfeit the deposit is voidable because she lacked mental capacity. This defense would be valid if Kristy (a) did not understand the nature of the contract or (b)

could not act reasonably if John had reason to know of her condition. Rest. § 15; Ortelere v. Teachers Retirement. The estate will argue that John did have notice because he knew of her trips to a neurologist.

7. Penalty. The executory may argue that Kristy's promise to allow John to keep the deposit is void because it is a penalty. Rest. § 356. But John will respond that liquidated damages are only a penalty if they are unreasonable in light of actual or anticipated damages. In this case, \$70,000 was not unreasonable because it was only 10% of the contract and only \$40,000 more than the actual damages.

LANE v. KRISTY'S ESTATE

Claim:

8. Breach of contract. Lane might sue Kristy's estate for breach of contract, claiming that Kristy promised to change her will to leave him her rare antique Cadillac limousine, and broke this promise when she did not change her will.

Defenses:

9. Statute of Frauds. Depending on the jurisdiction, Kristy's estate might argue that this kind of promise must be evidenced by a signed writing to be enforceable. See Monarco v. Lo Greco (promise to change will within statute of frauds) and Syllabus Appendix 10. But Lane may argue that the statute of frauds is satisfied if there was a writing even if the writing has become lost. Rest. § 137. (Notes: (1) Some answers suggested that Lane could also argue that his promise was enforceable on the basis of reliance because he sold his car to make room for the Cadillac. About half the states say that reliance can overcome the statute of frauds. Rest. § 139. But selling a car does not sound like much reliance, especially if Lane received a fair price for the car. (2) This problem does not involve a contract for the sale of goods. A sale of goods requires title to pass from the seller to the buyer for a price. In this case there was no price for the Cadillac. We will discuss the statute of frauds applicable to goods in Contracts II.)
10. No basis for enforcement. Kristy's estate also may argue that the promise lacks a basis for enforcement. Lane may respond that the promise should be enforced on the basis of moral obligation, as a promise made in recognition of a benefit conferred, namely, running errands for Kristy. See Rest. § 89; Webb v. McGowan. But the estate will respond that most jurisdictions don't recognize this basis for enforcement. Harrington v. Taylor. Alternatively, Lane may argue that the promise should be enforced on the basis of reliance because he sold one of his cars to make room for the limousine. The estate will also argue that injustice will not result if Lane does not receive a free Cadillac, even if he did drive his friend on errands and sell one his cars to make room for the Cadillac.

Remedy:

11. Specific Performance. Lane will seek specific performance for the promise to leave him the Cadillac. Kristy's estate will argue that specific performance should be denied because there was no exchange (and therefore no fair exchange) and because damages would be an adequate remedy. Lane might have no monetary damages for selling his car if he received a payment equal to the value of the car.

OTHER

12. Other

Note: Some answers suggested that John might sue Kristy's estate for breach of contract, claiming that she made a promise to buy his house for \$700,000 but only paid \$70,000 of the price. But a little reflection on remedies reveals that John would have no incentive to bring such a claim against the estate. He does not have any expectation damages because his loss in value (\$700,000 promise minus \$70,000 paid) is less than his costs avoided (the \$670,000 value of the house).

PROBLEM V.

[Max. points per item: #1=4 pts.; #2=3 pts.; #3=3 pts.; #4=3 pts.; #5=3 pts.; #6=4 pts.; #7=4 pts.; #8=3 pts.; #9=3 pts.]

Note: This problem contains an error. The second sentence of the second paragraph should have said: "She promised to pay Olivia [not Mariam] \$1000 a day to help her recovery." Equal points were given for however this sentence was interpreted.

NORMAN v. MARIAM

Claim:

13. Breach of Contract. Norman might sue Mariam for breach of contract, claiming that she promised to pay for his medical bills, lost wages, and his bicycle, and then refused to pay.

Defenses:

14. Misrepresentation. Mariam will argue that her promise is unenforceable because it was induced by Norman's accusation that she caused the accident, which was a material (and possibly fraudulent) misrepresentation. Rest. § 164(1). (Note: Some answers said that Mariam would raise a defense of unilateral or mutual mistake. But the facts do not indicate that Mariam believed that she had caused the accident. On the contrary, they say that she had no recollection of what happened.)
15. No basis for enforcement. Mariam will respond that her promise lacks a basis for enforcement. Norman's promise to forego bringing his tort claim against her, even if bargained for, does not count as consideration because Norman (in Mariam's view) did not have a good faith belief in the validity of the claim. Dwyer v. Nat'l By-Products; Rest. § 74(1). (Note: While Norman is correct that he did not have a duty to negotiate in good faith, see Rest. § 205 (requiring good faith only in the performance and enforcement of a contract), his promise to forego asserting his claim is not consideration unless he had a good faith belief in its validity.)
16. Undue influence/overreaching. Mariam will also argue that her promise is not enforceable because it was induced by overreaching. Norman insisted upon an immediate settlement, when Mariam was in a situation of stress, and was worried about bad publicity. Rest. § 177(1) & (2); Odorizzi v. Bloomfield School Dist. (Note: Some answers suggested that Mariam would argue that she was induced by duress to make her promise because Norman made an improper threat to use civil process in bad faith. Rest. § 175, 176(1)(c). But these answers had difficulty in explaining how Mariam would have no reasonable alternative other than to make the promise.)

Remedy:

17. Expectation damages. Norman will seek expectation damages equal to his loss in value (payment for his lost wages, medical bills, and damage to his bicycle) minus his costs avoided (not forgoing his worthless tort claim). Rest. § 347.

MARIAM v. OLIVIA

Claim:

18. Breach of contract. Mariam might sue Olivia for breach of contract, claiming that Olivia promised to stop further disclosures about her in the confidentiality agreement, and then broke this promise by selling stories about her to an internet gossip site.

Defenses:

19. Lack of consideration. Olivia may argue that the confidentiality agreement lacks consideration because she received nothing in exchange for it. Although Mariam continued to employ her, she made no commitment to do so. Cf. Strong v. Sheffield (consideration is tested by the agreement and not what was done under it). But some courts do not follow the ordinary rules and would say that continuing to employ an employee at will is consideration for such a promise. Lake Land Employment v. Columer.
20. Duress. Olivia also may argue that her promise is unenforceable because it was induced by duress. Rest. §§ 175, 176. She will say that her statement "You don't want to find out" was an improper threat, implying something bad like violence, that left her with no reasonable alternative. But Miriam will argue that she did not threaten to commit a crime or tort or to violate the contract in bad faith. She will also argue that Olivia could have simply stopped working for her.

Remedy:

21. Liquidated damages and injunction. Mariam will also seek liquidated damages of \$20,000 for past violations and an injunction against future violations. She will assert that the liquidated damages are reasonable because of the difficulty of determining actual damages. Rest. § 356. And the injunction is necessary because damages would not be an adequate remedy, again because they might be difficult to calculate. Rest. § 360. But Olivia will respond that the damages are unreasonable because they are a lump sum and not graduated. Dave Gustafson v. State.

OTHER

22. Other

Note: Some answers suggested that Miriam and Norman might sue the "unknown person" who caused the accident. Although they may have valid tort claims, they would have to identify the person before they could sue him or her.

Grading Guide for the Final Examination in

CONTRACTS I

(Course 6202-13)

Prof. Gregory E. Maggs

The final examination was scored on the basis of points. In accordance with the instructions at the bottom of each of the five problems, points were awarded based on how well you wrote essays identifying and discussing the claims and defenses that the parties might assert and the remedies that they might seek. Each problem was worth a total of 30 points, for a total of 150 points. This grading guide identifies the claims, defenses, and remedies that you should have discussed. I have included more detail in some instances than could be expected of a typical answer.

Everyone sees things a little differently. Accordingly, nearly all efforts to address issues earned partial credit even if they were not completely correct. The most common ways to lose points were (1) to overlook claims and defenses that the parties might assert or remedies that they might assert; (2) to evince an incorrect understanding of the applicable legal rules; (3) to discuss insufficiently the application of the law to the facts; and (4) to run out of time at the end of the examination. On point (3), many of the problems contained facts that were very similar to the facts of cases that we had read but that nonetheless had important differences; answers often overlooked these differences and therefore did not receive the full points. The raw scores were translated into letter grades in accordance with the Law School's mandatory grading guidelines for first-year classes.

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

In addition, whenever you take examinations, write papers, or prepare legal documents, make sure that you follow very carefully any applicable format instructions and length limitations. Many answers did not comply with the specific instruction of leaving a blank line between paragraphs and indenting the first line of each paragraph (which is the standard way of preparing any single-spaced document). Other answers lost points because they exceeded the 4500 word limit. These requirements are important. Altogether, the examination answers exceeded 1750 pages in length; accordingly, making them concise and easy to read was necessary for prompt and accurate grading.

PROBLEM I.

[Max. points per item: #1=5 pts.; #2=5 pts.; #3=3 pts.; #4=2 pts.; #5=2 pts.; #6=2 pts.; #7=5 pts.; #8=2 pts.; #9=2 pts.; #10=2 pts.]

Claim:

1. Breach of Contract. Agatha might sue Blas for breach of contract, claiming that he made two promises and broke both of them. First, she will allege that Blas promised to leave the ranch to her in his will, and broke this promise (a) when he conveyed some of the ranch to Celia (making it impossible for him to convey the whole ranch to Agatha) and (b) when he later repudiated his promise by saying he would not leave the ranch to her. Second, Agatha will also allege that Blas promised that she could live in his house without paying rent and would receive spending money and that Blas broke this promise when he told her that her services were no longer needed and that she would have to pay rent if she stayed in his house.

Defenses:

2. No Basis for Enforcement. Blas will argue that there is no basis for enforcing his promise to leave the property to her in his will. He will assert that neither the "hundreds of hours" she spent helping him before he made the promise, nor her help "for the next few years" after he made the promise was bargained for because these services were not given in exchange for his promise. Rest. § 71(2); Feinberg v. Pfeiffer.

Agatha might respond that the promise is enforceable on the basis of promissory estoppel. Rest. § 90. She will assert that she relied on the promise when she quit her job, moved into his house, continued to work for him, and made improvements to the house. But Blas might respond that the elements of promissory estoppel were not met. He will assert that her reliance was not reasonable because she knew that he "might change his mind at any minute." He also may contend enforcing the promise is not necessary to prevent injustice given all that Agatha already has received from him.

Agatha also might respond that Blas's promise is enforceable on the basis of moral obligation because Blas made the promise in recognition of a prior benefit received. Rest. § 85; Webb v. McGowin. But most states do not recognize moral obligation based on past consideration as a basis for enforcement. Harrington v. Taylor.

3. Statute of Frauds. In some states, a promise to devise property by will is covered by a statute of frauds. See Monarco v. Lo Greco; Syl. App. 10. Blas would argue that such a statute would make a promise to leave his ranch to Agatha by will unenforceable unless it was evidenced by a writing signed by him. The facts suggest that there was no signed writing because Agatha "sorely wished that she and her father had signed a contract." But in some states, Agatha might be able to overcome the lack of a signed writing by showing that she relied on the promise. Monarco; Rest. § 139. Blas might reply that her reliance was not reasonable and enforcement is not necessary to prevent injustice for the reasons given above.

Blas alternatively might argue that his promise should be construed as falling within the traditional land provision of the statute of frauds. § 125(1). Agatha might respond that Blas's promise was not in fact a "promise to transfer an interest in land" but instead a promise to write his will in a particular manner. She will also respond that if it is a land contract, the part-performance exception should apply because she moved onto the property and made improvements. See Beaver v. Brumlow. But Blas will reply that the part-performance exception does not apply because she did not pay any "price" for the property.

4. Mental Infirmity. Blas might assert that his promises were voidable based on mental infirmity. There is little evidence that Blas could not understand the promises that he was making. Rest. § 15(1)(a); Cundick v. Broadbent. But there is evidence that by reason of mental defect, he was unable to act reasonably and others had reason to know of his condition. Rest. § 15(a)(2); Ortelere v. Teachers' Retirement. Blas had suffered a stroke. He had "trouble managing his ranch," and he repeatedly acted "irrationally." In addition, "everyone knows Blas is an old fool."
5. Indefiniteness/No Breach. Blas might argue that the alleged promise to convey the ranch to Agatha is too indefinite to enforce because he and Agatha "never agreed on the details of what she would inherit." Rest. § 33; Varney v. Ditmars. Alternatively, he might argue that even if he made a sufficiently definite promise to convey his ranch, selling 20 acres to Celia did not breach the contract because he never promised that the ranch would be a particular size when Agatha inherited it.
6. Employment-at-Will/No Breach. Blas might argue that he did not breach any promise when he fired Agatha. He will assert that the two parties never agreed on a term of employment -- Agatha just started working for him after he offered to have her move into the house -- and that Agatha was therefore at most an employee at will. As an employee at will, Agatha's employment could be terminated at any time without breaching the employment contract. See Casebook, p. 61.

Remedies:

7. Specific Performance/Expectation Damages. Agatha will seek specific performance of Blas's promise to prepare his will such that she will inherit the remaining portion of his ranch when he dies, arguing that damages would be inadequate because the contract concerns land. See Tuckwiller v. Tuckwiller. In addition to specific performance, she will also seek expectation damages equal to the loss in value of the 20 acres conveyed to Celia. But Blas will say that she cannot prove her loss with reasonable certainty because there is no telling when he will die and what those 20 acres will be worth at the time of his death. Agatha will also seek expectation damages for breach of her employment contract equal to her loss in value (i.e., the rent and spending money she would have received) minus her costs avoided (i.e., the value of her labor). Blas may argue that, if she enforces the promises based on promissory estoppel, her remedies should be limited as justice requires. § 90(1)'s 2d sent. Justice may require no more than reliance damages equal to her expenses. Hoffman v. Red Owl Stores.

BLAS v. CELIA

Claims & Remedies:

8. Rescission/Mental Infirmity. Blas might sue Celia, claiming that the sale of the 20 acres is voidable because he lacked the mental capacity to make the sale. Cundick v. Broadbent. See the arguments above in support of his allegation of mental infirmity. He will ask the court to rescind the sale. (An order of rescission would require Celia to return the property and Blas to return the price.)
9. Rescission/Overreaching and Undue Influence. Blas might sue Celia, claiming that the sale of the 20 acres is voidable because it was induced by Celia's overreaching and undue influence. § 177(1) & (2); Odorizzi v. Bloomfield School Dist. In support of his claim, he may emphasize that Celia was a "supposed friend" and argue that she took

advantage of his trust in her and his age and foolishness. Blas will ask the court to rescind the sale.

10. Rescission/Unconscionability. Blas might sue Celia, claiming that the sale of the 20 acres is voidable because the bargain between them was unconscionable. Rest. § 208. He will assert that the sale is oppressive because he received only 40% of what the property is worth and because Celia took advantage of his frail condition. Blas will ask the court to rescind the sale.

OTHER

11. Other

PROBLEM II.

[Max. points per item: #1=2 pts.; #2=2 pts.; #3=2 pts.; #4=2 pts.; #5=2 pts.; #6=2 pts.; #7=2 pts.; #8=2 pts.; #9=2 pts.; #10=2 pts.; #11=2 pts.; #12=2 pts.; #13=2 pts.; #14=2 pts.; #15=2 pts.]

DARBY v. ESTELLE

Claim:

1. Breach of Contract. Darby might sue Estelle for breach of contract, claiming that Estelle promised to build a house for him for \$340,000, and then repudiated that promise when she told him that she could not finish construction for that price.

Defenses:

2. Cancellation. Estelle may argue that the original contract is not enforceable because she and Darby mutually canceled it. Cf. Schwartzreich v. Bauman-Basch. Darby will reply that they merely discussed cancelling the original contract and replacing it with a new contract but never actually agreed to do that (see below).
3. Mutual Mistake. Estelle might argue that her promise to build the house for \$340,000 is not enforceable because the promise was induced by a mutual mistake about how much the construction would cost. Rest. § 151; Sherwood v. Walker. But Darby will respond that they at most made a poor prediction about the construction costs and did not make a mistake about any "fact." Cf. Wood v. Boynton.

Remedies:

4. Expectation Damages. Darby will seek expectation damages equal to his loss in value (i.e., the cost of completing construction, which would be \$160,000 if he is obliged to pay Frank to complete the project or \$150,000 if he can hire the other contractor mentioned in the problem), plus other loss (i.e., any time he is without a house because of delay in the construction), minus his costs avoided (i.e., the \$140,000 that he did not pay Estelle).

Note: Although this lawsuit involves incomplete construction, no facts suggest that the cost of completion would be grossly disproportionate to the probable loss in value to Darby. Rest. § 348(2).

ESTELLE v. DARBY

Claim:

5. Breach of Contract. Estelle might sue Darby for breach of contract, claiming that he promised to pay her a total of \$380,000 to complete construction of the house (of which he had already paid \$200,000) and that Darby broke that promise when he "told her that he made other arrangements."

Defenses:

6. No Offer and acceptance. Darby might argue that he did not offer to pay \$380,000, but merely commented that he could not afford more than \$380,000 in total for the house. Cf. Owen v. Tunison. Additionally, the fact say that Darby has argued that even if he made an offer, Estelle did not accept it. Estelle will respond that she implicitly accepted the offer by firing Frank.
7. No consideration (pre-existing duty rule). Darby also might argue that his promise to pay \$380,000 lacks consideration because Estelle had a pre-existing duty to complete the work for \$340,000. Alaska Packers v. Domenico. But Estelle will respond that she did not have a preexisting duty because she and Darby canceled their original contract (see above).

Remedies:

8. Expectation Damages. Estelle might seek expectation damages equal to her loss in value (i.e., the \$380,000 contract price - the \$200,000 already paid = \$180,000) minus her costs avoided (i.e., \$150,000, the amount at which another contractor would be willing to do the work).

FRANK v. DARBY

Claims:

9. Breach of Contract and Restitution. Frank might bring two claims against Darby. He might sue Darby for breach of contract, claiming that Darby promised to pay him \$160,000 to complete the work and broke that promise when Darby "fired" him. In the alternative, Frank might sue Darby for Restitution, claiming that Darby would be unjustly enriched by the work that Frank has performed unless Darby pays him.

Defenses:

10. No offer/acceptance. Darby might argue in defense that he and Frank never formed a bargain. Here is what the parties will say about their various communications: (a) Darby will argue that even though he purported to accept Frank's offer to complete the work for \$160,000, his acceptance was not the mirror image of Frank's offer because he asked for the garage to be placed on the other side of the house. As a result, his statement was only a counteroffer. Rest. § 59; Minn. & St. Louis Rwy. v. Columbus Rolling Mill. (b) Frank might respond that he implicitly accepted Darby's counteroffer by continuing to work on the house. (c) Darby may respond that continuing to work was not a permissible method of acceptance because he wanted acceptance to be completed by signing a written agreement, which Frank did not do. (d) Frank will respond that signing a written document was just one way to accept the counteroffer but was not the only way. Cf. Allied v. Ford Motor Co. He will assert that Darby in fact acted as though they had a contract; otherwise, it would have been unnecessary for Darby to "fire" Frank.

11. No Unjust Enrichment (Officious Intermeddling). In response to Frank's claim for restitution, Darby will argue that Frank cannot recover for unjust enrichment because he was an officious intermeddler. Rest. Restitution § 2. Darby will assert that Frank was not invited to do the work until they had a contract. Frank will respond that he did not act officiously because he believed that he and Darby had a contract.

Remedies:

12. Expectation Damages/Restitution. Frank will seek expectation damages equal to his loss in value (i.e., the \$160,000 that he was promised) minus his costs avoided (i.e., what it would cost Frank to complete the work). Darby will argue that any costs incurred after Frank was fired could have been avoided and must be counted as costs avoided. Rockingham County v. Luten Bridge.

FRANK v. ESTELLE

13. Breach of contract. Frank might sue Estelle for breach of contract, claiming that she promised to pay him \$1500 per day to build Darby's house and then fired him.

Defense:

14. Unilateral Mistake. Estelle has argued that she and Darby were mistaken about the price. Estelle might assert her mistake as grounds for voiding the contract. But Frank will assert that this was at most a unilateral mistake, which only some states recognize as a defense. Furthermore, he will assert that enforcing the contract would not be unconscionable.

Note: Answers suggested other possible defenses which might be true, but were not established from the facts. Partial credit was awarded for plausible suggestions.

Remedies:

15. Expectation Damages. Frank might seek expectation damages equal to his loss in value (i.e., the amount that Estelle would have paid him) minus his costs avoided (i.e., labor and materials that he did not have to put toward the effort).

OTHER

16. Other

PROBLEM III.

[Max. points per item: #1=3 pts.; #2=3 pts.; #3=3 pts.; #4=3 pts.; #5=3 pts.; #6=2 pts.; #7=3 pts.; #8=3 pts.; #9=3 pts.; #10=2 pts.; #11=2 pts.]

GEORGETTE v. HOWARD

Claim:

1. Breach of Contracts/Restitution. Georgette might bring two kinds of claims against Howard. She might sue him for breaching four contracts, claiming that through his silence he made four promises to pay her \$10,000 a month for managing his investments for each of the past four months, and broke those promises when he refused to pay her. Alternatively, she might sue him in restitution, claiming that he would

be unjustly enriched by her services if he did not pay her for managing his investments for four months. Cotnam v. Wisdom; Rest. of Restitution § 1.

Defenses:

2. No Offer and Acceptance. Howard might argue that he did not accept her monthly offers because he never responded to them and silence generally cannot be an acceptance. Georgette will respond that Howard accepted her services because they had a course of dealing in which silence was a form of acceptance. Hobbs v. Massasoit. But Howard will reply that the course of dealing exceptions only applies when "it is reasonable that the offeree should notify the offeror if he does not intend to accept." In this case, he will argue that it was not reasonable to expect him to notify Georgette because he was in the hospital.
3. No Consideration. Howard has argued that there was no consideration for his promises to pay Georgette because Georgette did not earn any money. But Georgette will respond that Howard bargained for investment management efforts, whether or not those efforts actually resulted in a profit.
4. Incapacity. Depending on his condition (e.g., perhaps he was unconscious the whole time), Howard also might argue that he lacked the capacity to make the contract because of his hospitalization. Rest. § 15(1)(a). Whether this defense is valid would depend on the facts.
5. No Unjust Enrichment. Howard also might respond to the unjust enrichment claim by arguing that he was not enriched by Georgette's services because his investments earned no money. But she may respond that he benefitted from her efforts. Cf. Cotnam v. Wisdom.

Remedy:

6. Expectation Damages/Restitution. Georgette will seek expectation damages equal to her loss in value (i.e., \$10,000 for each of four months) minus her loss in value (i.e., presumably nothing, given that she completely performed). Alternatively, she will seek the reasonable value of her services, which is likely to be her usual contract rate with Howard. Rest. of Restitution § 155; Cotnam v. Wisdom.

GEORGETTE v. IVETTE

Claim:

7. Breach of Contract. Georgette might sue Ivette for breach of contract claiming that Ivette promised that she would "make sure you [i.e., Georgette] are paid for your past and future services," and broke that promise by not paying Georgette (or having someone else pay her).

Defenses:

8. No Basis for Enforcement. Ivette might argue that she received no consideration because all of the benefits went to Howard. But Georgette will respond that she and Ivette formed a bargain, in which Ivette promised to pay her "for [her] past and future services" in exchange for Georgette's promise to "continue to manage the investments." Rest. § 71(2). So long as there was a bargain, it does not matter whether Ivette actually benefitted from the past or future services. Hamer v. Sidway.

9. Statute of Frauds. Ivette also may argue that her promise is not enforceable because it is a suretyship promise--i.e., a promise by Ivette to pay her brother's debt--and it was not evidenced by a writing signed by Ivette as required by the statute of frauds. But Georgette will respond that the promise is an original undertaking in which Ivette promise to pay Georgette for continued services. Langman v. Alumni Ass'n.
10. Duress. Ivette also has argued that her promise was induced by duress given that she was upset about her "brother's comments." Rest. § 175. But this defense would be valid only if her brother's comments had contained an improper threat, such as a threat to commit a crime or a tort, which left her no reasonable alternative. Rest. § 176(1). Comments that merely made Ivette upset would not constitute duress.

Remedy:

11. Expectation Damages. Georgette will seek expectation damages equal to her loss in value (i.e., \$10,000 a month for four months) minus her loss in value (i.e., nothing, given that she completely performed).

OTHER

12. Other

Note: Any discussion of specific performance is incorrect. The promises alleged are promises to pay money. A judgment for money damages is an adequate remedy for a promise to pay money.

PROBLEM IV.

[Max. points per item: #1=4 pts.; #2=3 pts.; #3=3 pts.; #4=3 pts.; #5=3 pts.; #6=3 pts.; #7=1 pt.; #8=4 pts.; #9=3 pts.; #10=3 pts.]

KAY v. MT. JAVIER INC

Claim:

1. Negligence. As the facts say, Kay has sued Mt. Javier for negligence in the design of the man-made jump. Note: Although we have not studied torts, this claim (1) is identified in the problem, and (2) is essentially the same as the negligence claims that we discussed in connection with Galligan v. Arovitch and O'Callaghan v. Waller & Beckwith Realty.

Defenses:

2. Release. Mount Javier will argue that Kay, by contract, released Mt. Javier from any liability based on the exculpation clause on the back of the lift ticket. Cf. Galligan v. Arovitch, O'Callaghan v. Waller & Beckwith Realty.

Replies:

3. Strict Construction. Kay may argue that a reasonable interpretation of the exculpation clause on the back of the lift ticket is that it bars only claims for injuries arising out of the use of the ski lifts because (a) the clause appears on a "lift ticket," and (b) the exculpation clause says that it is made "in consideration for each lift ride." She will assert that this interpretation should prevail over other reasonable interpretations because it operates against the drafter of

the exculpation clause. Rest. § 106; Galligan v. Arovitch. Because her injuries did not occur on a ski lift, the exculpation clause does not apply to her claim.

4. Adequate notice. Kay may also argue that she did not have adequate notice that her lift ticket contained the exculpation clause. Cf. Rest. § 211. She may say that when she bought the ticket, she thought that it only served to show she had paid to use the lift and did not know that it contained contract terms. Klar v. H.M. Parcel. Although signs near the lifts say that there is a release, she may argue that she had already bought the tickets before she saw the signs, and thus this notice came too late. Cf. Lefkowitz v. Great Minn. Surplus Store (a store could not add conditions after bargain was formed).
5. Unconscionability. Kay also may argue that the disclaimer of liability for negligence is unconscionable because it attempts to relieve a business of liability for negligence that causes personal injury. Rest. § 208. Most states say such exculpation attempts are unconscionable. In some jurisdictions, her defense might be based on public policy in addition to or instead of unconscionability. Cf. Henningsen v. Bloomfield Motors.
6. Infancy. The facts say that Kay's parents drove Kay and her friends to the ski resort to celebrate her birthday. If Kay still needs her parents to drive her, she might be younger than 18 years old, and therefore an infant. As an infant, she could avoid her contracts. Rest. §§ 7, 14; Douglass v. Pflueger Hawaii.

Remedy:

7. Damages. Kay would seek whatever damages are available for her injuries under tort law.

MT. JAVIER INC v. LESTER

Claim:

8. Breach of Contract. Mt. Javier might sue Lester for breach of contract, claiming that he promised to write a report saying "whatever is necessary" to clear the resort of negligence and did not do it.

Defenses:

9. Public Policy. Lester might argue that the clause requiring him to say "whatever is necessary" is void because it violates a public policy -- which the court should use its power to recognize, cf. Black v. Bush Industries -- against expressing false expert opinions for use in court. Note: Lester will argue that only the specific clause is void, not the entire contract; otherwise, he might have to return the \$5000 that Mt. Javier paid him. See Henningsen v. Bloomfield Motors (holding a warranty clause was void as violating public policy).

Remedy:

10. Damages. The facts say that Mt. Javier is seeking to recover the \$5000 that it paid to Lester. Mt. Javier possibly could recover this amount as expectation damages, asserting that its loss in value is the difference in value between a report written to the contract specification (which Mt. Javier will argue is worth at least \$5000) and the report Lester actually wrote (which Mt. Javier will say is worth nothing to it). Mt. Javier has avoided no costs because it has already paid Lester \$5000. Mt. Javier further will say that the possible 50%

bonus promised to Lester is not a cost avoided because Lester cannot show with reasonable certainty that Mt. Javier would have had to pay the bonus if he had written a report clearing Mr. Javier.

OTHER

11. Other

PROBLEM V.

Note: The first word in paragraph three should have been "Orlene," not "Marlene." Some answers made this assumption; others read the problem literally, concluding Marlene was some additional person not otherwise involved in the contract. Either approach received full credit.

[Max. points per item: #1=5 pts.; #2=3 pts.; #3=3 pts.; #4=4 pts.; #5=5 pts.; #6=5 pts.; #7=5 pts.]

MADELINE v. NEWTON

Claim & Remedy:

1. Rescission. The facts say that Madeline is considering suing Newton seeking rescission of her purchase of the house. A contract may be voided if it was induced by (a) a material misrepresentation, Rest. § 164(1); (b) a fraudulent misrepresentation, id.; or (c) a mutual or unilateral mistake, Rest. §§ 152, 153. But Newton will respond that his misrepresentation about the sewer connection was not material because there is no evidence that the plumbing mattered to Madeline or would matter to a reasonable person (given that there was no difference in market value between the two forms of plumbing). Rest. § 161(2). Newton further will argue that his misrepresentation was not fraudulent because he did not have an intent to deceive Madeline. Rest. § 161(1). And Newton will argue that any mistaken belief about the plumbing does not make the sale voidable because it did not have a "material effect," Rest. § 152(1), or produce an "unconscionable result," § 153(a).

Alternative Claim:

2. Breach of contract. The facts say that Madeline is also considering suing Newton for breach of contract. If she does, she might claim that Newton promised to deliver a house that was connected to the sewer system and then broke that promise by delivering a house that was not connected to the sewer.

Defense:

3. Mutual Mistake. Newton might argue that he was induced to make his promise to sell a house with a sewer connection by his mistaken belief (which Madeline may have shared) that his house had such a connection. But as described above, it is not clear that this mistake had a material effect on the agreed exchange. Note: Newton does not appear to have any other plausible defense. It does not matter whether his breach of contract was negligent, material, fraudulent, etc. Cf. Sullivan v. O'Connor (doctor was not negligent but still breached contract.).

Remedy:

4. Expectation/Nominal Damages. Madeline might claim that her loss in value is the cost of attaching the house to the public sewer system (\$12,000). But Newton will respond that this cost to remedy the breach

is grossly disproportionate to the probable loss in value to Madeline because she has expressed no reason for caring about how the sewer is connected. Rest. § 348(2); Jacob & Youngs v. Kent. Accordingly, Madeline can recover only the loss in market value, which is nothing. Madeline might recover nominal damages (\$1) as an alternative. Rest. § 348(3).

MADELINE v. ORLENE

Claim:

5. Breach of Contract/Restitution. Madeline might bring two claims against Orlene. First, Madeline might sue Orlene for breach of contract, claiming that she made an implicit promise that her report would be accurate and she broke this promise when her report did not identify the plumbing discrepancy. Second, Madeline might sue Orlene under a theory of restitution, claiming that Orlene was unjustly enriched by her payment for the report because Madeline did not have a duty to pay unless "completely happy" with the report and she is not "completely happy" given the error.
6. No Consideration/Illusory Promise. In response to the breach of contract claim, Orlene might respond that there was no consideration for her promise to prepare the report. She will assert that Madeline's return promise to pay if "completely happy" is illusory because Madeline has made no commitment given that she might simply say she was not happy. Cf. Strong v. Sheffield. But Madeline will respond that she is constrained by an implied promise to act in good faith. Mattei v. Hopper.

Remedy:

7. Expectation. Madeline will seek expectation damages equal to her loss in value (i.e., the difference in value between an accurate and inaccurate report) and other loss (i.e., the losses she suffered as a consequence of the error in the report, which she might assert is the \$12,000 necessary to make a sewer connection), minus her costs avoided (i.e., nothing because she has already paid for the report). Orlene may respond that consequential damages are only nominal for the reasons stated above.

OTHER

8. Other

Grading Guide for the Final Examination in

CONTRACTS I

(Course 6202-21)

Prof. Gregory E. Maggs

The class as a whole did very well on the final examination. Your answers made clear that you studied diligently, learned the materials covered in the syllabus, and were very capable of applying your new knowledge. This grading guide provides information on how the examination was scored and how final grades were determined.

SCORING THE FINAL EXAMINATION

The final examination was scored using points. In accordance with the instructions at the bottom of each of the five problems, points were awarded based on how well you wrote essays identifying and discussing the claims and defenses that the parties might assert and the remedies that they might seek. Each problem was worth a total of 34 points, for a total of 170 points. This grading guide identifies the claims, defenses, and remedies that you should have discussed. I have included more detail in many instances than could be expected of a typical answer. Your score sheets, which you will receive separately, show how many points you earned on each problem.

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

FALL SEMESTER GRADES

Fall semester grades were based on the total number of points earned on the midterm examination and final examination. The maximum possible score was 200 because the midterm was worth 30 points (15% of 200 points) and the final examination was worth 170 points (85% of 200 points). The highest score achieved in the class was 178 points. The raw scores were translated into letter grades in accordance with the Law School's mandatory grading guidelines for first-year classes.

FOLLOWING INSTRUCTIONS

The instructions required answers to be written in essay form using complete sentences and proper paragraphs. Unfortunately, a number of answers did not comply with this requirement. Some contained outlines, bullet points, or numerous sentence fragments without capital letters or punctuation. These answers could not receive full credit, even if they correctly addressed issues. To be sure, writing essays well is difficult under the time pressure

of an exam. But as lawyers, all of your written work must be as polished as you can make it. Well written documents will impress your professors, employers, judges, and clients.

In addition, whenever you take examinations, write papers, or prepare legal documents, make sure that you follow very carefully any applicable format instructions and length limitations. Many answers did not comply with the specific instruction of leaving a blank line between paragraphs and indenting the first line of each paragraph (which is the standard way of preparing any single-spaced document). Other answers lost points because they exceeded the 4500 word limit. These requirements are important. Altogether, the examination answers exceeded 1500 pages in length; accordingly, making them concise and easy to read was necessary to facilitate prompt and accurate grading. As lawyers, you will learn that failing to follow instructions can have severe consequences (e.g., rejection of court filings, sanctions, etc.), and almost always creates a bad impression.

QUESTIONS

If you have questions about your examination, or seek tips for improving your scores on the spring examination, I would be happy to discuss these matters during my office hours. This semester, I usually will have office hours on Mondays at 5:00 p.m. Please note, however, that under the rules in the Law School Bulletin, "[n]o grade may be changed by an instructor after it has been posted or disclosed to a student unless there has been an arithmetic or administrative error that has been certified in writing as such by the instructor."

PROBLEM I.

[Points assigned: #1(4); #2(3); #3(3); #4(2); #5(3); #6(3); #7(3); #8(4); #9(3); #10(3); #11(3); #12(extra credit)]

BILL v. ANA

Claim:

1. Breach of Contract. Bill might sue Ana for breach of contract, claiming that Ana promised to provide him with advice, signs, advertising, and other services specified in the franchise agreement, and broke this promise when she improperly canceled the franchise agreement.

Defense:

2. No breach. Ana has argued that she properly canceled the agreement and does not have to give any reason for her decision, presumably referring to the clause in the franchise agreement giving each party an unqualified right to cancel at any time.

Replies:

3. Implied duty of good faith. Bill might reply that even though Ana had a right to cancel the franchise, she had an implied duty to act in good faith in executing her rights under the contract. See Rest. § 205, Mattei v. Hopper. He will argue that Ana did not act in good faith when she canceled the franchise agreement to eliminate him as a competitor because that is not a commercially reasonable and fair way for a franchiser to act toward a franchisee.
4. Unconscionability. Bill also might claim that a clause allowing either party to cancel at any time is unconscionable because ending a franchise agreement abruptly with no prior notice could cause a large investment

loss. Rest. § 208. But Ana might respond that the clause does not shock the conscience because she and Bill are business professionals, not consumers, and so they presumably were sophisticated enough to take this risk of financial loss into account when they made the agreement. In addition, the clause applied equally to each of them.

Additional Defenses:

5. No consideration. Ana has asserted that her promise is not enforceable because it is "one-sided." In making this assertion, she might be arguing that her promise lacks consideration because she is not guaranteed any payment from Bill. But Bill's promise is not illusory. Bill will argue that he made a commitment because he made an implied promise to use reasonable efforts to generate revenue. Without this implied promise, the contract would not make any sense. See Wood v. Lucy, Lady Duff Gordon.
6. Misrepresentation. Ana also appears to be arguing that her promise is unenforceable because it was induced by a fraudulent or material misrepresentation about Bill's business experience. Rest. § 164(1). Bill did make a statement that was not in accordance with the facts. But Bill appears to be arguing in response that his misrepresentation was neither fraudulent nor material. He might argue that it was not fraudulent because he did not have an intent to deceive Ana; instead, he made the incorrect statement by "mistake." Rest. § 162(1). And Bill has suggested that the overstatement was not material because he ultimately was able to run his franchise at a profit. Rest. § 162(3). But materiality must be judged at the time the statement induces a person to make a promise, and the amount of a prospective franchisee's business experience would appear to be material to a reasonable prospective franchiser when deciding whether to enter a franchise agreement.

Remedies:

7. Expectation damages. Bill might seek expectation damages equal to his loss in value (perhaps measured by how much having a franchise agreement would increase the sales price of his business) and other loss (his anticipated profit if the franchise had been continued) minus his costs avoided (the cost of running the store and paying 5% of the revenue to Ana). Rest. § 347. But Ana will argue that some of his lost profit is avoidable by starting another comparable business or continuing the business without a franchise agreement. Rest. § 350; cf. Parker v. 20th Century Fox.

CLAUDETTE v. BILL

Claim:

8. Breach of Contract. Claudette might sue Bill for breach of contract, claiming that he promised to repay her costs and pay her a reasonable compensation for her time for refurbishing his store, and broke these promises when he paid her only \$5,000.

Defenses:

9. Lack of consideration (illusory promise). Bill might argue that his promise lacks consideration because Claudette's promise to use her judgment to decorate the store to make it appealing to modern customers is illusory. He will assert that she did not really commit to do anything when she said that she would use her judgment to determine what

would be appealing. Strong v. Sheffield. But Claudette will respond that her promise is not illusory because she made a commitment to act in good faith and use reasonable efforts. Mattei v. Hopper; Wood v. Lucy. She would have acted in bad faith if she did not use her actual judgment in deciding how to decorate.

10. Indefiniteness. Bill will argue that his promise to pay Claudette's costs plus a reasonable compensation for her time is too indefinite to enforce because a reasonable compensation could be almost anything. Rest. § 33; Varney v. Ditmars. But Claudette may respond that her costs are not indefinite and that a reasonable compensation for her time can be determined by the going rate for interior decorators.

Note: Bill's defenses are that Claudette's promise is illusory and his promise is indefinite. Many answers were unclear or confused on this point.

Remedies:

11. Expectation Damages. Claudette will seek expectation damages equal to her loss in value (reimbursement of her costs plus a reasonable compensation minus the \$5,000 she has already received) minus her costs avoided (which she will assert are nothing because she completed the work). Bill will argue in response that she cannot prove with reasonable certainty, based on these facts, what a reasonable compensation should be. Rest. § 352. He will also assert that she could have avoided all but \$4,000 of her costs (\$12,000 costs expected minus \$8,000 costs incurred) by stopping work. Luten Bridge v. Rockingham County. But Claudette will reply that a half-finished project might have harmed her reputation and therefore she could not have ceased working without "undue risk, burden, or humiliation." Rest. § 350.

OTHER

12. Other

PROBLEM II.

[Points assigned: #1(3); #2(2); #3(3); #4(2); #5(3); #6(3); #7(2); #8(2); #9(3); #10(2); #11(3); #12(2); #13(4); #14(extra credit)]

DANNY v. ERIKA

Claim:

1. Breach of contract. If Danny is not required to repay his bonus to the university under a theory of restitution (see item 13 below), then he would have little reason to bring a lawsuit against Erika. But if Danny is required to repay his bonus, then he might sue Erika for breach of contract, claiming that Erika promised to "help" him by giving \$100,000 to the university, and that Erika broke this promise when she gave only \$10,000 to the university.

Defenses:

2. No Breach. Erika will argue that she did not break any promise; she promised to "help" Danny reach his goal, and she did help him by donating \$10,000. Although Danny told her he needed to raise \$100,000 she never promised to help him raise all of this money. Cf. Harvey v.

Facey. But Danny may respond that, in the context, her statement was an implied promise to help him by donating the full \$100,000.

3. No Basis for enforcement. Erika might respond that there is no basis for enforcing her promise to Danny. She will assert that there is no consideration because she made her promise out of gratitude and did not bargain for anything in exchange for her promise. See Mills v. Wyman. But Danny might respond in two ways. First, he will assert that Erika's promise is enforceable on the basis of promissory estoppel because he relied on the promise by hiring a roofing contractor. Rest. § 90; Feinberg v. Pfeiffer. But Erika may assert that this reliance was not reasonably foreseeable because she had no way of knowing that he would commit his bonus before receiving it. Erika also will argue that injustice will not result if the promise is not enforced. Danny received the benefit of the roof in exchange for his payments; he thus has not really lost anything. Second, Danny will assert that some states recognize moral obligation as a basis for enforcement, and will say that Erika made her promise in recognition of a moral obligation to help him after he assisted her nephew. See Webb v. McGowin. But Erika will reply that these courts permit recovery only when necessary to prevent injustice. See Rest. § 86(1). Again, here no injustice will result because Danny has not really lost anything.

Remedies:

4. Expectation or reliance damages. Danny's first choice of remedy would be expectation damages equal to his loss in value plus other loss (together equal to his \$20,000 bonus) and that he has avoided no costs. But Erika will argue that if Danny's promise is only enforceable on the basis of reliance, the amount of damages should be limited as justice requires under Rest. § 90(1)'s second sentence. Here, although he has spent \$15,000, he has received a roof worth that same value. Accordingly, justice requires no compensation.

UNIVERSITY v. ERIKA

Claim:

5. Breach of contract. The university might sue Erika for breach of contract, claiming that she promised to donate \$100,000 to the university and donated only \$10,000.

Defenses:

6. No basis for enforcement. Erika will argue that her promise lacks consideration because it is merely a promise to make a gift. The university might argue that it made an implied promise to use the money in a scholarship fund just like in Allegheny College v. National Chautauqua County Bank. But the decision that there was a bargain in that case has been criticized as stretching the facts to find a bargain. See Syllabus Appendix No. 1, Part 4.

Note: Some states hold that a promise to make a charitable gift can be enforced even without consideration or reliance, see Rest. § 90(2), but we did not address this principle in class.

7. Statute of frauds. Erika has argued that her promise is not enforceable because she did not make it in writing. But the statute of frauds would not apply to this promise. Her promise is not within the one-year provision of the statute of frauds. Rest. § 130(1). Although she promised to pay the money over a two-year period, she could have made

the payment all within one year without violating the contract. Klewin v. Flagship Properties.

Remedies:

8. Expectation damages. The university would seek expectation damages equal to its loss in value (\$200,000 promised minus \$10,000 paid) minus its costs avoided (whatever it would cost to set up the scholarship fund, which would probably be a minimal administrative cost).

UNIVERSITY v. FRED

Claim:

9. Breach of contract. The university might sue Fred for breach of contract, claiming that Fred promised to give the University \$100,000 and then broke that promise when he did not give the money.

Defenses:

10. No promise/assent. In saying that his promise was only an "aspiration," Fred is apparently arguing that he either did not make a promise or that, if he did make a promise, he did not assent to be bound. But the university will respond that a reasonable person would have understood his unqualified statement "I would like to donate \$100,000" as a promise and would have no way of knowing that he was not assenting to be bound. Lucy v. Zehmer.
11. No Basis for Enforcement. Fred will argue that his promise lacks a basis for enforcement. He will assert that there was no consideration because he did not bargain for the university's naming a classroom after him; the university told him about the plan to name the classroom after he had made the promise. Rest. § 71; Mills v. Wyman. Whether Fred's promise is enforceable on the basis of promissory estoppel is more complicated. Rest. § 90. If the university's only reliance on the promise was painting his name on the door, then Danny might argue that this action was not reasonably expected and that enforcement of his promise is "not necessary to prevent injustice" because painting a name on a door is an utterly trivial action. But if the university also cannot recover the bonus paid to Danny on the basis of Fred's promise (see below), then the university has a stronger argument for enforcing Fred's promise. Fred could foresee this expense, and it is substantial.

Remedies:

12. Expectation or Reliance Damages. The university will seek expectation damages from Fred equal to its loss in value (\$100,000) plus its other loss (Danny's bonus, if the university cannot recover it) minus its costs avoided (none because it already painted the door). If the promise is only enforceable on the basis of reliance, Danny may argue that the amount of recovery should be limited (according to the second sentence of Rest. § 90(1)) to the University's actual loss: the \$20,000 bonus paid to Danny and the cost of repainting the door.

UNIVERSITY v. DANNY

Claim & Remedy

13. Restitution. The university might sue Danny seeking recovery under a theory of restitution; it would claim that Danny was unjustly enriched

by the payment of the \$20,000 bonus which it paid by mistake thinking that Fred would donate money to the school. It would seek the \$20,000 in return. Danny would argue that he has not been unjustly enriched at the university's expense because the university has another remedy, namely, seeking recovery from Erika and Fred as discussed above. See Callano v. Oakwood Park Homes.

OTHER

14. Other

PROBLEM III.

[Points assigned: #1(4); #2(2); #3(2); #4(2); #5(2); #6(3); #7(3); #8(3); #9(4); #10(3); #11(3); #12(3); #13(extra credit)]

HENRI v. IDA

Claim:

1. Breach of contract. Henri might sue Ida for breach of contract, claiming that Ida promised to pay him \$80,000 and to restore his property after completing her mining operations, and that she broke both of these promises when she only paid him \$10,000 and did not restore the property.

Defenses:

2. No offer. Ida might argue in defense that she and Henri never formed a bargain because there was no initial offer. She will contend that Henri's statement ". . . it would only make sense . . ." was not an offer because Henri did not manifest a willingness to enter a bargain but merely explained his view of the economics. See Rest. § 24; Owen v. Tunison. But Henri will argue that what he said sounds more like an offer than the statement in Owen because he identified an affirmative condition on which he could enter a bargain. Alternatively, Henri might argue that the parties formed an implied bargain when Ida came onto the property and began mining and he did not stop her.
3. Statute of Frauds. Ida will argue that her alleged promises are not enforceable because they were not evidenced by a signed writing as required by the one-year provision of the statute of frauds. Under this provision, if any promises in a contract cannot be fully performed within one year, then all the promises are within the statute of frauds. Rest. § 130(1). Although Ida could completely perform her promises within a year, it would not be possible for Henri to allow her to mine for 18 months in less than a year.

About half the states allow a plaintiff to overcome the statute of frauds based on reliance. Monarco v. Lo Greco; Rest. § 139. Henri might argue that he relied on Ida's promises in letting her mine the property. But Ida would respond that Henri cannot show that enforcement is necessary to prevent injustice given that he knew all along that Ida would not find anything and did not tell her.

4. No promise to modify the original agreement. Ida also will argue that Henri's request for an assurance that she would restore the property was merely an offer to modify the contract that they had previously formed, and that she did not accept this offer. On the contrary, she merely commented that what he requested would be difficult.

5. Pre-existing duty rule. If the court concludes that Henri and Ida formed a contract through their initial communications, then Ida will argue that any promise to restore the property would be enforceable because there was no new consideration for this subsequent promise. Rest. § 73; Alaska Packers v. Domenico.
6. Nondisclosure. Ida apparently is arguing that Henri should have disclosed to her that past efforts to find minerals on his property had failed. She will assert that as friends, they stood in a confidential relation that required disclosure. Rest. § 161(d). But Henri will assert that friendship alone is not enough to establish a confidential relation, and that this is just a case of bare non-disclosure. Swinton v. Whitinsville Savings Bank.

Note: Many answers suggested that Ida would argue that her promise was induced by an active concealment. But an active concealment is an "action intended or known to be likely to prevent another from learning a fact." Rest. § 160. These answers did not identify any such action by Henri.

7. Unilateral mistake. Ida alternatively might argue that her promise should be voidable based on her unilateral mistake in believing that the land contained quartzite. Rest. § 153. Henri might respond that Ida did not make a mistake of fact; instead, she merely made an incorrect prediction that she would find quartzite. Henri will also assert that, as an expert in mining, Ida should bear the risk of mistake. Lees v. Stenoard.

Remedies:

8. Expectation Damages. Henri will seek expectation damages equal to his loss in value (the \$80,000 price - \$10,000 paid and the cost to level the land) plus other loss (apparently nothing because his farm production was not decreased by the failure to restore the property) minus his costs avoided and his other loss avoided (his principal cost was that he would be unable to use the land for a period and now he can use the property earlier than he otherwise would have been able to use it). Ida will assert that Henri should not be allowed to recover the cost to level the land because that "lavish" cost would be grossly disproportionate to the probable loss to Henri because Ida's mining did not reduce Henri's farm production. See Peevyhouse v. Garland Coal. But Henri will assert that his hiring Joaquin shows that he actually values the restoration of the property as much as the cost. He might assert that even though his farm production would not be diminished, he does not want the property to be "unsightly" because it has been in his family for generations and has sentimental value. In addition, Henri might be worried about the risk of injury to himself or liability for injury to others because Ida's mining left the property in a condition that was a "little dangerous."

JOAQUIN v. HENRI

Claim:

9. Breach of contract. Joaquin might sue Henri for breach of contract, claiming that Henri promised to pay him \$15,000 for restoring his farmland after Ida's mining operations, and then Henri repudiated this promise.

Defenses:

10. No offer and acceptance. Henri will argue that there was no completed offer and acceptance. He will assert that although Joaquin made an offer with his bid, cf. Drennan v. Star Paving (bids are offers), Henri's purported acceptance was really a counteroffer because it was not the mirror image of the bid; Henri he required Joaquin to promise to complete the work in 2 months. He will also assert that this counteroffer lapsed before Joaquin accepted it ("I thought that I would hear from you"). Rest. § 41(1). Joaquin will argue alternatively that Henri accepted his bid when he said "I accept," and that everything else was merely an unsuccessful subsequent attempt to modify the contract. Alternatively, Joaquin will assert that he accepted the offer by starting performance (driving his earthmoving equipment to the job site). Evertite Roofing v. Green.
11. Public policy. Henri will also argue that his promise to employ Joaquin is unenforceable on grounds of public policy because Joaquin does not have a valid license to do the work. Rest. 178; Bush v. Black Industries.

Remedies:

12. Expectation Damages. Joaquin would seek expectation damages equal to his loss in value minus his costs avoided. His loss in value is \$15,000 because Henri has not paid him anything. His costs avoided equal the costs he expected minus the costs he incurred. We can estimate that he expected costs of \$13,000 because the facts say that he anticipated earning \$2,000 on the job ($\$15,000 - \$2,000 = \$13,000$). The facts say that Joaquin spent "almost" \$2,000 in renting special equipment. Thus, Joaquin's costs avoided are roughly $\$13,000 - \$2,000 = \$11,000$. His expectation damages are therefore $\$15,000 - \$11,000 = \$4,000$.

OTHER

13. Other

PROBLEM IV.

[Points assigned: #1(3); #2(2); #3(3); #4(3); #5(3); #6(3); #7(3); #8(2); #9(3); #10(3); #11(3); #12(3); #13(extra credit)]

KATE v. LARRY

Claim:

1. Breach of contract. Kate might sue Larry for breach of contract, claiming that Larry promised to provide all prudent care for Rose under the veterinary services plan and broke this promise when he said that he would not remove Rose's kidney stone under the plan.

Defense:

2. No breach (exclusion). Larry will argue that he did not breach the contract because of the exclusion in the contract for "life-prolonging treatment for dogs suffering from cancer." He will say that Rose was not covered under the services plan because removal of kidney stones is life-prolonging and because Rose had a cancerous tumor.

Replies:

3. Adequate Notice. Kate appears to be arguing that she is not bound by the exclusion clause in the services plan because she did not read it. But not reading a contract is insufficient grounds for making a contract unenforceable. Kate had notice that the plan contained contract terms and assented to the plan and is therefore bound to the terms. Rest. § 211; cf. O'Callaghan v. Waller & Beckwith Realty (tenant had adequate notice of lease terms).
4. Strict Construction. Kate might argue that the exclusion does not apply because Rose was not "suffering" from cancer; although Rose had a tumor, it was benign and "did not even bother" her. It is true that the term "suffering from cancer" could merely mean "has cancer." But to the extent that there is ambiguity in the meaning of the term, it should be construed against Larry because he supplied the words of the veterinary services plan. Rest. § 206; Galligan v. Arovitch.

Note: Answers received credit for suggesting other plausible ways of construing the contract in favor of Kate and against Larry. Some answers, however, merely said that the contract should be strictly construed and did not adequately identify any ambiguity in the language.

5. Unconscionability. Kate also might argue that excluding liability for these services is unconscionable. But whether this exclusion really shocks the conscience is a difficult question. On one hand, Rose needs the operation and Mindy said that she was shocked by the exclusion. On the other hand, Larry will argue that he had a good reason for the exclusion, namely, some customers did not want to pay for this coverage. Cf. Klar v. H & M Parcel Service (acknowledging the right to limit liability, so long as the limitation is made clear).

Remedy:

6. Expectation damages. Kate will seek expectation damages equal to her loss in value (i.e., the \$1,200 cost of the kidney stone operation) and other loss (i.e., the \$3,000 cost to treat the injuries to her dog caused by Mindy) minus her costs avoided (i.e., none because she paid for the plan). Larry may respond that the injury to the dog was not foreseeable (i.e., Mindy should not have injured Rose) and it is avoidable (i.e., Kate can recover the money from Mindy).

KATE v. MINDY

Claim:

7. Contract/Tort Claim. Kate might sue Mindy raising a contract claim, a tort claim, or both. A contract claim might be that Mindy implicitly promised that the kidney stone operation would be done in a professionally competent manner, and Mindy broke that promise when she damaged Rose's organs. A tort claim might allege negligence in causing Rose's injuries. (We saw the possibility of bringing both a contract and a tort claim in Sullivan v. O'Connor. Although this is a course in contracts, we have seen several cases involving negligence claims. See, e.g., Galligan v. Arovitch, O'Callaghan v. Waller & Beckwith Realty.)

Defenses:

8. Exculpation clause. Mindy might argue in defense that she is not liable because of the sign in her office announcing that "the veterinarian cannot be responsible for operations that fail to achieve their intended result."

Replies:

9. Strict Construction. Kate will argue that the exculpation clause does not apply because the operation did achieve its intended result--the kidney stone was removed. Kate will say that injuries to Rose's other organs were a separate matter. Mindy might respond that the "intended result" was a successful removal of the kidney stones with no complications, but Kate will argue that any ambiguity in the meaning should be construed against Mindy because she supplied the words used in the contract. Rest. 206; Galligan v. Arovitch.
10. Adequate notice. Kate also will argue that the exculpation clause is not part of the contract because she did not receive adequate notice that a term on the wall is part of her contract. Klar v. H & M Parcel; cf. Rest. § 211. But Mindy will respond that the notice was prominently posted, and not simply put on the back of a receipt as in Klar. Businesses often post signs limiting their liability.
11. Unconscionability. Kate also will argue that the exculpation clause is unconscionable because it relieves Mindy from liability for injuries caused by her negligence, something that is typically not permitted. Rest. § 208; Cf. Henningsen v. Bloomfield Motors. But Mindy will respond that the court should treat injuries to an animal differently from injuries to a person.

Remedy:

12. Contract/Tort Damages. Kate will seek tort damages equal to her loss in value (i.e., nothing because the kidney stones were removed) and her other loss (i.e., the \$3,000 that she spent in treating Rose's injuries), minus her costs avoided (i.e., none, provided that she paid Mindy the \$1,200 cost). [Note: Points were awarded for any reasonable expression of tort damages because we did not study torts.]

OTHER

13. Other

PROBLEM V.

[Points assigned: #1(4); #2(4); #3(4); #4(4); #5(4); #6(4); #7(3); #8(3); #9(4); #10(extra credit)]

ODETTE v. NICHOLAS

Claim:

1. Breach of Contract. Odette might sue Nicholas for breach of contract, claiming that Nicholas promised to make his rental payment to her by 11:00 a.m. on the first day of the month or pay a 10% surcharge, and broke this promise when he did not make his payment until 12:30 p.m. and then refused to pay the surcharge.

Defense:

2. No breach. Nicholas has argued that he did not breach the contract because he dispatched his payment before 11:00 a.m. Nicholas's argument sounds like an application of the "mailbox rule," see Rest. § 63(a), but Nicholas is confused on this point. The mailbox rule applies only to

the acceptance of offers; it does not address the question of when performance must occur under a particular contract.

3. No Acceptance of Proposed Modification. Nicholas also might argue that Odette did not have a right to alter their existing contract unilaterally. He will say that when she sent him the message about the surcharge, she was at most offering to modify the contract, and he did not accept this offer. Odette may assert that his acceptance was implied because he did not object and continued to rent from her. But Nicholas will reply that silence is not an acceptance except in limited circumstances that did not occur here. Rest. § 69; Hobbs v. Massasoit.
4. No basis for enforcement. Nicholas further might argue that, even if he did accept the offered modification, his promise to pay the surcharge would lack consideration because he received nothing in exchange for it. Alaska Packers v. Domenico. But Odette might counter that continuing the month-to-month lease was similar to continuing the at-will employment in Lakeland Employment v. Columer, and the court in that case held that there was consideration for a subsequent promise by one party because the contract was continued (although this decision has been criticized). Odette also might counter that she and Nicholas each gained the certainty that damages for late payments would be liquidated at 10% of the rent rather than left to the court to measure. Odette also might assert that his implied promise to pay the surcharge for late payments is enforceable on the basis of reliance; in particular, she would not have continued to rent to him if he had not agreed to the term. Rest. § 90.

Remedies:

5. Liquidated Damages. Odette will seek liquidated damages, i.e., the surcharge, equal to 10% of the \$30,000 rent, which is \$3,000. But Nicholas will argue that the provision setting the surcharge at 10% of the lease is unenforceable as a penalty because the amount of the surcharge is "unreasonably large" in "light of the anticipated or actual loss caused by the breach and the difficulties of proof or loss." Rest. 356(1). He will argue that the amount of the surcharge is unreasonable because, unlike in Dave Gustafson v. State, the amount does not vary by the degree of lateness. But Odette may argue that, as in Dave Gustafson, the damage varies by the size of the contract (i.e., it is 10% of the amount of the rent, not a fixed dollar figure), and that the difficulty of proving actual damages for lateness made the payment reasonable.

Note: Many answers incorrectly stated the standard for when liquidated damages are a penalty (e.g., grossly disproportionate, unconscionably large, etc.).

NICHOLAS v. PETER

Claim:

6. Breach of contract. If Nicholas is required to pay damages to Odette, he might sue Peter for breach of contract, claiming that Peter promised to deliver the rent check to Odette by 11:00 a.m., and broke this promise by delivering the check at 12:30 p.m.

Defenses:

7. Infancy. If Peter is a recent high school dropout, he might be under the age of 18 and thus able to void the contract on grounds of infancy. Rest. § 14; Douglass v. Pflueger Hawaii.

8. Undue Influence/Overreaching. Peter might assert that his promise is not enforceable on the basis of undue influence or overreaching. Peter might explain that Nicholas unfairly persuaded him to enter the delivery contract without limiting his liability for damages because "by virtue of the relation between them [Peter was] justified in assuming that [Nicholas would] not act in a manner inconsistent with his welfare." Rest. § 177(1); Odorizzi v. Bloomfield School Dist. The facts say that Nicholas was a family friend and that Peter "trusted Nicholas to help him at all times."

Remedies:

9. Expectation Damages. Nicholas might seek expectation damages equal to his loss in value (presumably very little because the letter was delivered) plus his other loss (the \$3,000 surcharge) minus his costs avoided (nothing, if Nicholas has paid Peter). Peter might argue that Nicholas cannot recover the full \$3,000 because damages of this size for being an hour and a half late were unforeseeable. Rest. § 351(1); Hadley v. Baxendale. But Nicholas will respond that the damages were foreseeable because they arose "in the ordinary course of events." Tenants are customarily charged a fee when they pay the rent late, and thus the surcharge arose in the ordinary course of events and 10% is not an unusually large fee. (That is why most carriers do limit their liability for late deliveries.)

OTHER

10. Other

Note: Some answers suggested that Peter might raise the defense of unilateral mistake. It is true that Peter made a mistake in delivering the letter. But that is not the same thing as being induced to make a promise because of a mistaken belief about the facts.

Grading Guide for the Midterm Examination in

CONTRACTS I

(Course No. 6202-21; 3 credits)

Professor Gregory E. Maggs

The midterm examination consisted of six problems worth 5 points each, for a total of 30 points. The final examination will be worth 170 points. Accordingly, the midterm will count for 15% of your final grade (i.e. 30 points out of a total of 200 points). No letter grades were assigned to the midterm examination. You will receive a final letter grade for Contracts I at the end of the semester based on your total points on both the midterm examination and the final examination. As in all of your classes, letter grades will be assigned in accordance with the Law School's mandatory grade distribution guidelines.

The purpose of the midterm examination was to help you assess several specific skills that you will need for writing successful essays on the final examination. These skills include properly identifying and discussing claims, defenses, and remedies. They also include avoiding common problems such as overlooking claims and defenses, forgetting to apply the law to the facts, and misunderstanding complicated legal rules.

Your answers showed a very solid understanding of the law of contracts and remarkable progress in developing the skills that will be needed on the final examination. It is evident that everyone has studied diligently. You are well on your way to becoming attorneys.

The median score was 23 points, higher than in past years. Twenty percent of the class scored 27 or more points or higher and 20% scored 19 or fewer points. Your scores should help you decide what to work on when preparing for the final examination. They certainly do not preordain any particular grade for the semester, especially because the differences between the scores are very small in comparison to the 170 points that still may be earned on the final examination.

The discussion below provides suggested answers for each of the six problems and some guidance with respect to these answers. Some answers received full credit even if they were not exactly the same as the suggested answers because everyone sees things a little differently. Answers that were incomplete or not entirely correct received partial credit.

Finally, please remember to follow the instructions whenever taking examinations in law school. For the most part, this was not a problem. Only one examination exceeded the 1500 word limit. Unfortunately, a number of students overlooked the instruction to indent the first line of every paragraph and to leave a blank line between paragraphs. These small steps make it much easier for me to read the answers. (The answers to the midterm, when combined, exceeded 720 pages; the answers to the final examination will be three times as long.)

PROBLEM 1.

1. Properly Identifying and Discussing Claims. In summarizing the facts and procedure of Toys, Inc. v. F.M. Burlington [p. 259], the editors of our casebook say that Toys "sued for breach of contract." Based on the facts provided, identify and discuss Toys, Inc.'s breach of contract claim.

Sample answer:

In suing F.M. Burlington for breach of contract, Toys Inc. might have claimed (1) that F.M. Burlington promised to renew Toys Inc.'s lease for an additional five years at the then-prevailing rental rate in the mall provided that Toys notified Burlington in writing of its intention to renew, and (2) that F.M. Burlington broke this promise when it did not renew the lease, despite receiving Toys Inc.'s timely notice, and instead listed the space for rent to others.

Guidance:

We learned on the first day of class that a contract is a promise that the law will enforce, see Rest. § 1 (quoted prominently at the top of the first page of the syllabus), and that whenever a plaintiff sues a defendant for breach of contract, the plaintiff claims that the defendant made a promise and did not keep it. The keys in identifying a contract claim are (1) describing the promise that the defendant allegedly made, and (2) specifying how the defendant allegedly broke this promise.

Because identifying claims is so important, we discussed in class the nature of the claim in every case we covered this semester (including Toys, Inc.). And the "Tips for Writing Good Answers" on page 2 of the examination instructions offered this important guidance: "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')." Most students followed this guidance and wrote answers very similar to the sample answer above.

Everyone should work on this skill in preparation for the final examination. Experience has shown that if you do not properly identify the claim, you will have difficulty discussing the defenses and remedies pertaining to the claim. You can practice this skill by working through past examinations (available on the portal) and by striving to identify accurately the claims in every case in the syllabus.

Some answers lost points because they did not specifically identify what promise was made or how it was broken. Instead, they discussed the facts of the case, the procedural posture, and the legal issues considered by the court. What these answers said was often accurate, but not responsive to the specific question being asked.

A few answers lost points because they focused only on the fact that the offer was held open by an option contract. I think that this is inadequate because Toys Inc. was not merely suing F.M. Burlington for breaking the option contract. It was suing because it believed that it had accepted the offer. By way of comparison, in Dickinson v. Dodds, Dickinson did not sue Dodds for breaking his promise to keep the offer open until Friday; on the contrary, Dickinson sued Dodds for breaching his promise to sell the property.

PROBLEM 2.

2. Properly Identifying and Discussing Defenses. Suppose that the proposal in International Filter Co. v. Conroe Gin, Ice & Light Co. [p. 157] had

omitted the sentence "This proposal is made in duplicate and becomes a contract when accepted by the purchaser and approved by an executive officer of the International Filter Company, at its office in Chicago." Discuss how these changed facts might have affected the defenses that the Conroe Gin, Ice & Light Co. raised.

Sample Answer

The court identified Conroe's two defenses at the bottom of page 158. Conroe's first defense was that writing "O.K." on the proposal was not a proper manner of acceptance. The court rejected this defense because it found writing "O.K." to be consistent with the quoted sentence. Changing the facts should not affect this conclusion. Unless an offer indicates otherwise, the offeree may accept an offer in any manner reasonable under the circumstances. Rest. § 30(2). Writing an affirmative response on a written offer is a reasonable method of acceptance because that is how most offerees accept written offers.

Conroe's second defense was that International Filter did not provide notice of its acceptance. The court rejected this defense in two alternate holdings. The first alternate holding was that the quoted sentence waived notice. Rest. § 56. Omitting the quoted sentence would eliminate the basis for this first alternate holding because nothing else in the proposal would waive notice. The second alternate holding was that International Filter's letter of February 14 provided notice. Eliminating the quoted sentence would not affect this second alternate holding. The case therefore would come out the same way.

Extra Credit

It is possible that omitting the quoted sentence would have converted the written proposal into an offer by International Filter. Without the sentence, the proposal sounds like a "manifestation of willingness to enter a bargain" by International Filter that would justify Conroe Gin in understanding that its assent would conclude the bargain because no further approval by International Filter would be required. Rest. § 26. If this is correct, then a contract would have been formed when Conroe signed the document, and Conroe's two defenses would still be invalid.

Guidance

We learned in chapter 2 that a court might have to consider six questions to decide whether an offeree has accepted an offer:

1. What was the offer?
2. Did the offer invite the offeree to accept by rendering a complete performance (for a proposed unilateral contract) or by promising to perform (for a proposed bilateral contract)?
3. Did the offeree completely perform or make a promise to perform as invited by the offer?
4. If the offeree made a promise to perform, was the promise made in a permissible manner?
5. Was notice of acceptance required?
6. Did the offeree provide notice?

As we discussed in class, Conroe's first defense concerned question 4. For the reasons stated in the sample answer, changing the facts should not

affect the court's conclusion on this point. (I did not take off points from students who properly framed the issue but disagreed with this conclusion, provided that they adequately explained their answers.) Conroe's second defense concerned questions 5 and 6. Changing the facts would affect the answer to question 5 but not question 6. (The "extra credit" argument, which some very good answers addressed in addition to discussing Conroe's two defenses, concerns question 1.)

Most answers that lost points on this problem did not identify and discuss the two defenses that Conroe raised in this case. Improving the skill of identifying defenses is important because identifying and discussing defenses will be a central part of the final examination. And unlike in this problem, the defenses on the final examination may not be expressly stated.

Other answers lost points because they did not exhibit an adequate understanding of the rules pertaining to questions 4, 5, and 6 above. Some answers said almost nothing about the legal rules applicable to the defenses. Please understand that good answers do not have to quote the rules verbatim, but they must discuss their application to the facts. The "Tips for Writing Good Answers" gives this advice: "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 that the promise is too indefinite to enforce. Y will assert that there is no basis for determining the existence of a breach because ... and no basis for giving an appropriate remedy because X might respond')." "

Problem 3.

3. Properly Identifying and Discussing Remedies. Identify and discuss the arguments in Hoffman v. Red Owl Stores [p. 236] for limiting the remedy awarded to Hoffman in connection with the sale of the Wautoma grocery-store fixtures and inventory.

Sample Answer

Restatement § 90(1)'s second sentence says that the remedy awarded for a promise enforced on the basis of promissory estoppel may be limited as justice requires. Part of the remedy that Hoffman sought was compensation for the profits he would have made if he had not had to close the Wautoma grocery store and sell off the store's fixtures and inventory. But the court accepted the argument that justice did not require compensating Hoffman for this loss profit because Hoffman opened the store in order to gain experience in the grocery business, as a temporary experiment, and not to make a long-term profit.

Guidance

The key points to discuss were (1) the power of a court to limit the remedy awarded under section 90(1)'s second sentence; (2) the recovery that Hoffman desired; and (3) the arguments in this case for limiting Hoffman's recovery. Most answers addressed all three points and received full credit.

Some answers lost points because they said little more than that a court may limit the recovery as justice requires. They did not elaborate on why justice might not require Hoffman to recover profits in this case. Whenever you discuss a legal rule in a law school examination answer, make sure you address how the rule applies to the facts of the case. The "Tips for Writing Good Answers" provides this guidance on remedies: "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."

PROBLEM 4.

4. Overlooking Claims or Defenses. Identify and discuss the possible defenses in White v. Corlies & Tift [p. 162] that were not present in Ever-Tite Roofing v. Green [p. 164] and Allied Steel & Conveyers v. Ford Motor Co. [p. 167].

Sample Answer

The court's opinion in White v. Corlies & Tift considered two possible defenses. The first defense was that there was no acceptance because White did not make a promise to do the work as required by the offer. (The court acknowledged White's position that he made an implied promise by purchasing wood and starting to work on it.) The second defense was that there was no acceptance because White did not provide notice to Corlies & Tift. (As the court put it, "[t]here was nothing in his thought, formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer.") Neither of these defenses was possible in Ever-Tite Roofing or Allied Steel. In both of those cases, the offerees made implicit promises to do the work by starting their requested performance (i.e. loading the trucks and beginning assembly of the conveyor system). And in both cases, the offerees provided notice of their acceptance (i.e. by showing up at the Greens' house and the Ford plant).

Guidance

The goal here was identify the defenses in White and to discuss how White was distinguishable from Ever-Tite and Allied. As discussed above in the guidance to Problem 2, courts typically have to consider 6 questions when deciding whether an offeree has accepted an offer. This case concerned questions 3 and 6. In White, two defenses were possible on these points because White's conduct was ambiguous. These defenses were not possible, according to the courts, in Ever-Tite and Allied, for the reasons stated in the sample answer.

Most answers addressed these points without difficulty. Some answers lost points because they did not identify the possible defenses in White. (I permitted considerable latitude in the expression of these defenses.) Other answers did not say anything about Ever-Tite or Allied.

PROBLEM 5.

5. Applying the Law to the Facts. Suppose in Dyer v. National By-Products [p. 43] that National By-Products had raised the statute of frauds as a defense. Discuss the arguments that Dyer might have made about the application of the statute of frauds to the facts of the case.

Sample Answer

Dyer alleged that National By-Products made an oral promise to employ him for life. This promise apparently was not evidenced by a writing signed by National By-Products; on the contrary, National denied making the promise. If National By-Products had raised the statute of frauds as a defense, Dyer would have argued that none of the six statute of frauds provisions that we considered in class would make unenforceable a promise by National By-Products to employ him for life. The promise has nothing to do with marriage, land, executors, goods, or suretyships. That leaves only the one-year provision of

the statute of frauds, but a promise to employ someone for life is not within this provision because performance for a lifetime can be completed in less than a year. The person performing might die before the year is over.

Guidance

Most answers tracked the sample answer closely and received full points. Some answers lost points because they incorrectly said that a promise to employ someone for life is within the one-year provision. Others recognized the issue but did not know whether such a promise is within the statute. Others gave the correct answer but no explanation.

Some answers asserted that Dyer could overcome the statute of frauds by showing reliance as was done in Monarco v. Lo Greco and is allowed in some jurisdictions. But reliance is only relevant if the statute of frauds would require a signed writing; here no writing was required.

PROBLEM 6.

6. Accurately Understanding the Law. In Drennan v. Star Paving [p. 188], plaintiff Drennan argued "that he relied to his detriment on defendant's offer." But the court did not conclude that this reliance on the offer was by itself sufficient to allow Drennan to prevail. Instead, the court based its decision on the existence of a "subsidiary promise." What was the subsidiary promise and why was the existence of this promise necessary for the plaintiff to prevail?

Sample Answer

Star Paving offered to perform the paving work for \$7,131. The "subsidiary promise" was an implied promise by Star Paving not to revoke its offer until Drennan had "an opportunity to accept [Star Paving]'s bid after the general contract has been awarded to him." The court held that this subsidiary promise was binding because Drennan had relied on it.

The existence of the subsidiary promise was necessary for Drennan to prevail because Star Paving attempted to revoke its offer before Drennan accepted it. Absent the subsidiary promise, Star Paving's revocation would have been effective because offers are freely revocable unless there is a binding promise to keep them open. Rest. § 42.

Guidance

The last sentence of the problem asked two questions: (1) What was the subsidiary promise? And (2) why was the existence of this promise necessary for the plaintiff to prevail? The best answers addressed both questions correctly.

Some answers lost points because they did not correctly explain what the subsidiary promise was or did not explain why the subsidiary promise was necessary. A few answers said that the case was controlled by Rest. § 45, but this is incorrect. Rest. § 45 applies only to unilateral contracts. The court cited § 45 only by way of analogy.

Grading Guide for the Final Examination in

CONTRACTS I

(Course 6202-21)

Prof. Gregory E. Maggs

I was very impressed by the results of the examination. Most answers were thoroughly excellent, and the class overall did very well. Your answers made clear that you had studied diligently, learned the materials covered in the syllabus, and were very capable of applying your new knowledge. This grading guide provides information on how the examination was scored and how final grades were determined.

SCORING THE FINAL EXAMINATION

The final examination was scored on the basis of points. In accordance with the instructions at the bottom of each of the five problems, points were awarded based on how well you wrote an essay identifying and discussing the claims and defenses that the parties might assert and the remedies that they might seek. Each problem was worth a total of 34 points, for a total of 170 points. This grading guide identifies the claims, defenses, and remedies that you should have discussed. I have included more detail in some instances than could be expected of a typical answers. Your score sheets, which you will receive separately, show how many points you earned on each problem.

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

FALL SEMESTER GRADES

Fall semester grades were based on the total number of points earned on the midterm examination and final examination. The maximum possible score was 200 because the midterm was worth 30 points (15% of 200 points) and the final examination was worth 170 points (85% of 200 points). The highest score achieved in the class was 183 points.

FOLLOWING INSTRUCTIONS

The instructions required answers to be written in essay form using complete sentences and proper paragraphs. Unfortunately, a number of answers did not comply with this requirement. Some contained outlines, bullet points, or numerous sentence fragments without capital letters or punctuation. These answers could not receive full credit, even if they correctly addressed issues. To be sure, writing essays well is difficult under the time pressure of an exam. But as lawyers, all of your written work must be as polished as

you can make it. Well written documents will impress your professors, employers, judges, and clients.

In addition, whenever you take examinations, write papers, or prepare legal documents, make sure that you follow very carefully any applicable format instructions and length limitations. Many answers did not comply with the specific instruction of leaving a blank line between paragraphs and indenting the first line of each paragraph (which is the standard way of preparing any single-spaced document). Other answers lost points because they exceeded the 4500 word limit. These requirements are important. Altogether, the examination answers exceeded 1500 pages in length; making them concise and easy to read is crucial to facilitate prompt and accurate grading.

QUESTIONS

If you have questions about your examination, or seek tips for improving your scores on the spring examination, I would be happy to discuss these matters during my office hours. This semester, I usually will have office hours on Mondays at 5:00 p.m. Please note, however, that under the rules in the Law School Bulletin, "[n]o grade may be changed by an instructor after it has been posted or disclosed to a student unless there has been an arithmetic or administrative error that has been certified in writing as such by the instructor."

PROBLEM I.

[Points assigned: #1(4); #2(4); #3(3); #4(3); #5(3); #6(4); #7(4); #8(3); #9(3); #10(3); #11(extra credit)]

BERTHA v. ARTHUR

Claim:

11. Breach of Contract. Bertha might sue Arthur for breach of contract, claiming that Arthur promised to construct a medical office building on her property in one year and then failed to complete the building.

Defenses:

12. No Offer/Acceptance. Arthur might argue that the alleged promise is not enforceable because the parties never formed a bargain. In support of this defense, Arthur first might make two assertions.

First, he might assert that he never made an offer to do the work. He will explain that although he said that \$1 million was the lowest price he "could" offer, he did not say he "did" offer to do the work at that price, and thus he did not manifest a willingness to enter a bargain. Rest. § 24; Owen v. Tunison. Bertha will argue that Arthur's use of the word "offer" makes it reasonable to interpret his communication as an offer. Cf. Fairmount Glass v. Crunden-Martin.

Second, Arthur might assert that even if he did make an offer with his voice mail, Bertha did not accept the offer. He will say that her response was a counteroffer under the mirror image rule. Bertha's reply was not a mirror image of his alleged offer because Bertha added the condition that the work had to be completed in a year. Rest. § 59; Minn. & St. Louis Rwy v. Columbus Rolling Mill. Bertha will respond that even if she made a counteroffer, Arthur accepted the counteroffer by beginning work. His beginning work, she will say, constitutes an implied promise to complete the work. Evertite Roofing v. Green; Allied Steel v. Ford.

13. Statute of Frauds. Arthur has argued that his alleged promise is not enforceable because he "never signed anything." Bertha will respond that Arthur's promise to build the medical facility does not have to be evidenced by a signed writing because it does not fall within any statute of frauds (i.e., it is not a sale of land, nothing in the contract requires performance to take more than a year, etc.). Rest. § 110. (Note: Arthur's email likely would satisfy the statute of frauds if it was the offer that Bertha has accepted.)
14. Non-Disclosure/Confidential Relations. Arthur also has argued that his alleged promise is not enforceable because Bertha "deceived him." Bertha does not appear to have induced Arthur to make a promise through a misrepresentation, active concealment, or half-truth. See Swinton v. Whitinsville Savings Bank. But Arthur might argue that, as a "friend," Bertha and he stood in a confidential relation, and that she therefore had a duty to disclose material facts to him. Rest. § 161(d). Arthur will argue that Bertha did not disclose the fact that the land was miry, a fact which she must have known given the price she paid for the property.
15. Mutual/Unilateral mistake. Arthur also might argue that he was induced to make the promise by a mutual mistake because both parties assumed that the soil was suitable for construction when in fact it was not. Sherwood v. Walker; Rest. § 152. Bertha will make several responses. First, Bertha will respond that Arthur did not take for granted that the soil had any particular condition; instead, he merely predicted what it would cost him to construct the facility. Cf. Watkins & Sons v. Carrig (no mistake regarding unforeseen rocks). Second, Bertha will argue that the mistake was not mutual because she knew the condition of the soil given the low price she paid for the property. Third, Bertha will argue that he should bear the risk of loss because, as a contractor, he had greater expertise in soil conditions than she did. Rest. § 154(b); Leonard v. Stees. If the court determines that the mistake was not mutual, Arthur might assert unilateral mistake as an alternative defense. Rest. § 152. But Bertha will argue that enforcing the promise would not be unconscionable because contractors often have cost overruns; it is just a part of their business.

Remedy:

16. Expectation Damages. Bertha might seek expectation damages equal to her loss in value and other loss minus her costs and other losses avoided. Rest. § 347. Bertha will assert that her loss in value (the incomplete portion of the medical office building) should be measured by the cost to complete the structure, which she estimates to be \$1,200,000. Arthur has two responses on this point. First, Arthur will respond that because Bertha's subjective loss in value has been determined with reasonable certainty, her loss in value cannot be measured by either the cost to complete performance or loss in market value. Rest. § 348(2) (permitting use of these alternative measures when loss in value cannot be proved with reasonable certainty). Arthur will argue her loss in value is \$800,000. Here we know that the maximum that Arthur has promised is worth \$1.2 million (i.e., the cost to finish anything more is avoidable) and what he has delivered -- as measured subjectively by Bertha -- is \$400,000 (i.e., the amount she values the construction). Second, Arthur will argue that even if her subjective loss in value cannot be proved with reasonable certainty, she cannot recover the cost of completion because it would be grossly disproportionate to the probable loss in value to her. Instead, she is limited to the loss in market value. Rest. § 348(2)(b); Jacob & Youngs v. Kent. The cost to complete is \$1.2 million while Bertha's probable loss in value is \$800,000. This is only two-thirds of the costs to complete, which he

will argue is grossly disproportionate. Therefore, he will assert, she can only recover loss in market value which is \$1 million.

Bertha will assert that her other loss includes the damages that she has to pay Cristobal and the loss of rent that she would have received from him. Arthur will respond that her loss of rent is partially avoidable; at most it should extend only for the period which it would take to complete construction. Bertha's costs avoided equal the \$1 million price minus her \$200,000 down payment.

CRISTOBAL v. BERTHA

Claim:

17. Breach of Contract. Cristobal might sue Bertha for breach of contract, claiming that Bertha promised to lease him a medical office building starting one year later and broke that promise by not providing the building.

Defenses:

18. Indefiniteness. Bertha might argue that the contract is unenforceable because the amount of the rent is indefinite. The rent was to be \$5000 "with increases based on market conditions." She will assert that this standard is too vague enable a court to know whether there has been a breach. But Cristobal will assert that increases in annual rent could be determined by looking at other comparable buildings. Toys Inc. v. F.M. Burlington.

Remedies:

19. Liquidated/Expectation Damages. Cristobal will seek liquidated damages equal to "\$5000 for each month of delay." Bertha will oppose this remedy on grounds that it is a penalty because the amount of damages is excessive in comparison to actual or anticipated loss and difficulty of proof. Rest. § 356; Dave Gustafson v. State. If Cristobal is seeking these damages for the entire 10-year term of the lease, then the remedy is clearly unreasonable because most of the loss could be and was avoided. Bertha will further argue that, even if Cristobal is only seeking damages for five months (the two months of delay before Bertha told him that she could not honor the lease and the three months until he found a new location), the remedy is unreasonable because Cristobal's actual and anticipated loss is zero. His loss in value is the rental a medical facility, which should be valued at \$5000 a month because that is what suitable substitute facilities cost. His costs avoided is \$5000 in rent. There is no evidence of other loss (for all we know he is using another suitable facility). As a result, Cristobal cannot recover either liquidated or expectation damages.
20. No consideration/Pre-Existing Duty Rule. Bertha also will argue that her promise to pay \$5000 a month of delay is not enforceable because she received no consideration for it. Rest. § 71. But Arthur may argue that the consideration was his implied promise to give up a claim for actual damages or other remedies.

OTHER

21. Other

PROBLEM VI.

[Points assigned: #1(4); #2(4); #3(4); #4(3); #5(4); #6(3); #7(2); #8(4); #9(3); #10(3); #11(extra credit)]

EDOUARD v. FAY

Claim:

1. Breach of Contract. Edouard may sue Fay for breach of contract, claiming that Fay promised to perform certain decorative metal work and then broke this promise by not doing the work.

Defense:

2. Revocation (by Fay). Fay will argue that no bargain was formed. Although her bid was almost certainly an offer, she will argue that she revoked this offer before Edouard accepted it. Dickinson v. Dodds. In response, Edouard might analogize this case to Drennen v. Star Paving, and assert that Fay cannot revoke the offer because (1) Fay implicitly promised to keep the offer open until he heard from Dolly, and (2) he relied on the implied promise by preparing his bid to Dolly. But Fay will respond that this case is very different from Drennen; she will argue that she did not make an implied promise to keep the offer open because her bid said expressly that she could "withdraw" the offer before it was accepted or before it lapsed in 30 days. Fay also will say that, even if she had made a promise to keep the offer open, Edouard could not have reasonably relied on her price because it contained an "obvious mistake." Cf. Drennan v. Star Paving (finding reasonable reliance where there was no obvious mistake). The parties might dispute how obvious the mistake was.
3. Rejection (by Edouard). Fay also will argue that even if she did not revoke her offer, that no bargain was formed for two reasons. First, Edouard rejected her offer when he sent her a proposed subcontract that was not the mirror image of her offer. The facts say that the subcontract was "almost identical," which means that it was not identical. Although Edouard eventually signed her offer in attempt to accept it, by that time it was too late because he had already terminated his power of acceptance. Minn. & St. Louis Rwy v. Columbus Rolling Mill. Second, Fay will argue that she did not accept Edouard's counteroffer. Although Edouard asked Fay to "let him know" if she needed something else, he did not have the power to make her silence acceptance. Rest. § 69.

Remedy:

4. Expectation Damages. Edouard might seek expectation damages. He will argue that his loss in value should be measured by the difference in contract price for the other subcontractor (i.e., \$66,000 more than Fay's bid) and that his costs avoided should be the amount that he would have paid Fay, for a total of \$66,000. Fay will argue that he could have avoided some of these damages if he had begun to search for a less expensive substitute subcontractor sooner and that he could have done this without undue risk, burden, or humiliation. Rest. § 350.

EDOUARD v. DOLLY

Note: I made a mistake in writing the problem. In the last sentence, I wrote: "Fay unsurprisingly never sent Edouard the promised \$10,000 bonus." I should have written "Dolly" instead of "Fay." Grading was adapted to address this error.

Claim:

5. Breach of Contract. Edouard might sue Dolly for breach of contract, claiming that she promised him a \$10,000 bonus and did not pay it to him.

Defense:

6. No basis for enforcement. Dolly might defend on grounds that her promise lacks a basis for enforcement. The promise lacks consideration because it was given "in gratitude" and was not bargained for in exchange for anything. Rest. § 71; Mills v. Wyman. She will further argue that Edouard did not rely on the promise and therefore the promise is not enforceable on the basis of promissory estoppel. Rest. § 90.

Edouard might respond a few courts have held that "a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit." Webb v. McGowin. In this case, Dolly promised the money because she evidently valued the work she received more than she paid for it. But Dolly will respond that most states reject this view and those which accept it generally enforce the promise only when necessary to prevent injustice. Rest. § 87(1). Here, no injustice would result if he did not received the money. Dementas v. Tallas.

Remedy:

7. Expectation Damages. Edouard will seek expectation damages equal to his loss in value (\$10,000) minus his costs avoided (\$0).

DOLLY v. EDOUARD

Claim:

8. Breach of Contract. Dolly might sue Edouard for breach of contract, claiming that Edouard promised to do the additional paving work and then broke the promise by telling her he was not interested.

Defenses:

9. No Acceptance. Edouard might argue that he did not accept Dolly's offer. He will assert that he merely went to look carefully at the property and then decided not to conclude a bargain. He will assert that nothing can be inferred from this conduct, just as it was not possible to infer an acceptance in White v. Corlies & Tift. Dolly may respond that he did accept by beginning work. He loaded his trucks and went to the site, which was acceptance in Evertite Roofing v. Green. And at the site, he began to perform by surveying the property "in accordance with the contract," which was the acceptance in Allied Steel v. Ford.

Remedy:

10. Expectation Damages. Dolly will seek expectation damages equal to her loss in value, which she will argue should be measured by the cost of hiring another contractor (\$60,000), minus her costs avoided, which would be what she would have paid Edouard (\$45,000).

OTHER

11. Other

PROBLEM VII.

[Points assigned: #1(4); #2(5); #3(3); #4(2); #5(3); #6(3); #7(4); #8(3); #9(3); #10(2); #11(2); #12(extra credit)]

HANNA v. GONZALO

Claim:

1. Breach of Contract. Hanna might sue Gonzalo for breach of contract, claiming that Gonzalo not only expressly promised to employ her (which he did for nearly a year) but also implicitly promised to continue her employment--or at least not fire her without cause--for a reasonable period. She will assert that Gonzalo broke the implied promise when he terminated her employment for no clear reason.

Defense:

2. No implied promise. Gonzolo's position is that the employment contract did not include the alleged implied promise; he has asserted that Hanna was an employee at will, as are most employees in the United States. As an employee at will, she had no promise of future employment and could be fired at any time without cause. Hanna may respond that the implied promise is necessary for the transaction to make sense. Wood v. Lucy. No one would move across the country to accept a job when there is no promise that the job would continue. Gonzolo may reply that, even he made an implied promise to employ her for a reasonable time, he kept this promise by employing her for almost a year. Or he will argue that the proposed implied term is just too uncertain to amount to a promise. Rest. § 4.
3. Statute of Frauds (material terms). If Hanna is claiming that Gonzolo's implied promise extended beyond one year (which seems likely if Hanna wants to collect much of a remedy), Gonzolo will argue that the promise cannot be enforced because of the statute of frauds. See Rest. § 130. Although he wrote an email, which is a signed writing, the email was insufficient to satisfy the statute of frauds because it did not state with "reasonable certainty the essential terms" of the promise. Rest. § 131(c). Most importantly, the email omitted to state the duration of the employment contract.
4. No consideration (conditional promise to make a gift). Many answers suggested that Gonzalo would argue that his promise to employ Hanna was merely a conditional promise to make a gift because it sounds something like the promise in Kirksey v. Kirksey. But this argument seems frivolous; unlike in Kirksey, Gonzalo and Hanna clearly formed a bargain. Gonzalo promised to pay her a salary in exchange for her work. Rest. § 71.

Remedy:

5. Expectation damages. Hanna might seek expectation damages equal to her loss in value (i.e., her salary for the remainder of the term of her employment) minus her costs avoided (i.e., the value of her labor for the same period except to the extent she received credit for constructive service). Rest. § 347; Parker v. 20th Century Fox. Gonzolo will argue that she cannot receive constructive credit because she "can always get another job" at the same salary given that she was "paid a fair wage." But Hanna will respond that she should receive constructive credit for costs incurred because she has not been able to find comparable employment at a similar wage. (The remaining period of her employment is of course a subject of debate.)

ISAIAS v. HANNA

Claim:

6. Breach of Contract. Isaias might sue Hanna for breach of contract, claiming that Hanna promised to sell him her house for \$500,000 and then did not sell it to him.

Defenses:

7. No offer/acceptance. Hanna may argue that she does not have to keep the alleged promise because she and Isaias never formed a bargain through an offer and acceptance.

Isaias may respond in two ways. First, he may argue that Hanna's internet advertisement was an offer to sell, which Isaiah accepted by email. Hanna may reply that the advertisement on the internet is not an offer, citing the general rule that advertisements are not offers. Rest. § 26 cmt. b. But Isaias might respond that the general rule does not apply in this case because the offer was clearly limited to one person and left nothing for negotiation. Lefkowitz v. Great Minneapolis Surplus Store. In fact, Hannah specifically invited a person to be the first to "conclude" the sale.

Second, Isaias may argue that his email was an offer to buy, which Hannah accepted when she called him. Hanna might argue that if Isaias's email is regarded as an offer, she did not accept when she called him because she had already sent an email rejecting the offer. She will assert that her rejection was effective when Isaias received the email, not when he read it. Rest. § 63 (applying the mailbox rule only to acceptances). It was too late for her to accept by phone.

8. Statute of Frauds. Hanna also will argue that if her telephone call is determined to be an acceptance, then her promise to sell is not enforceable because it is not evidenced by a signed writing as required by the statute of frauds applicable to sales of real property. Rest. § 125(1). (This defense would not apply if her advertisement was an offer that Isaias accepted.)
9. Duress/Undue Influence. Hanna has said that her promise is voidable because it was induced by duress. This argument is incorrect because no one made an improper threat against Hanna. Rest. § 171(1). In addition, Isaias appears to be a stranger who could not assert undue influence over Hanna. § 177(1); cf. Odorizzi v. Bloomfield School Dist.

Remedy:

10. Specific Performance. Isaias will likely seek specific performance, given that he has already contracted to sell the property to someone else. Specific performance is usually granted as a remedy for enforcing promises to sell land. Rest. § 360 cmt. e. Hanna, however, may argue that specific performance should be denied because the bargain was unfair given that the property was quickly sold for \$100,000 more. Rest. § 364; McKinnon v. Benedict; Tuckwiller v. Tuckwiller.
11. Expectation Damages. Alternatively, Isaias will seek expectation damages equal to the loss in value (i.e., the value of the property, ostensibly \$600,000), plus his other loss (e.g., any consequential damages that he must pay to the other buyer) and his costs avoided (i.e., \$500,000).

OTHER

12. Other

PROBLEM VIII.

[Points assigned: #1(4); #2(3); #3(3); #4(3); #5(2); #6(4); #7(3); #8(3); #9(3); #10(3); #11(3); #12(extra credit)]

KYLE v. JOSEPHINE

Claim:

1. Breach of contract. Kyle might sue Josephine for breach of contract, claiming that Josephine promised in the settlement agreement to pay him \$50,000 and then refused to pay the money.

Defenses:

2. No consideration. Josephine might argue that her promise is not enforceable because it lacks consideration. She will assert that Kyle's promise not to sue her for negligence is not consideration because he did not have a good faith and reasonable belief in the possible validity of a negligence claim. Fiege v. Boehm. Josephine will emphasize that Kyle thought that her "account of the accident" (i.e., that she was not at fault) was "probably correct," suggesting that he did not in good faith believe his claim was valid. But Kyle will respond that even if he thought Josephine was probably correct, he could still have a good faith belief in the possible validity of his claim.
3. Mutual mistake. Josephine also might argue that her promise to pay \$50,000 was induced by a mutual mistake of fact, namely, the mistaken belief that she was at fault for the accident. Rest. § 151; Sherwood v. Walker. But Kyle will argue that Josephine was not mistaken. She did not assume that she was at fault; instead, she assumed that she was not at fault but nevertheless decided to settle the case.
4. Lack of mental capacity. The facts indicate that Josephine suffered a head injury and was acting with "unreasonable haste." Josephine might argue the her injury caused a mental defect which prevented her from acting reasonably and that Kyle had reason to know of her condition (perhaps by observing her during the settlement negotiations). Rest. § 15(1)(b); Ortelere v. Teachers' Retirement Board. Most jurisdictions, however, do not accept this test of mental incapacity; they would say that Josephine had capacity if she could understand the nature of the transaction even if she could not or did not act reasonably. There is no evidence that she could not understand the transaction.

Remedy:

5. Expectation Damages. Kyle might seek expectation damages equal to his loss in value (\$50,000) minus his costs avoided (nothing, given that his negligence claim has no value). He will assert that he has not avoided any costs because he has agreed not to bring his negligence claim.

KYLE v. LAURA

Claim:

6. Breach of contract. Kyle might sue Laura for breach of contract, claiming that Laura promised to repair his car and broke this promise when she did not repair the steering mechanism.

Remedy:

7. Expectation damages. Kyle might seek expectation damages. He will claim his loss in value is the difference between the value of the car completely repaired and the value of the car as Laura returned it to him. Kyle will assert that his other loss equals the consequential damages of his car being destroyed in the accident. He has no costs avoided because he paid for the repairs.

Remedy Limitation:

8. Express Limitation on Remedies. Laura will argue that the contract expressly limited damages to the cost of repair and that Kyle therefore cannot recover the total value for the loss of his car.

Responses to the Remedy Limitation:

9. Strict construction. Kyle might argue that the limitation does not apply in this case because, strictly construed against Laura, the limitation covers only problems "with the repairs," and here Laura did not repair the steering mechanism. Rest. § 206; Galligan v. Arovitch.
10. Inadequate notice/No Assent. Kyle might make two alternative arguments about whether the terms printed on the receipt are part of his contract with Laura. First, he will argue that he and Laura already formed their bargain, and Laura cannot subsequently add terms without his agreement. See Lefkowitz v. Great Minneapolis. Second, he will argue that, even if they had not yet established all the terms of their contract, the terms on the receipt should become part of the contract because he had no "reason to believe that like writings are regularly used to embody terms of agreements of the same type." Rest. § 211(1). He would assert that he merely thought the receipt showed that he had paid for the repairs, and never assented to these terms. Cf. Klar v. H & M Parcel.
11. Unconscionability. Kyle also might argue that the limitation on damages is unconscionable for reasons of both unfair surprise and oppression. He will assert that he did not understand that she was limiting the remedy because she hid the limitation term on the back of the receipt. And he will assert that he was oppressed because Laura's failure to complete the repair resulted in an large uncompensated loss and because an average consumer like him could not know whether the repairs were done properly. Rest. § 208; cf. Henningsen v. Bloomfield Motors. Laura might respond in two ways. First, although Laura did not repair the steering mechanism, it must be remembered that it was the earlier accident that caused the problem. She is therefore not entirely at fault. Second, this dispute involves only economic loss, not personal injuries. Therefore, she will argue, the terms, even if favorable to her, do not shock the conscience.

OTHER

12. Other

Note: Some answers suggested the Kyle would sue Laura in tort. But the problem says that "Kyle sees no point in bringing a tort action." Some answers said that Kyle would recover what he paid for the repairs, but that is not part of expectation damages.

PROBLEM IX.

NANA v. MARCO

Claim:

1. Breach of Contract. Nana might sue Marco for breach of contract claiming that he promised to bring all of her teeth into proper alignment, and then failed to adjust the location of her teeth properly (as indicated by the difficulty she is having chewing).

Marco's Argument Based on the Arbitration Agreement:

2. Arbitration Agreement. Marco may argue that the court should dismiss the case because Nana agreed to arbitrate her claims against him.

Nana's Replies to this Argument:

3. Strict Construction. Nana will argue that the arbitration clause only applies to claims "alleging malpractice" and does not apply to a breach of contract action where she is alleging only that he did not keep her promise. Rest. § 206; Galligan v. Arovitch. Cf. Sullivan v. O'Connor (distinguishing contract and malpractice claims).
4. Not Reading the Contract. Nana indicates that she will also argue that she is not bound by the arbitration agreement because she did not read it. Not reading a contract, however, is not a valid defense. Rest. § 211.
5. Unconscionability. Nana also might be arguing that enforcement of the arbitration agreement would be unconscionable given that she said that in fairness it should not apply. Rest. § 208. But arbitration clauses are not per se unconscionable; they do not exculpate anyone from liability but instead merely limit the forum.

Other Defenses:

6. No negligence. Marco might argue that he is not liable because he was not negligent. (Omar specifically says that Marco will make this argument.) But a lack of negligence is not a defense to breach of contract. Sullivan v. O'Connor.

Remedy:

7. Expectation Damages. Nana might seek expectation damages. Her loss in value would be the value of the promised improvement to her teeth (which might be measure by the cost to have the problem corrected). Her other loss would include the detriment to her teeth caused by the braces and possibly pain and suffering from their condition. She does not appear to have avoided any costs. Sullivan v. O'Connor.

OMAR v. NANA

Claim:

8. Breach of Contract. Omar might sue Nana for breach of contract, claiming that Nana promised not to initiate any claims against Marco and then repudiated that promise by announcing she was planning to file a lawsuit against Marco in court.

Defenses:

9. No basis for enforcement. Nana might argue that her promise is not enforceable because she did not receive any consideration for it. Rest. § 71. She will also argue that Omar could not have relied on the promise because he had to continue to employ her anyway under a contract. Rest. § 90. This case is therefore different from Lake Land

Employment, where the court held that continued employment was consideration in the context of employment at will.

10. Undue Influence. Nana also might argue that Omar used undue influence to induce her to promise not to sue Marco. She had to make the promise to avoid controversy at work. Rest. § 177(1); Odorizzi v. Bloomfield School Dist.
11. Public Policy. Nana also might argue that her promise violates public policy. Rest. § 178; Bush v. Black Industries. The policy, as expressed in various state laws according to the problem, is that employers should not discourage employees from seeking lawful remedies.
12. Infancy. If Nana is an infant (as in issue worth investigating given that most people who need braces on their teeth are teenagers), she could void her promise to Marco on grounds of lack of capacity. Rest. § 14; Kiefer v. Fred Howe Motors.

Remedy:

13. Specific Performance. Omar might seek specific performance as a remedy. Rest. § 359; McKinnon v. Benedict. This would amount to an injunction by the court requiring Nana not to bring a legal action against Marco. He would argue that damages would not be an adequate remedy because there is no way to measure the harm to Omar of having Nana sue his friend Marco. But Nana will argue that the exchange was inadequate; she received nothing for her promise.

OTHER

14. Other

Note: Nana would not want to void her contract with Marco on grounds of infancy, even though it contains an arbitration agreement, because then she could not recover from him for breach of contract.

**Grading Guide for the Midterm Examination in
Contracts I (6201-21)**

Congratulations on completing the midterm examination. The performance of the class was excellent. The high, mean, and median scores were all higher this year than they were last year. You clearly have studied the material thoroughly and are well on your way in this course.

In addition to this document, you should have received by email a copy of your answer and a score sheet showing the points that you earned on each problem. Please check to make sure that you received the correct documents. They are identified by the first four (or sometimes five digits) of your GWID. (To preserve anonymity in grading, your final examinations will be identified by the final four or five digits of your GWID.)

Each of the six problems on the midterm was worth 5 points and the midterm was therefore worth a total of 30 points. Partial credit was awarded for incorrect and incomplete answers. The high-score, achieved by four students, was 29. The mean score and median score were both 23 points. One-quarter of the students scored 26 or more points. One quarter scored 21 or fewer points. A total of 123 students took the examination.

The final examination will be worth 170 points. Your points on the midterm and final examination will be added together, for a total of 200 possible points. Final grades will then be awarded based on the total points earned according to a curve set by the Law School's mandatory grading guidelines.

The midterm examination was designed to help you assess the skills that you will need in completing the final examination. On the final examination, you will be given a set of facts and you will be asked to "write an essay identifying and discussing any claims and defenses that the parties might assert, and any remedies that they might seek." Problems 1-3 on the midterm were designed to test your ability to identify and discuss claims, defenses, and remedies. Problems 4-6 were designed to test your ability to avoid common problems such as overlooking claims and defenses, insufficiently discussing the application of the law to the facts, and misunderstanding the applicable legal rules.

To help you understand your score, this document provides sample answers and explanatory guidance. I recommend that everyone read this document thoroughly, even if you received all of the points on some of the problems. If you have questions about your midterm examination, please see me during my regularly scheduled office hours (Tuesdays and Thursdays from 5:05-5:45 p.m.).

One final point deserves special mention: Whenever you take a law school examination, follow the instructions completely. Following instructions is an essential skill for all lawyers. Instruction 3 said that examination answers could not exceed more than 1500 words in length. Several examinations violated this rule. Instruction 4 required you to indent the first line of each paragraph and to include a blank line between paragraphs. Several examinations did not conform to this requirement and consequently were difficult to read. Failure to follow these kinds of instructions on the final examination in this class or other classes could needlessly jeopardize your grade; do not risk it.

PROBLEM 1.

Suggested answer:

Hopper might sue Mattei for breach of contract, claiming that Mattei promised to pay her \$57,500 for her land (provided that Coldwell Banker found leases satisfactory to Mattei), and that Mattei broke this promise, without a valid excuse, by paying her only a \$1000 deposit and then refusing to pay the rest of the price.

Mattei might sue Hopper under a theory of restitution, claiming that Hopper would be unjustly enriched if Hopper did not return Mattei's \$1000 deposit. Mattei will assert that he was excused from paying any of the purchase price for the property, under the terms of the contract, because Coldwell Banker did not find leases that were satisfactory to him.

The claims of both parties will turn on whether Coldwell Banker found leases satisfactory to Mattei. Mattei has told Hopper that he is unsatisfied with the leases. But as the court said in the actual opinion, "his expression of dissatisfaction is not conclusive." Mattei had an implied duty to exercise his judgment in good faith. Hopper might argue that Mattei did not act in good faith in saying he was unsatisfied because the problem says "the reason" that Mattei does not want to complete the sale is that he has found less expensive property nearby, not that the leases are actually unsatisfactory.

Guidance:

This problem was designed to test your ability to identify and discuss claims. A claim is an assertion of a reason that the defendant should be held liable to the plaintiff. The tips for writing good answers on page 2 of the instruction advised: "When identifying and discussing claims, be very specific about who might assert them and what they might allege." The instructions then gave this example of how to identify a claim: "X might sue Y for breach of contract, claiming Y made a promise to do ... and broke it by doing" Following this exact pattern in stating claims was not required, although most attempted variations were not improvements.

Under the changed facts of the hypothetical, as indicated in the suggested answer, Hopper and Mattei each might assert a claim against the other. Identifying these claims was difficult given the conditional nature of Mattei's promise to pay for the property and the parties' apparent dispute over whether the condition was satisfied. The suggested answer provides one possible method; some students found different but equally adequate methods.

Most answers thoroughly discussed Mattei's duty to act in good faith. This was important, but insufficient. Many answers were incomplete because they did not specifically address either Hopper's possible claim that Mattei broke his promise to pay for the property or Mattei's possible claim that he is entitled to a refund of his deposit.

A few answers discussed at considerable length various possible defenses that the parties might assert and how a court might assess them. This discussion would be essential on a final examination, but it was not relevant here because the problem asked only about the parties' claims. Many of the discussions were also inaccurate. For example, a few of these answers asserted that the payment of \$1000 only created an option contract and the parties never formed an agreement; the opinion, however, specifically rejected this view of the facts.

PROBLEM 2.

Suggested answer:

In the quoted passage, the newspapers appear to be defending on grounds that they did not assent to be bound by their promise to keep Cohen's identity confidential. To prevail on this defense, the newspapers would have to have manifested their intention not to be bound sufficiently that Cohen actually knew that the newspapers were not assenting to be bound or that a reasonable person would have known that the newspapers were not assenting to be bound. See Lucy v. Zehmner. In this case, the newspapers would argue that Cohen knew that the newspapers were not assenting because, as the court says, "this was not a situation where the parties [i.e., both Cohen and the newspapers] were thinking in terms of a legally binding commitment." But Cohen might respond that both he and any reasonable person would have thought that the newspapers were assenting to be bound; no one would risk the opprobrium Cohen faced for revealing the information without thinking the newspapers had made a legally binding commitment of confidentiality.

Guidance:

A defense is an argument for why the plaintiff cannot establish liability on an asserted claim. The tips for writing good answers on page 2 of the instruction advised: "When identifying and discussing defenses, describe in detail what the parties might argue based on the relevant facts and applicable law." The instructions gave this example: "Y might defend on grounds that the promise is too indefinite to enforce. Y will assert that there is no basis for determining the existence of a breach because ... and no basis for giving an appropriate remedy because X might respond"

Most answers recognized that when the court said that the parties "were [not] thinking in terms of a legally binding commitment" that this was just another way of saying that the parties were not assenting to be bound. Most of these answers discussed the arguments that the parties would make in support of or in opposition to this defense, although some did not.

Several answers identified other possible defenses that the newspapers also raised in the case, including lack of consideration or other basis for enforcing the promise and the First Amendment's guarantee of Freedom of the Press. Some also suggested that the newspapers were arguing moral obligation is not a basis for enforcement. These answers were not necessarily incorrect in what they said, but they did not receive full credit because they did not completely address the defense apparently raised in the quoted passage.

PROBLEM 3.

Suggested answer:

When a person who has rendered services to another seeks to recover under a theory of restitution, the measure of recovery is "a reasonable compensation for the services rendered," which is "fair compensation for his time, services, and skill." Cotnam v. Wisdom. Accordingly, if Christie Lo Greco had tried to recover from Natale Castiglia's estate under a theory of restitution, the remedy he would have sought would have been reasonable compensation for his 20 years of service as a laborer to Natale, minus the value that Natale already provided to Christie in terms of room, board, and spending money. Christie's recovery might not be very large because a laborer typically might earn only the minimum wage, and the total fair compensation might not have exceeded by very much what Natale already provided to Christie. This remedy differs from the remedy that Christie sought in the actual case. In the actual case, Christie sought either the property or the value of the

property that Natale had promised him, which appears to have been worth about \$50,000 (one-half of the total value of the property owned by Natale and Carmela Castiglia).

Guidance:

Page 2 of the instructions advised: "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." The best answers to this problem accurately (1) described the general measure of recovery under a theory of restitution; (2) explained that in this case the recovery would be the fair wages Christie would have earned limited by the amount that he already received in terms of room, board, and spending money; and then (3) compared this recovery to the recovery that Christie actually sought in the case.

Answers that correctly identified the general measure of recovery for services under a theory of restitution (as described in Cotnam v. Wisdom) typically did not have difficulty applying the measure to the facts of the case. Some answers, however, overlooked the important facts that Christie had already received room, board, and spending money, even though we emphasized these facts in class. Some answers forgot to address the final part of the problem: how recovery under a theory of restitution would differ from the remedy he sought in the actual case.

A number of answers showed some confusion about the difference between suing under a theory of restitution and seeking to enforce a promise under a theory of promissory estoppel. Promissory estoppel is a ground for enforcing a promise. Restitution is an alternative theory of liability when enforcement of a promise is not possible. I recommend reviewing your notes on these important points.

A few answers discussed at length the question of whether Christie would be entitled to recover under a theory of restitution. Discussion of this topic would be important on a final examination. But this problem asked only what remedy Christie might "seek" if he sought to recover on the basis of restitution.

PROBLEM 4.

Suggested answer:

Even if a court determined that Columber's promise lacked consideration, Lake Land Employment Group might have sought to enforce Columber's promise not to compete on the basis of promissory estoppel. See, e.g., Feinberg v. Pfeiffer (holding a promise was not enforceable on the basis of consideration but was enforceable on the basis of promissory estoppel). Accordingly, to prevent enforcement of his promise, Columber might have needed to argue that the elements of promissory estoppel were not met. Columber, for instance, might have asserted that his promise did not induce any action by Lake Land (e.g., it is not certain that Lake Land would have fired him absent the promise) or that enforcement was not necessary to prevent injustice (e.g., Columber's subsequent competition in violation of his promise might not necessarily be unfair depending on what Columber did or did not receive from Lake Land).

Guidance:

A common source of lost points on final examinations is overlooking claims and defenses. This problem was designed to illustrate how that might happen. As shown in Feinberg v. Pfeiffer, it is often not sufficient for a

defendant to argue that a promise is not enforceable merely because it lacks consideration. The defendant also must argue that the promise is not enforceable on any other basis, such as promissory estoppel. (The plaintiff, of course, would have the burden of proof on both issues.)

Most answers recognized the import of the changed facts in this problem and correctly explained that Columber's promise might be enforceable on the basis of promissory estoppel. In my view, the court might more sensibly have decided the case on this ground in the first place, although this question was not part of the problem.

A number of answers seemed to have misunderstood what the question was asking. Some argued that there was consideration for Columber's promise. Others argued that there was no consideration for his promise. These discussions were interesting but not relevant because the problem asked you to assume that the court had accepted Columber's argument that his promise lacked consideration.

A few answers suggested other possible defenses that Columber might have raised, including indefiniteness, lack of assent to be bound, the statute of frauds, and so forth. In general, it was hard to see how these suggested defenses were supported by the facts of the case, but the better arguments still received partial credit. They could not receive full credit because additional defenses would not be relevant unless Lake Land established some basis for enforcement other than consideration.

PROBLEM 5.

Suggested answer:

The general rule is that "[w]here an offeree fails to reply to an offer, his silence and inaction [do not] operate as an acceptance." Rest. § 69(1). Massasoit Whip might cite this rule in arguing that it did not accept Hobbs's offer to sell 2,350 eelskins merely because Massasoit Whip silently retained the eelskins. But Hobbs will argue that the general rule is subject to exceptions. One exception is that silence and inaction may constitute acceptance "[w]here because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept." Rest. § 69(1)(c). Hobbs might assert that this exception applies to this case because he had sent eelskins to Massasoit Whip "in the same way four or five times before" and they had been accepted. But Massasoit Whip might respond that the previous instances are distinguishable; the facts do not indicate whether Massasoit Whip affirmatively notified Hobbs of its acceptance in the previous cases. Hobbs also might cite the exception that "[a]n offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms." Rest. § 69(2). Hobbs might argue that this exception applies to this case because Massasoit Whip retained the eelskins for an "unreasonable time." But Massasoit Whip might respond that this exception properly would apply only if Massasoit Whip did something like use the eelskins to make whips, which the facts do not indicate.

Guidance:

This problem asked essentially the same question as note (1) on page 167, which we discussed at length in class. The problem was designed to test the skill of applying the law to the facts. This skill is important because on final examinations, answers in many instances identify legal rules but then do not address their application to the facts.

Most answers were excellent. They identified the general rule and the exceptions and explained how each party would argue that they would apply. A few answers, however, either did not identify the applicable rules or did not discuss how the buyer and the seller might argue the rules should apply to the facts.

PROBLEM 6.

Suggested answer:

The statute of frauds at issue in the Langman case appears in footnote c on page 300. This statute, as interpreted by the Virginia Supreme Court, requires suretyship promises to be evidenced by a signed writing. The error in the Alumni Association's understanding of the statute was that the Alumni Association incorrectly believed that its promise was a suretyship promise when it was not. A suretyship promise involves three parties: a debtor, a creditor, and a surety. The surety promises the creditor that the surety will pay the debtor's debt to the creditor. In this case, there was a debtor (Langman) and a creditor (the mortgagee of the property Langman granted to the Alumni Association). In addition, when the Alumni Association assumed Langman's mortgage, the Alumni Association promised to pay Langman's debt on the mortgage. But the Alumni Association's promise was not a suretyship promise because the Alumni Association made the promise to Langman and not to the mortgagee. As the court said, "[t]he grantee makes no promise to the mortgagee to pay the debt of another"

Guidance:

Most of the basic rules of contract law are not complicated and students in this class study so diligently that they rarely misunderstand them. But there are a few tricky principles, especially those relating to the various statutes of frauds discussed in class. This problem asked for an explanation of the Langman case. Although we discussed this case at length, it still was not a simple problem.

Most answers provided explanations similar to the one suggested above. A few answers lost points because they exhibited some confusion about who was the creditor and who was the debtor in the case. Some answers did little more than quote the court's statement that "[a] grantee who assumes an existing mortgage is not a surety." This statement is correct, but is insufficient as an answer because it does not explain why the grantee is not a surety. Indeed, the court itself felt it necessary to explain this point in the next sentence of its opinion.

Information about the Final Examination
in CONTRACTS I (Course No. 6202-21)

Professor Gregory E. Maggs

The class did very well on this examination. You evidently studied the materials thoroughly and paid careful attention in class. I congratulate you for your accomplishments. I also offer encouragement to all of you. Although some examination answers were more accurate or complete than others, each showed a solid understanding of the law of contracts and of legal reasoning. The writing quality was uniformly very high.

I have written this grading guide to explain the results and to aid possible future improvement. You will receive a copy of your examination answer and your score sheet by email. After you review this grading guide, your answer, and your score sheet, I would be happy to discuss the examination or anything else during my office hours. My office hours in the spring semester are generally on Mondays from 11:00 to 11:55 a.m. and Thursdays from 2:45-3:40 p.m. Please note that Law School rules, described in the Law School Bulletin, prohibit changing grades except to correct clerical or mathematical errors.

Each of the problems on the examination presented a fact pattern based on an actual case and asked you to write an essay identifying and discussing the claims and defenses that the parties might assert, and the remedies that they might seek. In determining the raw scores on the examination, I assigned points based on how well your essays identified and discussed the claims, defenses, and remedies. Final grades were determined from these raw scores in accordance with the Law School's mandatory grade distribution for first-year courses. I regret that I could not award higher grades in many cases.

Below are the checklists that I used in grading the answers. These checklists are not model answers. They are not model answers because the instructions required all answers to be written in essay form. In grading the examination, I recognized that not everyone sees things in the same way. I attempted to be flexible and generous when grading. I usually found ways of awarding points when answers discussed issues not specifically listed on the grading guide or when they characterized issues differently from the grading guide.

Most answers did extremely well in identifying claims, defenses, and remedies. A possible area for improvement for many answers, however, would be to discuss these claims, defenses, and remedies more thoroughly and carefully. The law and the application of the law to the facts in many instances was difficult. Often the parties might see the same point in a different way. Still, most answers received partial credit for all of the claims, defenses, and remedies discussed.

The final examination included 5 problems worth 34 points each, for a total of 170 points. The midterm was worth 30 points. Combined, the final and midterm were worth 200 points, with the midterm counting for 15% (i.e., 15% of 200 points is 30 points). The combined high score was 187 points.

One last but important point requires mention: Whenever you take an examination, you should read and follow the examination instructions. The instructions on this final examination limited answers to 4500 words, specified that all answers must be written in essay form, and required indenting the first line of each paragraph and including a blank line between paragraphs. Some answers did not follow one or more of these instructions.

PROBLEM I.

[2 points for item 8; 4 points for all other items, except for item 10 which had no assigned points]

BERYL v. ALBERTO

Claim:

1. Breach of Contract. Beryl might sue Alberto for breach of contract, claiming that Alberto promised to sell his vacant lot to her and then broke this promise when he did not sell it to her.

Defenses:

2. Revocation. Alberto might argue his offer to sell the property to Beryl terminated before Beryl accepted it because Beryl learned that Alberto was offering to sell his property to Chris, which is an act inconsistent with an intention to enter into a contract with Beryl. Rest. § 43; Dickinson v. Dodds. Beryl might respond that Alberto could not revoke his offer because he had promised to keep the offer open until Monday and thus formed an option contract. Beryl will argue that even though the option contract lacked consideration, it is enforceable on the basis of promissory estoppel. She will assert that she relied on Alberto's promise to keep the offer open by not accepting his offer immediately even though she thought she wanted the property and by moving landscaping equipment onto the property and mowing the weeds. Rest. § 90(1).
3. Lapse of offer. Alberto alternatively might argue that, even if an option contract was formed and he could not revoke his offer until Monday, the offer still lapsed before Beryl's attempt to accept the offer became effective. Beryl mailed her acceptance on Saturday but it did not arrive on Tuesday. Although the mailbox rule says that the acceptances typically are effective upon dispatch, an acceptance under an option contract is not effect until received by the offeror. Rest. § 63(b). As a result, Alberto will argue that Beryl's attempt to accept could not become effective until Tuesday, which was too late.
4. Statute of Frauds. Alberto also might argue that his alleged promise made over the telephone to sell the property is not enforceable because it is not evidenced by a signed writing as a statutes of fraud requires for a contract for the sale of land. Rest. § 125(1). Beryl will respond that Alberto's promise to sell the land is enforceable despite the lack of a writing under the "part performance" doctrine because she paid part of the price (\$1000), she took possession (by moving equipment onto the vacant lot), and by making improvements (cutting the weeds). Rest. § 129; Richard v. Richard. But Alberto may respond that she did not take these actions with his consent; he returned the purchase price and there is no evidence he knew about the landscaping equipment or mowing. In addition, he will argue that enforcement of the promise is not necessary to prevent injustice; the reliance was minor and he could compensate her by just repaying for value of the mowing (see below).

5. Indefiniteness (Uncertainty). Alberto further might argue that his promise is too indefinite to enforce because the price was stated as "the current average sale price of similar land in the area," and "no comparable property had sold in the area in a long time." Rest. § 33; Varney v. Ditmars. He will assert the lack of evidence makes this case different from other cases, like Toys Inc. in which there was an easily established "prevailing rate." In addition, it seems that Beryl would be loathe to argue that the sale for \$400,000 to Chris establishes the price with reasonable certainty because the facts say that she cannot pay \$400,000.

Remedies:

6. Specific Performance. The facts say that Beryl still wants the property if it becomes available. Accordingly, if Chris is successful in rescinding the transaction with Alberto, and Alberto regains the property, Beryl might seek specific performance, which would be conveyance of the property. But Beryl could only obtain specific performance if the price could be established (see point 5 above) and Beryl could pay the price.
7. Expectation Damages. If Beryl cannot obtain specific performance, she might seek expectation damages. Her loss in value is the value of land (which she will argue is worth the \$400,000 that Chris paid for it) minus her costs avoided (which is the purchase price she would have paid as "the current average sale price"). But Alberto will claim that she cannot prove the current average sale price with reasonable certainty, and thus cannot recover anything. Rest. § 352.

BERYL v. ALBERTO

Claim & Remedy:

8. Restitution. If Beryl cannot prevail on her breach of contract claim, she might seek restitution for the value of mowing the weeds (which probably isn't very much). Rest. Restitution § 1; Cotnam v. Wisdom. Given her expectation of buying the property, she was not a volunteer or officious intermeddler.

CHRIS v. ALBERTO

Claim, Defense, and Remedy:

9. Rescission & Restitution. Chris might sue Alberto, seeking to rescind the sale of the property, and obtain restitution of the \$400,000 purchase price he paid, on grounds that Alberto had not told him that he was selling the property because the neighborhood had become crime ridden. Chris might assert that, as a lifelong friend, he had a confidential relation with Alberto which required disclosure of this material fact. Rest. § 161(d). If they did not have a confidential relationship, Alberto might respond that he engaged in a mere bare nondisclosure. Swinton v. Whitinsville Saving Bank.

OTHER

10. Other

Notes: Beryl cannot seek reliance damages because her reliance occurred before the contract was formed.

PROBLEM II.

[4 points for items 1, 6-8; 3 points for all other items, except for item 11 which had no assigned points]

DEBBY v. ERNESTO

Claim:

1. Breach of Contract. Debby might sue Ernesto for breach of contract, claiming that Ernesto promised to restore her property to its original condition, and broke this promise when he did not clean up the pollution.

Defenses:

2. No Consideration. Ernesto has argued that he does not have to keep his promise because he received nothing for it ("Why should I have to do the clean up, when I have spent so much and not gained anything?"). This sounds like a defense that there was no consideration. But Debby will argue that there was consideration. She promised to give him 5% of any gas recovered. Although this turned out to be worth nothing, it was bargained for, and was therefore consideration. Rest. §§ 71; 79; Fiege v. Boehm.
3. No breach. Ernesto has also raised the defense that he did not breach the contract because cleaning up was required only after "removal" of the gas and "no gas was removed." While this is one possible interpretation of the contract, Debby might argue that the contract should be strictly construed against Ernesto, who supplied the form, to mean his duties arise after the removal of whatever gas there is even if that means no gas. Rest. § 206; Galligan v. Arovitch.
4. Unconscionability. Ernesto further has argued that enforcing his promise would be unconscionable, Rest. § 208, because it would be a waste of money to clean up the pollution given that the pollution was located deep underground, was not dangerous, and would not change the value of the property. Debby will respond that it should not shock the conscience of the court that she wants Ernesto to keep his promise to clean pollution created in a business venture.
5. Mutual Mistake. Ernesto further will argue that his promise is voidable based on mutual mistake. He will assert that both Debby and he mistakenly believed that the property contained natural gas when it did not. Rest. § 152; Sherwood v. Walker. But Debby will argue that the parties made only an incorrect prediction about whether gas would be found, not a mistake of fact, and that in any event Ernesto, as the expert in drilling, should bear the risk of any mistake, § 154.

Remedies:

6. Expectation Damages. Debby will seek expectation damages of either \$10,000 or \$90,000, depending on what she has to pay Florence to clean up the pollution (see below). In the expectation damages formula, the "loss in value" is the value of Ernesto's promise to clean up the pollution. Rest. § 347(a). There are three ways to measure the loss in value: loss in value to Debby, loss in market value, and cost to complete or remedy. Ernesto would like to limit the measure to "loss in market value" because that value appear to be zero because the property value remained the same after the pollution was cleaned up. But loss in value is limited to lost in market value only if the loss in value to

Debby is not proved with reasonable certainty and if the cost to remedy would be grossly disproportionate to the probable loss in value to Debby. Rest. § 348(2); Jacob & Youngs v. Kent; Peevyhouse v. Garland Coal. If Debby is seeking only \$10,000, she will say that she has proved with reasonable certainty that the loss in value to her is at least \$10,000 by agreeing to pay Florence this amount to clean up the pollution. But if Debby is seeking \$90,000, that figure appears to be clearly disproportionate to the probable loss in value to her because Debby told Florence, "It is not worth that much to me." In that case, she could recover only the loss in value to her that she has proved with reasonable certainty (\$10,000) or loss in market value (which she would not seek because it is \$0).

FLORENCE v. DEBBY

Claim:

7. Breach of Contract. Florence will sue Debby for breach of contract, claiming that Debby promised to pay her a total of \$90,000 to clean up the property and paid her only \$10,000.

Defenses:

8. Rejection and Non-Acceptance. Debby will argue that she rejected Florence's offer to modify the original contract (i.e., to modify it by having Debby promise to pay additional \$80,000) by laughing and saying "it's not worth that much to me." Rest. § 38(1). Debby will further argue that, even though Florence appears to have renewed her offer by saying "I won't take no for an answer," that she did not accept this renewed offer because she never promised to pay the additional \$80,000. Rest. § 56. Florence will argue that Debby accepted her offer by silence when she took the benefits of her offered services. Rest. § 69(1)(a). But Debby might reply that she just thought Florence was completing the contract as originally agreed; surely she does not have to stop Florence from performing what was already bargained for.
9. Pre-Existing Duty Rule. Debby will also argue that, even if she implicitly promised to pay \$80,000 more, there is no consideration for this promise because Florence had a pre-existing duty to do the work. Rest. § 73; Alaska Packers v. Domenico. Florence might argue that no additional consideration is necessary because modification of the contract was reasonable in light of changed circumstances. Rest. § 89; Watkins & Sons v. Carrig. But the facts do not suggest any change in circumstances (or any reason that the initial promise might be voidable by Florence). In addition, only a few states have adopted this exception to the pre-existing duty rule.

Remedy:

10. Expectation Damages. Florence will seek expectation damages equal to her loss in value (\$90,000 promised - \$10,000 received) minus her costs avoided (none, given that the work has been done), which equals \$80,000.

OTHER

11. Other

PROBLEM III.

[points for items 1, 5-7; 3 points for all other items, except for item 11 which had no assigned points]

ISAAC v. HELENE

Claim:

1. Breach of Contract. Isaac might sue Helene for breach of contract, claiming that she promised to pay him \$7500 to do the electrical work and she broke that promise by not paying him anything.

Defenses:

2. No acceptance. Helene will argue in defense that even though Isaac offered to do the work for \$7500, she did not accept this bid. She would not have accepted it before winning the bid from Gordon because she would not need his services. And she never contacted Isaac after winning the bid from Gordon, except to announce that she was hiring someone else. But Isaac has argued that Helene implicitly accepted his offer. He might rely on Rest. § 69(1), which says that silence operates as an acceptance where "because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if [she] does not intend to accept." Rest. § 69(1)&(2); Hobbs v. Massasoit. Here Isaac will say that it was reasonable to expect Helene to contact him because she previously told him that he was the low bidder and that she was using his bid in calculating her own. Helene will argue that it is not the custom that bids from subcontractors are automatically accepted when the general contractor obtains a contract, and thus that Isaac did not have a reasonable expectation that she would contact him if she did not intend to accept. Cf. Drennan v. Star Paving (general contractor went to premises of subcontractor to accept).
3. Policy of Using on Local Subcontractors. Helene has argued that she did not accept because her policy was only to hire local subcontractors. Given that contractual liability is voluntary, this is a perfectly good reason for not accepting an offer. The policy, however, would not excuse Helene from a contract if the contract was formed before she announced the policy. Lefkowitz v. Great Minneapolis. Thus, the issue turns on whether there was an acceptance or not (see above).
4. Statute of Frauds. Helene has argued that Isaac cannot enforce the alleged promise against her because she "never signed anything." A promise to pay an electrician to do electrical work does not have to be evidenced by a signed writing (especially where the value of services predominate over any goods, as they do here). Rest. § 110(1).

Remedies:

5. Expectation Damages. Isaac will seek expectation damages equal to his loss in value (\$7,500), minus his costs avoided. His cost avoided are his costs expected minus his costs incurred. He appears to have expected \$5000 in costs because he says that he hoped for \$2500 in profit (\$7500-\$5000=\$2500). Although he bought \$3000 of supplies, he was able to use \$1000 for his other project; therefore his costs incurred appear to be \$2000. Expectation damages would thus equal \$7500-(\$5000-\$2000)=\$4500.

ISAAC v. GORDON

Claim:

6. Breach of Contract. Isaac will claim that Gordon originally promised to pay him \$6000 to perform some separate rewiring work, and broke that promise when he ultimately paid him only \$5000 for the work.

Defenses:

7. No Offer/Acceptance. Gordon will argue that he did not originally promise to pay Isaac \$6000 because no bargain was formed. Gordon will assert that when Gordon said "I would need at least \$6000 to do it right" that was not an offer because Gordon was not manifesting a willingness to do the work for \$6000. Rest. § 24. It is like the statement in Owen v. Tunison that the seller would need at least \$16,000, which was held not to be an offer. But Isaac will argue that Gordon's statement "I can agree to that" was an offer to pay \$6000, which Gordon accepted by beginning work at Isaac's shop. Evertite Roofing v. Green. But Gordon may respond that Isaac's unpacking his tools was not really beginning work and was insufficient to constitute an implied promise to do the work. Cf. White v. Corlies & Tift.
8. Unilateral Mistake. Gordon also appears to argue that he does not have to keep a promise to pay \$6000 because he miscalculated his finances. In some states, promises induced by a unilateral mistake are voidable where enforcement of the contract would be unconscionable. Rest. § 153. But a miscalculation causing only \$1000 difference on a business contract does not shock the conscience.
9. Waiver. Gordon also will argue that Isaac waived any right he had to being paid \$6000 when he "relented and agreed" to do the work for \$5000. Cf. Schwartzreich v. Bauman-Basch. Gordon further will argue that Isaac's waiver was not induced by duress; even if Gordon was breaching his original contract to pay \$6000, he was not breaching the contract in bad faith but instead breaching it because he miscalculated his finance and could not afford it. Rest. § 176(1)(d).

Remedies:

10. Expectation Damages. Isaac will seek expectation damages equal to his loss in value (the \$6000 he was originally promise minus the \$5000 he was ultimately pid) minus his costs avoided (\$0), which equals \$1000.

OTHER

11. Other

PROBLEM IV.

[5 points for items 1-2; 4 points for all other items, except for item 8 which had no assigned points]

JOYCE v. LESLIE INSURANCE CO. (LESLIE)

Claim and Remedy:

1. Rescission (based on Infancy) & Restitution. Joyce might sue Leslie seeking to rescind the insurance agreement based on infancy and obtain in restitution the "very expensive insurance premiums" that she paid for one year. Rest. § 7; Kiefer v. Fred Howe Motors. The facts do not reveal Joyce's age, but they say she inherited the property from her mother's great aunt (a person three generations older who was recently alive), that she was inexperienced in any kind of business affairs, and that she was saving money for college. All of these facts suggest that Joyce might have been younger than 18 years of age when she contracted with Leslie. Leslie would not have to make restitution (even if she is emancipated) because the subject matter, insurance, is no longer

available and insurance is not a necessary. Restatement of Restitution § 62 cmt. b [syllabus appendix 6].

LESLIE INSURANCE CO. (LESLIE) v. KIRK

Claim and Remedy:

2. Rescission (based on Public Policy) & Restitution. Leslie might seek to rescind its promise to pay Kirk a commission on grounds of public policy and obtain in restitution the amount of the commission. Leslie will argue that because state law requires insurance brokers to have licenses, it would violate public policy to pay someone who does not have a license for performing the services of an insurance broker. Rest. § 178(1). Kirk might respond that state legislation does not specify what should happen if a broker does not have a license and that the court should not adopt a common law rule that a promise to pay a commission is void because voiding the promise would reward the insurance companies for using brokers who do not have licenses. Cf. Bush v. Black Industries.

JOYCE v. KIRK

Claim:

3. Breach of Contract. Joyce might sue Kirk for breach of contract, claiming that by saying "stick with me and you will never be at risk," he implicitly promised that he would keep the property insured and he did not keep it insured.

Defense:

4. No Consideration. Kirk has argued that he did not get anything from Joyce in exchange ("you paid me nothing") and therefore may argue that his promise lacks consideration. Joyce, however, may argue that his promise is enforceable on the basis of promissory estoppel because she relied on it. Rest. § 90; Feinberg v. Pfeiffer.
5. Lack of Assent to be Bound. Kirk might argue that he did not assent to be bound because he was not thinking of a legal obligation. But this defense is available only if Kirk made it sufficiently clear to a reasonable person or to Joyce that he did not intend to be bound. Lucy v. Zehmer. He will argue that a reasonable person and Joyce would understand that he was not undertaking to be bound by his promise because his only compensation was to come from the insurance company. But Joyce will argue that the language he used, and the fact that he was an insurance broker, make this sound like he was assenting to be bound.
6. Public Policy. Kirk might argue that his promise to obtain insurance is void because it violates public policy. He will assert that state law requires insurance brokers to have a license, and he does not have one. Although state legislation does not say what should happen when a broker does not have a license, he will argue that allowing enforcement of this kind of contract would encourage people who do not have insurance to do business with unlicensed brokers. (This argument is somewhat, although not totally, inconsistent with his argument above that paying a commission does not violate public policy; but perhaps Kirk hopes to win with at least one argument or the other.)

Remedy:

7. Expectation Damages. Joyce might seek damages equal to her loss in value plus other loss (the uncompensated damage to her rental property)

minus her costs avoided (whatever it would have cost to insure the property.)

Kirk might argue that, if the promise is enforceable on the basis of promissory estoppel under Rest. § 90(1), the remedy can be limited "as justice requires." He might argue that Joyce should be limited to reliance damages. Hoffman v. Red Owl Stores. Reliance damages strive to put the plaintiff in the same position the plaintiff would have been in if the contract had not been made. Given that Joyce did not pay Kirk anything for his promise to find insurance the property, she arguably does not have reliance damages.

OTHER

8. Other

PROBLEM V.

[1 point for item 13; 2 points for items 5, 9, 22; 3 points for all other items, except for item 13 which had no assigned points]

MICHAEL v. NADINE

Claim:

1. Breach of Contract. Michael might sue Nadine for breach of contract, claiming that Nadine promised to pay him his salary for two years, and broke that promise when she stopped paying him after several months.

Defenses:

2. No Consideration. Nadine might argue in defense that her promise lacks consideration because she received nothing in exchange for the promise. Michael may contend that he gave up any contracts claims against her, but Nadine will argue that he did not have any claims because he was an employee at will. Michael alternatively may contend that he implicitly promised not to disclose embarrassing information and that Nadine understood this when she asked "Is that your price?"
3. Duress. Nadine might argue in defense that her promise is not enforceable because it was induced by duress. She will assert that Michael implicitly threatened to reveal embarrassing information about her and that she had no alternative but to pay him off. She will say that his threat is blackmail or akin to blackmail and is therefore improper. Rest. § 176(1).
4. Statute of Frauds. Nadine has argued that her promise is not enforceable because it was not written down. But a promise to pay money for two years does not have to be evidenced by a signed writing because the promise could be fully performed within one year by paying the money early. § 130(1); Klewin v. Flagship Properties.

Remedies:

5. Expectation Damages. Michael will seek expectation damages equal to his loss in value (i.e., the payments he did not receive). He will assert that he has avoided no costs. Nadine has argued that he avoided costs by finding alternative employment, but he will assert that he never had a duty to find other work under the contract and thus he saved no expected costs.

MICHAEL v. NADINE

Claim:

6. Breach of Contract. Michael might claim that Nadine broke her promise to pay him \$5000 for his telling her gossip about Oscar.

Defenses:

7. Statute of Frauds. Nadine has argued that Michael does not have any written proof. But this type of promises does not have to be evidenced by a signed writing to be enforceable. See Rest. § 110(1).
8. Public Policy. Nadine also might argue that her promise violates public policy because she is paying Michael to breach a duty of confidentiality to his employer.

Remedy:

9. Expectation Damages. Michael will seek expectation damages equal to his loss in value (\$5000). He has avoided no costs.

OSCAR v. MICHAEL

Claim:

10. Breach of Contract. Oscar might sue Michael for breach of contract, claiming that Michael promised not to reveal confidential information and broke this promise by selling gossip to Nadine.

Defenses:

11. No consideration. Michael might defend on grounds that his promise lacks consideration because nothing was sought or given in exchange for the promise. See Rest. § 71. Michael will explain that Oscar could have fired him immediately after he made the promise because he was an employee at will. Although Michael's view may represent the general understanding of consideration, some courts hold that a promise made by an employee at will is enforceable if the employer continues to employ the employee, even if the employer made no promise to continue employment, as Oscar did here. See, e.g., Lake Land Employment v. Columer.

Remedy:

12. Liquidated Damages. Oscar will seek liquidated damages equal to six months of Michael's salary. Michael may claim that this amount is unreasonably large and is unenforceable as a penalty. But the facts say that the disclosure was highly damaging.

OTHER

13. Other

Grading Guide for the Midterm Examination in

CONTRACTS I

(Course No. 6202-21; 3 credits)

Professor Gregory E. Maggs

The midterm examinations have been graded. You may obtain a copy of the answers that you submitted and a score sheet showing how many points you earned on each problem by sending a polite email, with your complete GWID number, to my assistant, Ms. Lillian White <lwhite@law.gwu.edu>.

The midterm examination consisted of six problems worth 5 points each, for a total of 30 points. The final examination will be worth 170 points. Accordingly, the midterm will count for 15% of your final grade (i.e. 30 points out of a total of 200 points). No letter grades were assigned to the midterm examination. You will receive a final letter grade at the end of the semester based on your total points on both the midterm examination and the final examination. As in all of your classes, grades will be assigned in accordance with the Law School's mandatory grade distribution guidelines.

The purpose of the midterm examination was to help you assess several specific skills that you will need for writing successful essays on the final examination. These skills include properly identifying and discussing claims, defenses, and remedies. They also include avoiding common problems such as overlooking claims and defenses, forgetting to apply the law to the facts, and misunderstanding complicated legal rules.

Your answers were impressive. They showed a very solid understanding of the law of contracts and remarkable progress in developing the skills that will be needed on the final examination. It is evident that everyone has studied diligently. You are well on your way to becoming attorneys.

The mean, median, and mode were all 21 points. The high score, achieved by several students, was 28 points. One quarter of the class scored 24 points or higher, and one quarter of the class scored 19 points or lower. Your scores should help you decide what to work on when preparing for the final examination. They certainly do not preordain any particular result on the final examination, especially because the differences between the scores are very small in comparison to the 170 points that still may be earned on the final examination.

The discussion below provides suggested answers for each of the six problems and some guidance with respect to these answers. Some answers received full credit even if they were not exactly the same as the suggested answers because everyone sees things a little differently. Answers that were incomplete or not entirely correct received partial credit.

Finally, please remember to follow the instructions whenever taking any examinations in law school, even if the instructions involve seemingly minor matters like indenting the first line of every paragraph and spacing between paragraphs.

1. Properly Identifying and Discussing Claims. Using the facts in the Schott v. Westinghouse problem [pp. 109-110], identify the restitution and breach of contract claims Schott might assert.

Suggested Answer:

Schott might sue Westinghouse under a theory of restitution, claiming that Westinghouse was unjustly enriched at his expense when Westinghouse did not compensate him for suggesting a design for a circuit breaker even though Westinghouse benefitted later by using an identical design.

Schott might sue Westinghouse for breach of contract, asserting that even if the Suggestion Committee's decisions on cash awards are final, Westinghouse implicitly promised that the Committee would act in good faith (Rest. § 205) in determining whether to pay cash awards. Schott will claim the Committee acted in bad faith because denying him payment for his design on grounds that someone in the company later independently replicated the design violates reasonable standards of fair dealing. Even crediting the truth of Westinghouse's assertion, the decision is unfair because Westinghouse had no reason to duplicate his efforts and thus deny him his award.

Guidance:

Being able to identify claims is a key step in analyzing legal problems. Without properly identifying claims on the final examination, it will be very difficult to identify and discuss defenses and remedies. Although the entire Schott v. Westington problem was assigned in the reading, we focused in class on the restitution claim and not the contract claim. The problem thus presented both something familiar and something new. Many answers addressed all or almost all of the points in the suggested answer above. But some answers lost points because they only attempted to identify a restitution claim or a contract claim but not both claims. Still other answers conflated the two theories of liability as though there were no distinction between them.

The "Tips for Writing Good Answers" on page two of the examination gave this guidance: "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')." Good answers, accordingly, included specific details based on the facts of the problem.

Section 1 of the Restatement of the Law of Restitution (reprinted in Syllabus Appendix No. 3) says: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." A restitution claim therefore must allege that Westinghouse was in some particular way unjustly enriched at Schott's expense. It is not enough to say "Schott will sue Westinghouse for unjust enrichment" without additional elaboration.

Section 1 of the Restatement (Second) of the Law of Contracts defines a contract as a promise that the law will enforce. A claim based on a theory of breach of contract therefore must identify what Westinghouse promised and how Westinghouse broke its promises. Some answers lost points because they did not indicate what Westinghouse promised or they oversimplified the promise. Westinghouse did not promise to pay cash rewards to employees in all cases, but instead only when a Suggestion Committee determined that awards should be paid. Because the Committee decided that Schott would not receive an award, the best strategy for him is to argue that the decision violates the implied duty of good faith under Rest. § 205.

Note that this problem asked only for the identification of Schott's restitution and contract claims. It did not ask about defenses that might be asserted or remedies that might be sought.

2. Properly Identifying and Discussing Defenses. Suppose in Fairmount Glass Works v. Crunden-Martin Woodenware [p. 130], that Fairmount's communication of April 23, 1895 had omitted the words "for immediate acceptance." Using these changed facts, discuss Fairmount's defense that there was no offer.

Suggested Answer:

In support of its defense, Fairmount will continue to assert (as it did in the actual case) that its communication of April 23 was a mere price quotation, and will continue to cite the general rule that a quotation of prices is not an offer to sell. Crunden-Martin may respond (as it did in the actual case) that courts do not follow this general rule when special circumstances show it should not apply. Crunden-Martin, however, can no longer rely on the "for immediate acceptance" language to show these special circumstances. So instead Crunden-Martin might argue that Fairmount's communication was not a typical price quotation given to the public but was instead a direct response to Crunden-Martin's inquiry about the price for 10 car loads of jars. Crunden-Martin will argue the communication was an offer because, as in Lefkowitz, it was so specific that it "left nothing open for negotiation," and because unlike advertisements and price quotations made to the general public, this communication, if construed as an offer, would allow only one offeree (Crunden-Martin) to accept it. Fairmount may respond that none of this is enough to overcome the presumption that price quotations merely invite offers and will liken this case to Harvey v. Facey where a price quotation in response to specific questions was held not to be an offer.

Guidance:

Although we discussed this case at considerable length in class, the problem changed one fact that was a key to the court's actual decision. The problem was thus partly familiar and partly new.

The "Tips for Writing Good Answers" said: "In 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 that the promise is too indefinite to enforce. Y will assert that there is no basis for determining the existence of a breach because ... and no basis for giving an appropriate remedy because X might respond')." Many answers followed this guidance and addressed all or almost all of the points above. Some answers, however, lost points, not because they were wrong, but just because they did not go far enough into the details. Some said simply that Fairmount will assert that there was no offer. That is insufficient because the question assumed that was Fairmount's defense. Others said that Fairmount will argue that there is no offer because price quotations generally are not offers. Again, that is true, but not sufficient, because that is exactly what Fairmount argued in the original case. Instead, it was necessary to go one step further and discuss the parties' arguments about whether omission of the "for immediate acceptance" language would change the outcome of the case.

A few answers discussed the other kinds of defenses that Fairmount might raise. These discussions were not wrong, but the question focused solely on "Fairmount's defense that there was no offer."

3. Properly Identifying and Discussing Remedies. Suppose that Antillico Kirksey in Kirksey v. Kirksey [p. 56], Katie Scothorn in Ricketts v. Scothorn [p. 89], and Anna Feinberg in Feinberg v. Pfeiffer [p. 94] had been allowed to

recover under the rule in Restatement (Second) of the Law of Contracts § 90(1). Discuss the arguments that the defendants in these cases might have made for limiting the remedies awarded.

Suggested Answer:

Even if a plaintiff is allowed to recover under the first sentence of § 90(1), the second sentence of § 90(1) says that the "remedy granted for breach may be limited as justice requires." The defendants would argue that because the promises in all three cases were gratuitous, justice does not require that the plaintiffs recover the full value of what they were promised. Instead, they should recover only what they lost in reliance on the promise. See, e.g., Hoffman v. Red Owl Stores. Thus, the defendants might argue: Antillico Kirksey should not recover the full value of "a place to raise her family," but instead only what she lost in "breaking up and moving to the defendant's"; Katie Scothorn should not recover the full \$2000 she was promised, but only the money she lost by temporarily leaving her employment in reliance on the promise; Anna Feinberg should not recover the full \$200 a month promised for life, but only the amount necessary to make up for what she lost by retiring in reliance on the promise. The plaintiffs may dispute factually how much they actually lost and, in Mrs. Feinberg's case, may contend that the loss cannot be made up in another way.

Guidance:

We discussed the very question asked by this problem in class with respect to Katie Scothorn and Anna Feinberg. Although we talked about whether Antillico Kirksey might have been able to recover under Restatement § 90(1), we did not expressly consider the possibility of limiting her remedy under that section. The question was thus again a mixture of the familiar and the new.

The Tips for Writing Good Answers advised: "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." Good answers thus identified what the plaintiffs in these cases might have sought (i.e., the full value of what they were promised) and the defendant's arguments for limiting the plaintiff's recovery under the second sentence of § 90(1).

Some answers lost points because they did not talk about whether remedies should be limited, but instead focused on whether the plaintiffs should be allowed to recover at all under Restatement § 90(1). Many of these answers went through all of the elements of the first sentence of that section. These answers were not wrong in what they said, but they did not respond to the question. The question assumed that the plaintiffs could recover and asked only about the arguments for limiting their remedies. A good practice on all examinations is to read the question twice and, if necessary, look up and read any legal provisions cited in the section.

4. Overlooking Claims or Defenses. In Callano v. Oakwood Park Homes Corp. [p. 110], the court held that the Callanos did not have a valid quasi-contract (i.e. restitution) claim against Oakwood Park Homes. Identify other claims that might have been brought on the facts of the case.

Suggested Answer:

The Callanos might have sued Pendergast's estate, claiming that Pendergast promised to pay them \$497.95 for the shrubbery, and broke this promise when he did not pay them.

Pendergast's estate might have sued Oakwood Park Homes Corp. under a theory of restitution, claiming that Oakwood Park Homes Corp. was unjustly enriched at the estate's expense when it benefitted from the shrubbery that Pendergast added to the property and did not compensate Pendergast or his estate for it.

Guidance:

The Callano v. Oakwood Park Homes Corp. opinion specifically discusses the Callanos' contract claim against Pendergast in the last paragraph on page 111. The existence of this claim was the reason that the court said the Callanos could not recover from Oakwood Park Homes on a theory of restitution. Although the opinion does not mention the possibility that Pendergast's estate might have a restitution claim against Oakwood Park Homes, we discussed it in class.

Many answers identified both claims, but a significant number overlooked the estate's claim. Overlooking claims is a common problem on final examinations. One method of avoiding the mistake is to think logically about all the possible pairs of plaintiffs and defendants and to ask yourself whether a claim can be brought by the plaintiff in each pair. For example, given parties A, B, C, you would ask yourself: "Might A have a claim against B or C? Might B have a claim against A or C? Might C have a claim against A or B?" This strategy might have led some who missed the estate's claim to identify it.

5. Applying the Law to the Facts. In Channel Home Centers v. Grossman [p. 239], one of Grossman's arguments was that he had not "manifested an intent to be bound by the agreement." Identify the legal rule applicable to this defense and discuss how Grossman might argue the rule should apply to the facts.

Suggested Answer:

Grossman's defense is that he did not assent to be bound. See Rest. § 21. The rule applicable to this defense is that, to avoid liability, the defendant must have manifested an intention not to be bound sufficiently that either (1) a reasonable person would have thought the defendant was not assenting to be bound, or (2) the plaintiff actually knew that the defendant was not assenting to be bound. See Lucy v. Zehmer. Grossman might argue that a reasonable person would not have thought he was assenting to be bound by his promises because the document containing the promises was called a "letter of intent" rather than a "contract" and because the terms were too vague to suggest an enforceable agreement. The terms, for example, did not address any details of the lease sought or give a deadline for forming a lease. Grossman also might argue that Channel actually knew that he was not assenting to be bound because he explained to Channel that the purpose of the letter was merely to have something to "show to other people, banks, or whatever," rather than saying that the purpose was to create binding legal obligations.

Guidance:

This question required two steps: identifying a legal rule and then discussing how a party would argue that the rule should apply. On final examinations, points are sometimes lost because answers identify legal rules but do not discuss how the parties will argue about their application.

We discussed the elements of the applicable legal rule in great depth when covering Lucy v. Zehmer. We also discussed how the court thought the rule applied in Channel Home Centers v. Grossman. We did not, however,

discuss in the same depth how Grossman would argue the rule should apply. The problem therefore offered something new and old.

Some answers identified various different kinds of defenses that Grossman might have raised. But the problem asked only about his defense that he did not manifest an intention to be bound by the promise.

6. Accurately Understanding the Law. Identify the error in Flagship Properties' understanding of the statute of frauds at issue in C.R. Klewin v. Flagship Properties [p. 270], and explain how the correct rule should apply to the facts.

Suggested Answer:

The one-year provision of the statute of frauds makes promises that cannot be completed within one year unenforceable unless they are evidenced by a signed writing. Flagship Properties argued that the one-year provision made its oral promise to employ C.R. Klewin Inc. as its construction manager unenforceable because it would be "realistically impossible" for C.R. Klewin to complete the enormous construction project within one year. But the correct rule, according to the court, was that the one-year provision applies only if completion of a contract within one year would violate the terms of the contract. Because nothing in the contract prohibited finishing the project in one year, the statute of frauds did not require Flagship's promise to be evidenced by a signed writing.

Guidance:

Although many of the rules of contract law are not complicated, some of them are difficult--especially those concerning exceptions and special cases under the statute of frauds. This problem required a correct statement of a somewhat confusing rule and an explanation of its application. Although we discussed this precise issue in class, articulating the correct answer was still difficult.

Many answers correctly said exactly what the court in C.R. Klewin v. Flagship Properties ruled: a promise can be completed in a year for the purpose of the statute of frauds unless the contract requires performance to take more than a year. Some answers, however, mistakenly said that Flagship Properties' understanding of the rule was incorrect because it might be possible to complete the construction in less than a year if sufficient manpower and resources were devoted to the effort. While that may be true, that is different from what the court said. Whether the project can theoretically be completed in a year is not the question; the question is whether the contract prohibits completion within a year. It is a question of law, not physics. Other answers suggested that Flagship Properties was confusing the possibility of complete performance of a contract within one year with the possibility of early termination. That is often a problem in statute of frauds cases, but it was not the issue here.

Information about the Final Examination
in CONTRACTS I (Course No. 202-11)

Professor Gregory E. Maggs

The class did very well on this examination. You evidently studied the materials thoroughly and paid careful attention in class. I congratulate you for your accomplishments. I also offer encouragement to all of you. Although some examination answers were more accurate or complete than others, each showed a solid understanding of the law of contracts and of legal reasoning. The writing quality was uniformly very high.

I have written this grading guide to explain the results and to aid possible future improvement. You may obtain a copy of your examination answer and your score sheet by sending a polite email, with your GWid, to my assistant, Ms. Susan Krause <skrause@law.gwu.edu>. After you review this grading guide, your answer, and your score sheet, I would be happy to discuss the examination or anything else during my office hours. My office hours are generally on Wednesdays from 3:50-5:50 p.m. (immediately after our Wednesday class). Please note that Law School rules, described in the Law School Bulletin, prohibit changing grades except to correct clerical or mathematical errors.

Each of the problems on the examination presented a fact pattern based on an actual case and asked you to write an essay identifying and discussing the claims and defenses that the parties might assert, and the remedies that they might seek. In determining the raw scores on the examination, I assigned points based on how well your essays identified and discussed the claims, defenses, and remedies. Final grades were determined from these raw scores in accordance with the Law School's mandatory grade distribution for first-year courses. I regret that I could not award higher grades in many cases.

Below are the checklists that I used in grading the answers. These checklists are not model answers. They are not model answers because the instructions required all answers to be written in essay form. In grading the examination, I recognized that not everyone sees things in the same way. I attempted to be flexible and generous when grading. I usually found ways of awarding points when answers discussed issues not specifically listed on the grading guide or when they characterized issues differently from the grading guide.

Most answers did extremely well in identifying claims, defenses, and remedies. A possible area for improvement for many answers, however, would be to discuss these claims, defenses, and remedies more thoroughly and carefully. The law and the application of the law to the facts in many instances was difficult. Often the parties might see the same point in a different way. Still, most answers received partial credit for all of the claims, defenses, and remedies discussed.

One final but important point requires mention: Whenever you take an examination, you should read and follow the examination instructions. The instructions on this final examination limited answers to 4500 words, mandated that all answers be written in essay form, and required indenting the first

line of each paragraph and including a blank line between paragraphs. Some answers did not follow one or more of these instructions.

PROBLEM I.

[4 points for items 1 & 2; 3 points for items 7, 8, 11 & 14; 2 points for the remaining items]

BRETT v. ARLENE

Claim:

14. Breach of Contract. Brett might sue Arlene for breach of contract, claiming that Arlene made two promises to him and broke both of them. First, he will say that Arlene expressly promised that she would lend him the remainder of the \$2 million purchase price for the health center if he raised \$500,000 (which he did by selling his bakery), and that she broke this promise by not lending him the money. Second, he will say that when Arlene told him that "he needed more experience she could trust him with the loan," she was implicitly promising him that she would lend him the money if he gained more experience (which he did by working for Cindy), and she broke this implicit promise when she still did not lend him the money.

Defenses:

15. No consideration or other basis for enforcement. Arlene might argue in defense that neither of the two promises has a basis for enforcement. She will assert that she was simply promising to make a gift to Brett in the form of a low interest loan. She will contend that there was no bargain because she did not seek anything in exchange from Brett. Rest. § 71. In her view, Brett's raising \$500,000 and gaining experience were merely conditions for receiving the promised gift. Cf. Kirksey v. Kirksey. Brett might respond that his implicit return promise to repay any loan with interest, even at a low rate of interest, is the consideration for each promise to lend him the money.

Brett also might argue that Emily's promises are enforceable on the basis of promissory estoppel because, in reliance on these promises, he sold his bakery and took a low paying job as a manager for Cindy. Rest. § 90(1); cf. Feinberg v. Pfeiffer. But Arlene might respond that the promises cannot be enforced based on promissory estoppel because enforcing the promises is not "necessary to prevent injustice." Cohen v. Cowles Media. She will explain that Brett's selling the bakery and gaining experience was not a burden on Brett, but instead helped him to accomplish what he wanted all along: buying and running a profitable business. It is not unjust that he does not receive a low interest loan also from Arlene, who sought nothing from him.

16. Preliminary Negotiations. Arlene has refused to agree to Brett's characterization of the transaction as a "deal." This suggests that Arlene will defend on grounds that she and Brett never got further than preliminary negotiations. Rest. § 26. Arlene might argue that, even if she offered to lend money to Brett, he did not accept the offer. He never promised her that he would accept and repay the money as required by any loan. But Brett may respond that he implicitly promised that he would repay the money when he took the actions necessary for obtaining the loans, namely, raising \$500,000 and gaining experience. Cf. White v. Corlies & Tift. Brett will also argue that no acceptance is

necessary if the promises are enforceable on the basis of promissory estoppel. Rest. § 90.

17. Indefiniteness. Arlene also might defend on grounds that her promises are too indefinite to enforce because both the duration of the loan and the interest rate were unspecified. If a court does not know when the loan is due or how much interest has accrued, she will argue, the court has no basis for determining the existence of a breach and for giving an appropriate remedy. Rest. § 33(1); Varney v. Ditmars. But Brett will respond that some courts have held that the requirement of definiteness is less strict when a promise is enforced under a theory of promissory estoppel. Hoffman v. Red Owl Stores.
18. Statute of Frauds. Arlene has told Brett that the loan is not enforceable because her promises are not in writing. But a promise to make a loan is not typically required to be evidenced by a signed writing. Rest. § 110. A loan is not a contract to buy or sell an interest in land. In addition, Arlene's promises are not covered by the one year provision because both parties could completely perform in one year (e.g., she could lend him the money, and he could repay it in a time shorter than one year).

Remedy:

19. Expectation damages. Brett will seek expectation damages. His loss in value is the value of a low interest loan for \$1.4 million (i.e., the rest of the \$1.9 million price after he has paid \$500,000) and his costs avoided are all the costs of paying the loan back. The value of the low interest loan might be measured by the present value of the savings in interest payments that Brett would have enjoyed over the life of the loan if he had not had to borrow money at a higher market rate. But if the promise is enforceable on the basis of promissory estoppel, Arlene may argue that the remedy should be limited as justice requires under Rest. § 90(1). In this case, justice does not require any damages because Brett is operating his new business at a profit; again, it is not unjust that he does not also have a low interest loan.

CINDY v. BRETT

Claim:

20. Breach of Contract. Cindy might sue Brett for breach of contract, claiming that he promised not to work for a competitor in the same city for a period of two years and that Brett broke that promise when he purchased and began operating a rival fitness center in what appears to be less than that time.

Defenses:

21. No consideration. Brett might respond that his promise not to compete lacks consideration because he did not seek anything and was not given anything in exchange for his promise not to compete. Although this argument might be valid under the generally accepted "bargain theory of consideration," Rest. § 71, Cindy might point out that some courts say that continued employment of an at will employee counts as consideration for a promise not to compete. Lake Land Employment v. Columber. Cindy also might argue that this promise is enforceable under a theory of promissory estoppel because she relied on it by allowing him to continue to work for her business.
22. Duress. Brett appears to be arguing that his promise is not enforceable because he "had no other choice" but to make the promise. He may have

felt that Cindy would fire him if he did not agree to what she asked. But Cindy will respond that duress is not a defense because she did not make any improper threat. Rest. §§ 171, 175. Unless he had a contract to work for her for a particular time -- which most employees do not have -- she was free to terminate his employment at any time.

23. Strict Construction (no breach). Brett might argue the court should construe the promise strictly against Cindy because she supplied the words of his promise and he had no real opportunity to negotiate different words. Rest. § 206; Galligan v. Arovitch. So construed, Brett might respond that he did not breach his promise not to "work for a competitor" because he does not work for a competitor; he now owns a competitor and personally competes against Cindy.
24. Statute of Frauds. Brett also might argue that his promise is not enforceable because it is not evidenced by a signed writing and it could not be performed within one year--he promised not to compete for 2 years. Rest. § 130(1). But Cindy will point out that when one party to a contract has completed his performance, the one-year provision of the Statute does not prevent enforcement of the promises of other parties. Rest. § 130(2). In this case, if the consideration for his promise is Cindy's act of not firing him (a theory that some courts would accept), Cindy's performance is already complete, and the statute of frauds does not apply.

Remedies:

25. Specific Performance/Injunction. Cindy might seek a specific performance of Brett's promise, which would amount to an injunction preventing Brett from competing. But Brett might respond that Cindy cannot obtain specific performance because damages would be an adequate remedy (Cindy presumably can measure her lost profits in dollars), Rest. § 359(1); and because the bargain was not fair given that he did not receive anything in exchange for his promise, Rest. § 164, McKinnon v. Benedict; Tutwiller v. Tutwiller.
26. Expectation damages. Alternatively, Cindy might seek expectation damages. Her loss in value is the value of his promise not to compete (which by itself does not appear to be very valuable, given that she obtained it without paying him anything for it), her other loss would be her loss in profits cause by his competing business (which may be significant), and she does not appear to avoided any costs because she did not expect any costs. Cindy, of course, would have to prove her damages with reasonable certainty to recover. Rest. § 352.

ARLENE v. BRETT

Claim:

27. Restitution. Arlene thinks that Brett is "ungrateful for her help in reducing the purchase price," and therefore might seek restitution from Brett. She might claim that Brett would be unjustly enriched if he did not pay her for the reduction. Rest. Restitution § 1. She will seek to recover \$100,000, the amount by which he was benefitted. Rest. Restitution § 155. Brett, however, may argue that Cindy was a friend and was acting as a volunteer when she conferred the benefit on him. Rest. Restitution § 157 (Syl. App.). This argument is risky, however, because it somewhat undercuts his theory that there is a basis for enforcing her promise to lend him money.

OTHER

28. Other

PROBLEM 2.

[3 points for items 2-5; 4 points for the remaining items]

EMILY v. DON

Claim:

1. Breach of contract. Emily might sue Don for breach of contract, claiming (1) that Don initially promised to pay her \$23,000, and (2) that Don later promised to pay her \$25,000, and that Don broke both these promises because he did not pay her anything.

Defenses:

2. No acceptance of offer to modify. Don might argue that, although he offered to pay Emily \$25,000, Emily never accepted the offer. Instead, she just grumbled, continued to work as before, and continued to ask for more money. But Emily might respond that she implicitly accepted by doing more work.
3. No consideration (modification). Don also might argue that he does not have to keep his second promise because he received no consideration for increasing the price from \$23,000 to \$25,000. Emily was under a pre-existing duty to complete the work. Rest. § 73; Alaska Packers v. Domenico. Emily and Don do not appear to have cancelled the original contract. Cf. Schwartzreich v. Bauman-Basch. Emily, however, might argue that the circumstances have changed in a way that would make a modification without consideration reasonable; just as the court in Watkins & Sons v. Carrig found out that it would be more expensive for them to dig Watkins's cellar, Emily has discovered that it will be more expensive to build an enclosed room. Rest. § 89(a). Only some jurisdictions accept this view.
4. Stress, Angst and Duress. Don has argued that he does not have to keep the promises because of the "stress, angst, and duress" caused by Emily after the contract was made. But these ailments are not a valid ground for terminating a contract. If Don had made a promise while he lacked mental capacity or if was induced to make a promise by an improper threat, then the promise might be voidable. Rest. §§ 15 & 171. But the stress, angst, and duress that Don is referring to occurred after the promises were made and did not induce any promise.
5. Public Policy. Don also will argue a promise to pay for building without a permit violates public policy because it is a promise to pay someone to commit an illegal act. Rest. § 178; cf. Bush v. Black Industries.

Remedies:

6. Expectation Damages. Emily may seek expectation damages. She will claim her loss in value is \$25,000 (i.e., the amount Don promised to pay), her costs expected are \$23,000 (a figure we know because she said that she would make no profit if paid \$23,000), and her costs incurred are \$12,000. This would yield expectation damages of $\$25,000 - (\$23,000 - \$12,000) = \$14,000$. If only Don's promise to pay her \$23,000 is enforceable, then her damages would be $\$23,000 - (\$23,000 - \$12,000) = \$12,000$.

Don also will contend that Emily has underestimated her costs avoided. He estimates that it will now cost and additional \$22,000 to complete the work. If it would cost the same for Emily to complete the work, Emily's expectation damages would be her loss in value (\$25,000) minus her costs avoided (\$22,000), which would be only \$3,000. If only Don's promise to pay her \$23,000 is enforceable, then her damages would be \$23,000-\$22,000=\$1,000. It does not matter that she has already spent \$12,000.

DON v. FRANKLIN

Claim:

7. Breach of contract. Don might sue Franklin for breach of contract, claiming that Franklin promised to complete the project and he broke this promise by not completing it and saying that he does not want to "get involved" in the project.

Defenses:

8. No offer and acceptance. Franklin might argue that he is not liable because there was no completed offer and acceptance. Franklin will assert that when he said that the lowest cash price was \$20,000, that was merely a price quote and not an offer. Franklin will assert that it was not a manifestation of willingness to enter into a bargain. Rest. § 24; Owen v. Tunison. But Don will say that he had made an offer when he gave Franklin the down payment and that Franklin accepted the offer by retaining the down payment and starting work. Cf. Evertite Roofing v. Green.
9. Misrepresentation. Franklin might argue that his promise is voidable because he was induced to enter the contract by a fraudulent misrepresentation when Don falsely indicated that he had lawyers. Rest. § 164(1). A fraudulent misrepresentation does not have to be material to make a promise voidable. Rest. § 161(1)(a). But Don will assert that his talk of lawyers did not induce Franklin to enter the bargain; instead, it only induced him to increase the price.

Remedies:

10. Expectation damages. Don might seek expectation damages. He will claim her loss in value is \$22,000 (i.e., what it would cost him to complete the room), his costs expected are \$20,000, and his costs incurred are \$10,000. There is no mention of other loss. His expectation damages would thus be \$22,000-(\$20,000-\$10,000)=\$12,000.

Franklin, however, will argue that the loss in value should not be measured by the cost to complete (\$22,000) because that would be grossly disproportionate to the probable loss in value to Don. Rest. § 348(2); Jacob & Youngs v. Kent. We don't know exactly what value Don places on the property, but the facts say that he is having second thoughts because completing the room will only add \$15,000 in value to his home.

OTHER

11. Other

PROBLEM 3.

[2 points for items 6, 7 & 13; 1 point for item 14; 3 points for the remaining items]

GERT v. HARVEY

Claim:

1. Breach of Contract. Gert might sue Harvey for breach of contract, claiming that Harvey promised to pay him \$100,000 each year for five years, and that Harvey has now repudiated this promise by indicating that he "has no intention to pay Gert."

Defenses:

2. No Acceptance. Harvey might argue that he never accepted Gert's offer because silence cannot be acceptance. Rest. § 69. Harvey did not tell Gert he was accepting, but instead merely gave Gert's offer to his attorney to file. Gert may respond that the parties had already completed negotiating the lease agreement, and the letter he sent to Harvey merely memorialized their agreement. He therefore did not have to respond. In addition, Gert will say that Harvey in any event should be deemed to have accepted the offer by his conduct in running the inn. Evertite Roofing v. Green.
3. Statute of Frauds. Harvey might argue that his promise is not enforceable under the statute of frauds because he did not sign any writing and one of the promises in the lease agreement (i.e., Gert's promise to lease for five years) could not be completed in less than one year. Rest. § 130(1). Gert might respond that his promise could be completed in less than one year if zoning rules were changed. But Harvey might argue that termination of the contract because of a change in zoning rules would be an early discharge rather than a complete performance. Rest. § 130 cmt. b (Syl. App. 4). This distinction, as the Restatement says, is "tenuous."
4. Misrepresentation (half-truth). Harvey also may argue that his promise to pay rent is voidable because the promise was induced by a half-truth. Although Gert told the truth when he said that a plumber had inspected the property, he did not tell the whole truth, which is that the plumber said that the septic system did not work. This was misleading. Kannovos v. Annino. Gert will respond that he merely engaged in a non-disclosure, which does not justify rescission. Swinton v. Whitinsville Savings Bank.
5. Non-Disclosure/Confidential Relations. Harvey also will argue that the non-disclosure of the problem with the septic system should be treated as misrepresentation because Gert and he had a confidential relationship (i.e., Harvey trusted Gert because he was his uncle) requiring disclosure. Rest. § 161(d).
6. Unilateral Mistake. Harvey also may argue that his promise is voidable based on his unilateral mistake in assuming that nothing was wrong with the septic system. Rest. § 153. But Gert may argue in response that Harvey should bear the risk of loss because Harvey specifically advised him to consult a plumber and Harvey chose not to do so. Rest. § 154(b).

Remedy:

7. Expectation damages. Gert will seek expectation damages equal to his loss in value (i.e., whatever Harvey does not pay) minus his costs and loss avoided (i.e., whatever he can make from leasing the property to someone else).

HARVEY v. GERT

Claim:

8. Rescission. Harvey may seek to rescind his lease of the inn, and recover any rent that he has already paid, if the contract is voidable based on a misrepresentation, non-disclosure, or unilateral mistake (see above). In that case, the liability to Irene might be Gert's problem rather than Harvey's.

IRENE v. HARVEY

Claim:

9. Tort. The facts say that Irene has sued Harvey "in tort," presumably for negligence. (True, this course is Contracts, not torts, but the claim is stated in the problem, and it is the same claim on upon which plaintiffs sued their landlords in Galligan v. Arovitch and O'Callaghan v. Waller & Beckwith Realty.)

Defense:

10. Exculpation clause. The facts say that Harvey has responded that he is not liable because the exculpation clause on key card says that the inn is not liable to any guests for any injuries caused by falls (like the landlords in Galligan and O'Callaghan).

Replies:

11. Strict construction. Irene will say that the clause should be strictly construed against Harvey because he drafted it. Rest. § 206; Galligan v. Arovitch. So construed, she will argue, it does not exculpate Harvey because it applies only to "guests" and she was not a guest when she fell; she had already checked out of the hotel.
12. Adequate notice. Irene will further argue that she did not have adequate notice that the key card contained contract terms. She may have thought that it was just a key for opening her room and served no other purpose. Rest. § 211; Klar v. H. & M. Parcel.
13. Unconscionability. Irene also may argue that a hotel proprietor's attempt to disclaim liability for negligence that causing personal injuries is unconscionable. Rest. § 205; cf. Henningsen v. Bloomfield Motors; O'Callaghan v. Waller & Beckwith (dissent).

Remedy:

14. Tort damages. Irene will seek damages under tort law for her injuries. (No further discussion is expected.)

OTHER

15. Other

PROBLEM 4.

[4 points for all items]

KATIA v. JOSE

Claim:

1. Breach of contract. Katia might sue Jose for breach of contract, claiming that Jose promised to pay her \$150,000 to make repairs to his property and that Jose broke this promise when he paid her only \$50,000.

Defense:

2. No offer and acceptance (mirror image rule). Jose will argue that even if Katia made him an offer, he did not accept it. He will say that his purported acceptance was not an actual acceptance under the mirror image rule because he insisted on terms that were not in Katia's offer, namely, that she concentrate on six priority items first. Rest. § 59; M. & St. L. v. Columbus Rolling-Mill. But Katia will respond that he did not change the terms of the contract but merely specified his preferences for the order of doing the work. Cf. Fairmout Glass v. Crunden-Martin. She also will respond that even if his purported acceptance was not an acceptance, it was a counteroffer, and she accepted the counteroffer by starting work. Cf. Evertite Roofing v. Green.

Remedy:

3. Full payment. The facts indicate that Katia is seeking full payment as a remedy. She has said that Jose "owe[s] her the full \$150,000." But Katia's argument that she is entitled to full payment "because it was [Jose's] choice to cancel" is wrong as a matter of contract law. Under the expectation damage formula, she can only recover the full \$150,000 (i.e., the \$50,000 she has already received and her remaining \$100,000 loss in value), if she can show that she could not have avoided any of her expected costs. Jose will argue that Katia did avoid costs because she had fully completed the construction she had promised; that she is not entitled to constructive costs because she "can find work elsewhere," Parker v. 20th Century Fox; and that she could have avoided additional costs if she had not continued to work for a few days after he requested her to stop. Katia might respond that, at the least, the costs she incurred by continuing to work were not avoidable without "undue risk." Rest. § 350(1). She may have worried about the risk that she would be liable if she left the property in an unsafe condition and someone was injured.
4. Reliance damages. If Katia cannot obtain expectation damages, perhaps because she cannot prove her costs avoided with reasonable certainty (they are not stated in the facts), she might seek reliance damages. Rest. § 349. Given that she expended \$70,000, and has received only \$50,000 in payment, her reliance damages would be \$20,000.

JOSE v. LEE

Claim:

5. Breach of contract. Jose might sue Lee for breach of contract, claiming that Lee promised to buy Jose's residence for \$400,000, and that Lee broke that promise when he did not pay.

Defense:

6. Revocation before acceptance. Lee will argue that he is not liable to Jose because he revoked his offer to buy the property for \$400,000. Lee will say that he revoked the offer when he told Jose that "he would not buy the property unless Jose first paid Katia \$100,000." Jose may reply that Lee could not revoke his offer because Lee had promised to keep the offer open for a week. But Lee will respond that his promise to keep the offer open is not enforceable because he received no consideration for it. Dickinson v. Dodds. Jose may argue that he relied on Lee's promise to keep the offer open when he repudiated his contract with Katia and that the promise is enforceable under promissory estoppel. Drennan v. Star Paving.

7. Lapse of offer. Lee will alternatively argue that his offer lapsed because one week had passed before he received Lee's acceptance. Rest. § 41(1). Jose may respond that his acceptance was effective upon its dispatch under the mailbox rule and that dispatch occurred before the week was over. Rest. § 63(a). But Lee will reply that the mailbox rule does not apply because the "offer provided otherwise"; when Lee and Jose agreed that Jose would have a week to decide, their agreement indicated that Lee would want to hear from Jose within a week. Id. Lee will also say that, if Jose is correct that Lee's promise to keep the offer open is enforceable, then the mailbox rule does not apply because of the exception for offers held open under an option contract. Rest. § 63(b).

Remedies:

8. Liquidated damages. Jose will seek liquidated damages of \$100,000. Lee might respond that these damages are unreasonably large and therefore are not enforceable as a penalty. Rest. § 356(1); Dave Gustafson & Co. v. State. But Lee will respond that the damages are not unreasonably large because they are graduated according to the contract price (i.e., 25% of the price) and because they do not differ greatly from actual damages (i.e., \$90,000, as indicated below).
9. Expectation damages. Jose alternatively will seek expectation damages equal to his loss in value (the \$400,000 that Lee promised him) minus his cost avoided (giving up his house which appears to be worth no more than \$310,000), which is a total of \$90,000.

OTHER

10. Other

PROBLEM 5.

[4 points for items 1, 5, 11; 3 points for the remaining items]

MARIA v. NATE

Claim:

1. Breach of contract. Maria might sue Nate for breach of contract, claiming that Nate promised to pay 100% of the costs of Maria's services to Ophelia minus the amount covered by insurance, and that he broke that promise by not paying her.

Defenses:

2. No consideration (illusory promise). Nate might argue that his promise is unenforceable because it lacks consideration. Although Maria promised that she "will do what [she] can," Nate will say that this promise is illusory because Maria did not commit herself to do anything. Rest. § 2. Although Maria ultimately did render services to Ophelia, the consideration is to be tested by the agreement and not what was done under it. Strong v. Sheffield. Maria, however, may respond that her promise was not illusory because she was committed to act in good faith and to use reasonable efforts to help Ophelia. Rest. § 205; Wood v. Lucy; Mattei v. Hopper.
3. Statute of Frauds. Nate also might argue that his promise is unenforceable under the statute of frauds because it is a suretyship promise and it is not evidenced by a signed writing. Rest. § 110(1)(b).

He will assert that it is a suretyship promise because in effect he promised to pay whatever Ophelia might owe Maria. But Maria might argue that Nate is not a surety but is instead making a contract directly with her for the services to Ophelia; in other words his obligation is primary and not secondary. Langman v. Alumni Ass'n.

Remedy:

4. Expectation damages. Maria might seek expectation damages equal to her loss in value (\$35,000-\$10,000), minus her costs avoided (nothing), or \$25,000.

MARIA v. OPHELIA

Claim:

5. Breach of contract. Maria might sue Ophelia for breach of contract, claiming that Ophelia implicitly promised to pay for the psychological services that she authorized Maria to perform, and that Ophelia broke that promise by not paying.

Defenses:

6. No implied promise to pay. Ophelia might argue that there was no implied promise to pay Maria because they never discussed the price and because they thought at the time that there was no way that she would be able to pay for the services. Rest. § 33(3).
7. Indefiniteness. Ophelia also might argue that her promise cannot be enforced because it lacks definiteness. They never discussed exactly what service Maria would provide or how much it would cost, and therefore there can be no basis for determining the existence of a breach and for giving an appropriate remedy. Rest. § 33(1); Varney v. Ditmars. But Maria may respond that she will simply charge her usual rates and provide necessary services as determined by professional standards.
8. Incapacity (infancy). The facts do not indicate how old Ophelia is. But if Nate is paying for his daughter's medical treatment, Maria might still be an infant. In that case, she might be able to void the contract. Rest. §§ 7, 14; Kiefer v. Fred Howe Motors. If Ophelia voided the contract, she would probably be liable in restitution to Maria; although psychological services are necessities, incarcerated infants are emancipated because their parents are no longer responsible for their care. Rest. Restitution § 62.
9. Incapacity (mental infirmity). Ophelia might argue that her promise is voidable because she lacked mental capacity. Although she apparently could understand that she was entering a contract, the facts suggest that she could not act reasonably and Maria had notice of her condition. She could not make up her mind, she had irrational fears about Maria's intentions, and Maria knew all of this. Rest. § 15(1)(b); Ortelere v. Teachers' Retirement. But only a few jurisdictions have adopted this modern standard of mental incapacity.

Remedy:

10. Expectation damages. Maria might seek expectation damages equal to her loss of value (\$35,000-\$10,000), minus her costs avoided (nothing), or \$25,000.

MARIA v. OPHELIA

Claim:

11. Restitution. If Maria cannot prevail on a breach of contract action against Ophelia, she might sue her for restitution, claiming that Ophelia would be unjustly enriched if she retained the "substantial benefit" of the psychological treatments and did not have to pay for them. Maria could recover the reasonable value of the services she provided. Rest. of Restitution §§ 1, 155.

OTHER

12. Other

Information about the Final Examination
in CONTRACTS I (Course No. 202-11)

Professor Gregory E. Maggs

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PROBLEM 6.

[2 points for each item]

ALEX v. BONNIE

Claim:

1. Breach of contract. Alex might sue Bonnie for breach of contract, claiming that she made an implied promise to pay him a 6% commission on the sale of her property, and then broke that promise when did not pay him. (The facts imply that she did not pay him given that she called the sale off and told him that she did not intend to be bound by any promise.)

Defenses:

2. No implied promise to pay a commission. Bonnie appears to be arguing that she did not make an implied promise to pay the 6% commission because she had "no idea that Alex was expecting a sales commission" and had "no experience in real estate." Alex might respond that a promise to pay a commission is implied in any contract to hire a real estate agent because "[w]ithout an implied promise, the transaction cannot have such business efficacy, as both parties must have intended that at all events it should have." Wood v. Lucy Lady-Duff Gordon.
3. Preliminary negotiations. Bonnie alternatively might argue that, even if a contract with a real estate agent ordinarily would include an implied

promise to pay a commission, she and Alex never formed a contract. Instead, they merely engaged in preliminary negotiations. Rest. § 26. Bonnie will argue that her statement that she "was hoping you could help me find a buyer," was not an offer to pay Alex a commission to find a buyer because she did not manifest a willingness to be bound. Rest. §§ 24, 26; Owen v. Tunison. Instead, she was merely discussing the possibility of entering into a contract. Alex will respond that it was reasonable for him to understand the statement as an offer after she gave him more details. But some courts are reluctant to find an offer in cases of ambiguity. See Owen v. Tunison; Harvey v. Facey.

4. No Acceptance/Basis for Enforcement. Bonnie also might argue that there was no acceptance and, relatedly, no basis for enforcing her promise. Alex might respond in three ways. First, Alex might argue that Bonnie implicitly made an offer to enter into a unilateral contract -- namely, she offered to pay him the standard commission if he found a buyer -- and that he accepted her offer by his complete performance of finding a buyer. Rest. § 32. His performance is the basis for enforcement. But this seems unlikely; a person hiring a real estate agent generally wants the real estate agent to make return promises (such as promises to list the property, etc.) and not simply to accept by performance.

Second, Alex might argue that even if Bonnie made an offer to enter into a bilateral contract, he accepted by making a return promise when he said, "I will see what I can do." Bonnie might respond that this is an illusory promise because it contains no real commitment and that it therefore cannot be consideration. Rest. § 2, Strong v. Sheffield. But Alex will reply that his promise was not illusory because he had an implied duty to act in good faith and use reasonable efforts to sell the property. Rest. § 205; Mattei v. Hopper; Wood v. Lucy.

Third, Alex will contend that he reasonably relied on Bonnie's promise, as she reasonably could have expected him to do. The promise is therefore enforceable on the basis of promissory estoppel. Rest. § 90; Feinberg v. Pfeiffer.

5. Public policy. Bonnie might argue that enforcing her alleged promise to pay Alex a commission would violate public policy because Alex had allowed his state license to sell real estate to expire. The state apparently has a policy of protecting buyers and sellers by allowing only licensed agents to sell real estate. Rest. § 178.
6. Infancy. Bonnie also might have a defense of infancy if she was younger than 18 when she made the promise. Rest. § 14. She is described as a "young woman." In addition, her "recent" inheritance from her great-grandmother suggests that her great-grandmother was recently living. Most people with living great-grandparents are not very old.
7. No assent to be bound. Bonnie has argued that she is not liable for breach of contract because she "never intended to be bound by any promise." But Alex will respond that her intention is immaterial because it was not disclosed to him at the time the contract was formed and a reasonable person would have thought she intended to bound. Rest. § 21; Lucy v. Zehmner.
8. Indefiniteness. Bonnie also might argue that her implied promise to pay a commission cannot be enforced because it lacks definiteness. Because the parties did not discuss any specific figure, the amount of the commission might be "any sum from a nominal amount to a material part." Rest. § 33; Varney v. Ditmars. But Alex may respond that 6% is the "customary" sales commission, that this figure was therefore implied, and thus that the promise did not lack definiteness.

Remedies:

9. Expectation Damages. Alex will seek expectation damages equal to his loss in value, which is the amount that Bonnie implicitly promised to pay. As noted above, Alex claims that this figure is 6%, although Bonnie disagrees.

COLIN v. BONNIE

Claim:

10. Breach of Contract. Colin might sue Bonnie for breach of contract, claiming that she promised to sell him the property, and then told him that the sale was off.

Defenses:

11. Misrepresentation. Bonnie might argue that her promise is not enforceable because it was induced by a fraudulent misrepresentation, namely Colin's admittedly misleading statement that his offer "was really more generous than anyone could expect in this market." Rest. § 162(1). But Colin might respond that he was just stating an opinion and puffing, and that he did not misrepresent any facts. Rest. § 159.
12. Statute of Frauds. Bonnie might argue that her promise is not enforceable because it is a promise to sell land and it is not evidenced by a writing signed by her, as the statute of frauds requires. Rest. § 125. Colin, however, may argue that her promise is enforceable under the "part performance doctrine." This doctrine says that an oral promise to sell land may be enforceable if the buyer takes possession of the property, pays a substantial part of the purchase price, or makes improvements. Rest. § 129 cmt. a (reprinted in Syl. App. No. 5); Richard v. Richard. Colin will argue that he made improvements by removing hazardous waste and that he paid her \$5 of the purchase price. But Bonnie will respond that Alex has not paid a "substantial part of the purchase price."
13. No assent to be bound. As noted above, Bonnie has argued that she is not liable for breach of contract because she "never intended to be bound by any promise." But Colin will argue that a reasonable person would have thought that she was assenting to be bound given that she arranged the sale of her property through a real estate agent.

Remedies:

14. Specific performance. Colin might seek specific performance of Bonnie's promise to sell the property to him. Bonnie might respond that he is not entitled to specific performance because the bargain was unfair and because the price is low (given that Colin admits he misled Bonnie and was delighted with the price). Rest. § 364; McKinnon v. Benedict.
15. Expectation damages. Alternatively, Colin might seek expectation damages. Rest. § 347. His loss in value is the market value of the property which Bonnie did not deliver, which is probably greater than the contract price because Colin said he was "delighted" with the contract price. His other loss would be the profit that he expected to earn with his new business. It is foreseeable that he would lose profit if the sale of "commercial real estate" falls through, Rest § 351, but Colin might be able to avoid some of this loss by purchasing substitute property. Rest. § 350(1). He also might have difficulty proving the lost profit of the planned new business with reasonable certainty because he has no past record of profits. Rest. § 352; Fera v. Village Plaza.

Colin's costs avoided and other loss avoided include the amount of the purchase price that he did not pay (all but \$5) and additional money (beyond what he spent on cleaning up the hazardous waste) that he would have spent on the property.

ALEX v. BONNIE

16. Restitution. If Alex does not prevail on his contract claims, he might sue Bonnie in restitution, claiming that she has been unjustly enriched at his expense. Restatement of Restitution § 1; Cotnam v. Wisdom. He will assert that he provided her the service of finding a buyer for her property, at her request, and with the expectation of payment, and that she should have to pay for it. His recovery would be the reasonable value of his services, which might be the 6% commission that he has requested.

COLIN v. BONNIE

17. Restitution. Similarly, if Colin does not prevail on his contract claim, he also might sue Bonnie in restitution, claiming that she was unjustly enriched at his expense. He cleaned up the hazardous waste on her property, and she should have to pay for it. Again, her recovery would be the reasonable value of his services.

OTHER

18. Other

PROBLEM 7.

[3 points for each item]

DANIELLE v. EARL

Claim:

1. Breach of contract. Danielle might sue Earl for breach of contract, claiming that he promised to pay her rent for 12 months, but broke this promise when he stopped paying after 3 months.

Defenses:

2. Duress. Earl has argued that he did not have to keep the promise because he had no reasonable alternative but to rent the apartment when he first came to town. This argument sounds somewhat like a defense of duress. But Danielle will respond that she did not induce the promise by any improper threat, and that duress is therefore not a valid defense. Rest. § 175(1).
3. Unconscionability. Earl has argued that the lease is unenforceable because it contains an exculpation clause. Although the majority of the court upheld such a clause in O'Callaghan v. Waller & Beckwith Realty, many courts now hold that contract terms that seek to exclude liability for negligence are unconscionable. Rest. § 208. But Danielle will respond that even if the clause is unconscionable, a court should at most strike the clause, and not invalidate the whole contract, because no one was injured and the clause therefore has no bearing on this case. Restatement § 208 says that if a clause in a contract is unconscionable, the court "may enforce the remainder of the contract without the unconscionable term."

Remedies:

4. Liquidated damages (remaining rent). Citing the "key clause," Danielle will seek liquidated damages equal to the 9 months of rent that Earl did not pay. But Earl will argue that 9 months rent is unreasonably large in comparison to either her actual or anticipated damages because she could and did lease the apartment to someone else. He therefore will argue that the key clause is not enforceable because it is a penalty. Rest. § 356(1); Dave Gustafson v. State.
5. Expectation damages (lost rent). If Danielle cannot recover the full rent as liquidated damages, she will seek expectation damages.

Danielle's loss in value is 9 months of rent at \$1300 per month because Earl promised to pay for 12 months and paid for only 3. Her cost avoided equals her costs expected minus her actual and constructive costs incurred. Her expected costs were to give up the apartment to Earl for 12 months. Her actual costs incurred were the 3 months that she actually allowed Earl to use the apartment. But Danielle will argue for the addition of 2 constructive months when the apartment was vacant. Parker v. 20th Century Fox. So she will claim that her total costs avoided were 7 months times the value of the apartment. She will further argue that these 7 months should be valued at only \$1100 a month because that was the amount the new tenant agreed to pay. Thus, she will seek (9 months @ \$1300) - (7 months @ \$1100) = \$4000.

Earl may respond that she should not be allowed to include the 2 months of constructive expenses because she could have avoided leaving the apartment vacant but she "did not hurry to find another tenant." Rest. § 350(1); Parker v. 20th Century Fox. He will also argue that the value of the apartment should be either \$1300 or \$1400 a month, because that is what he paid and what Danielle was willing to pay. He thus will argue that damages should be (9 months @ \$1300) - (9 months @ either \$1300 or \$1400) = no damages.

6. Attorney's fees. If Danielle prevails in her lawsuit, she will also seek reasonable attorney's fees pursuant to the clause in the lease. But Earl will argue that the court should construe the term strictly against Danielle because she supplied the lease form. Rest. § 206; Galligan v. Arovitch. He will argue that the clause, when strictly construed, does not apply because Danielle did not (and could not) bring an "action to recover all of the rent due under the lease." An action for all of the rent due would be an action for 12 months, not just 9 months.

DANIELLE v. FIONA

Claim:

7. Breach of contract. Danielle might sue Fiona for breach of contract, claiming that Fiona promised to rent the apartment from her for seven months and did not do it.

Defenses:

8. Preliminary Negotiations. Fiona might argue in defense that the parties never got beyond preliminary negotiations. Danielle asked her two questions (i.e. whether she want to rent the apartment and what she would be willing to pay), and Fiona will say that she only answered the second question. The case is thus similar to Harvey v. Facey. Danielle will respond that her statement that both parties in fact understood Danielle to be offering to rent the apartment for \$1400 a month. Indeed, Fiona "prepared to move," showing she thought the parties had a lease.

9. Statute of Frauds. Fiona has argued in defense that she is not liable because "she never signed a lease." But Danielle might make two arguments in response. First, in her state, it is likely that no statute of frauds requires a lease for less than a year to be evidenced by a signed writing. Second, Fiona's email should satisfy the statute of frauds.
10. Non-disclosure/confidential relation. Fiona also has argued in defense that she is not liable because Danielle should have disclosed to her the price that Earl had paid. Danielle may argue that Fiona cannot void the contract on this ground because Danielle's silence was a bare non-disclosure. Swinton v. Whitinsville Savings Bank. But Fiona will reply that as a co-worker, she had a confidential relationship with Danielle, and "trusted" her to make full disclosure. Rest. § 161(d).

Remedy

11. Expectation Damages. Danielle will seek expectation damages. Her loss in value is payment of \$1400 for 7 months. Her costs avoided are leasing the apartment to Fiona for 7 months, which she will say should be valued at 7 months at a rent of \$1100. Thus, her expectation damages are (7 months x \$1400 per month) - (7 months * \$1100) = \$2100.

OTHER

12. Other

PROBLEM 8.

[3 points for items 1-4 & 10, 2 points for all other items]

GASTON v. HERMINE

Claim:

1. Breach of Contract. Gaston might sue Hermine for breach of contract, claiming that she promised not to sell gasoline from her property, and that Hermine now has repudiated this promise by making a "plan" to sell gasoline from a pump in her parking lot. (If Hermine changes her mind, then there would be no need for a lawsuit.)

Defense:

2. No basis for enforcement. Hermine will argue in defense that she received no consideration for her promise not to sell gasoline. Gaston's guarantee of her loan is not consideration because he had already guaranteed the loan before she made the promise. Mills v. Wyman. His "peace of mind" is also not consideration because it is not a promise or performance given in exchange to Hermine. But Gaston may respond that Hermine's promise is enforceable on the basis of "moral obligation" because it is a "promise made in recognition of a benefit previously received by the promisor." Rest. § 86(1). Some courts enforce promises on this basis, but others do not. Compare Webb v. McGowan with Dementas v. Tallas. Gaston also may argue that Hermine did not rely on his promise because she did not take an additional action after he made it.

Remedy

3. Specific Performance. Gaston's comment that he does not "want money" from Hermine suggests that he will not seek damages. But he might seek specific performance, which would be an order by the court prohibiting

Hermine from selling gasoline. Hermine might respond that damages would be adequate because this is simply a business transaction concerning lost profits. Rest. §§ 359(1), 360. In addition, she will argue that a court should not enforce her promise because the exchange was grossly unfair (in fact, there was no real exchange) and because the only way she can make money is by operating a convenience store and selling gasoline. Rest. § 364; McKinnon v. Benedict. But Gaston might respond that specific performance is appropriate because he could not prove his loss profits with reasonable certainty.

IGOR v. HERMINE

Claim:

4. Breach of Contract. Igor might sue Hermine for breach of contract, claiming that she had promised to repay a loan when it became due, and now one year later has refused to repay it.

Defense:

5. No breach. Hermine will respond that she has not breached the original loan contract because Igor modified the contract by promising to extend the time for repayment by 2 years. Only one year of the extension has now elapsed.

Replies:

6. No acceptance. Igor will argue that he never agreed to the alleged extension. Although Hermine told him that she would "assume no news is good news," the offeror generally cannot make silence the form of acceptance. Rest. § 69(1). But Hermine will say that Igor's acceptance of her interest payments was an implied form of acceptance because it was an act inconsistent with not granting an extension. Cf. Rest. § 69(2); Hobbs v. Massosoit Whip Co.
7. No basis for enforcement. Igor also has argued that his alleged promise to extend the debt is not enforceable because he "received no benefit." This statement suggests that he believes that there was no consideration or other basis for enforcing his promise. But Igor's statement is incorrect; he received additional interest payments during the period in which the loan was extended. Hermine will argue that there was consideration for the extension.
8. Statute of Frauds. Igor also might argue that his alleged promise to extend the debt (i.e., promise not to collect the debt) for two years is unenforceable because he could not possibly perform this promise in one year or less and he did not sign a writing as required by the statute of frauds. Rest. § 130. Hermine does not appear to have a good argument in response.

Remedies:

9. Expectation damages. Igor will seek expectation damages. His loss in value is the amount of Hermine's debt that has not been repaid.

IGOR v. GASTON

Claim:

10. Breach of contract. Igor might sue Gaston for breach of contract, claiming that Gaston promised to guarantee Hermine's debt but now has said that he "won't pay."

Defenses:

11. No breach. Gaston will repeat Hermine's argument above that he is not in breach because Igor agreed to modify the original contract by extending the date for repayment by two years. Igor will reply that he promised Gaston (as opposed to Hermine) a "fair extension," not necessarily a 2-year extension, and that 1 year is a fair extension.
12. No basis for enforcement. Gaston also has argued that his promise to guarantee the debt is not enforceable because he did not "get" anything "out of this deal." In other words, Gaston appears to be arguing that there was no consideration. Igor will have difficulty responding to this argument for two reasons. First, Igor cannot argue that the extension is consideration because he must argue that there was no extension if he wants to bring the lawsuit now. Second, Igor's promise of a "fair extension of time" might not be consideration because it would be too indefinite to enforce. Varney v. Ditmars.
13. Statute of Frauds. Gaston will argue that his promise to pay is not enforceable because it was a suretyship promise and it was not evidenced by a signed writing as required by the statute of frauds. Rest. § 112. Instead, Gaston merely left a message on Igor's answering machine. But Igor might respond that this is not a suretyship promise because Gaston made the promise primarily for his own benefit; he wanted Hermine to be able to open the coffee shop because it would bring more customers to his gas station. Rest. § 116; Langman v. Alumni Association (explaining in dicta that the statute of frauds covers a promise only if "the promisor is merely a surety or guarantor [and] receives no direct benefit").

Remedy:

14. Expectation Damages. Igor will seek expectation damages. His loss in value is the amount of Hermine's debt that has not been repaid.

OTHER

15. Other

PROBLEM 9.

[6 points for item 2, 3 points for item 8, and 4 points for all other items]

JULIA v. KARL

Claim:

1. Breach of Contract. Julia will sue Karl for breach of contract, claiming that he promised to lease a corner of his farm to her for 10 years, and he did not do it.

Defense:

2. No Acceptance. Karl will argue that, even though he offered to lease the corner of his farm to Julia, she did not effectively accept the offer. This defense requires analysis of three events:

(a) Julia's ordering a billboard and hiring a contractor

Julia has argued that she accepted Karl's offer "by performance." By this statement, she must mean that she made an implied promise to complete performance by beginning performance. Julia cannot mean that

she completely performed because complete performance would have required her to pay \$300 per month for 10 years, which she did not do. But Karl will respond that ordering a billboard and hiring a contractor is not beginning performance because her only performance under the contract is to pay money. In addition, he will argue that he had no notice that she was beginning performance because she routinely orders billboards and hires contractors. White v. Corlies & Tift. But Julia will respond that Karl did have notice because the contractor went to Karl's property to conduct a survey, although she might have done that during preliminary negotiations before forming a contract. She also might argue that Karl waived the requirement of notice when he told her that she "could start immediately if she agreed to the terms." International Filter v. Conroe.

(b) The contractor's report that Karl was negotiating with Lisa

Karl will argue that the contractor's report to Julia that he was negotiating with Lisa was an indirect communication that he was revoking his offer. Rest. 43; Dickinson v. Dodds. Accordingly, Karl will argue that Julia lost her power to accept after receiving that report. But Julia might respond that he cannot revoke the offer because she had already accepted (see above) or if she has not already accepted because she relied on the offer being open. Drennan v. Star Paving.

(c) Julia's special delivery letter to Karl and his informing her that she was too late.

Karl will argue that, because he had already revoked his offer, Julia's special delivery letter was too late to be an acceptance and was at most a new offer. But if it was an offer, he rejected it when he told Julia that she was too late. Dickinson v. Dodds.

Remedy:

3. Expectation Damages: Julia will seek expectation damages. Her loss in value is the value of the land where the billboard would be (apparently \$400 a month for 10 years because that is what Lisa is paying); her other loss is the profit she would have made; and her costs avoided are the costs of setting up the billboard and paying \$300 a month in rent for 10 years. Karl will argue that she cannot recover the lost profit because she cannot prove the amount of lost profit with reasonable certainty because it was a new billboard. See Fera v. Village Plaza. But Julia can point to the profits that Lisa has made and say that they suffice for estimating her lost profit with reasonable certainty. Karl will also argue that much of the lost profit could be avoided by renting space for a billboard somewhere else, which she could easily do in the next 10 years.

KARL v. LISA

Claim:

4. Breach of contract. Karl will sue Lisa for breach of contract, claiming that she promised to pay rent for 10 years and to protect Karl from liability to Julia, and now has refused to keep these promises.

Defenses:

5. No Acceptance (Mirror Image Rule): Lisa has told Karl, "I don't believe that we have a contract." Based on this statement, Lisa appears to be arguing in defense that, although she made an offer to Karl, Karl did not accept her offer because what he wrote back to her was not a mirror image of her offer. Rest. § 59; M. & St. L. Rwy. v. Columbus Rolling-Mill.

Although Karl purported to accept, he added a term specifying that Lisa would assume his liability to Julia.

Karl might reply that, even if his counteroffer rejected Lisa's offer, he and Lisa formed an implied contract when he allowed her to set up the billboard on his property. But Karl could not claim that the implied contract was for more than a year because the statute of frauds would prevent its enforcement. Perhaps the implied contract was just that Lisa would pay rent for the months that she used the property.

6. Half-truth. Lisa also will argue that her alleged promise to assume Karl's liability to Lisa would be voidable because it was induced by a half-truth. Rest. § 161(d); Kannavos v. Annino. Karl told Lisa that he was negotiating with Julia, which was true, but he did not tell her the whole truth, which was that he had made an offer to her. Lisa might not have made the alleged promise had he known the whole truth.

Remedy:

7. Expectation damages. Karl might seek expectation damages. His loss in value would be \$400 rent for 10 years, less any amount that he could avoid by renting the property to someone. (He probably also would bring a separate civil action to evict Lisa.)

KARL v. LISA

8. Restitution. If Karl cannot recover from Lisa for breach of contract, Karl might sue Lisa for restitution, claiming that she was unjustly enriched by the use of the billboard without paying rent. The amount of the recovery would be the reasonable value of the rented property, presumably \$400 per month.

OTHER

9. Other

PROBLEM 10.

[3 points for each item]

MATTHEW v. NICOLE INDUSTRIES INC.

Claim:

1. Breach of contract. Matthew might sue Nicole for breach of contract, claiming that the company promised to pay him a "double bonus," but instead paid him a bonus equal to what he had previously received.

Defenses:

2. No breach. Nicole has argued in defense that it did not breach the contract because it did give him a "double bonus"; namely, a bonus that was double what it otherwise would be. But Matthew will argue that this term should be strictly construed against Nicole because Nicole drafted the term and Nicole's interpretation is "ridiculous." Why would anyone agree to something that had no content?
3. Indefiniteness. Nicole will say that its promise to pay a "double bonus" is too indefinite to enforce because bonuses have no set amount, and instead depend on many factors. Rest. § 33; Varney v. Ditmars.

Matthew will have difficulty specifying exactly what the term "double bonus" should mean.

4. No assent to be bound. Nicole will say that bonus payments are always discretionary and therefore there was no assent to be bound. Lucy v. Zehmer. But Matthew will argue that the promise to pay him a double bonus is different. A reasonable person would understand that Nicole had assented to be bound by the promise because otherwise it would make no sense for Matthew to agree to work for three more years.

Remedy:

5. Expectation Damages. Matthew will seek expectation damages. His loss in value is the difference between what Nicole promised (i.e., a double bonus and his salary for three years) and what it delivered (i.e., an inadequate bonus and his salary for one year), and his costs avoided (i.e., his labor for three years minus one year of actual labor and whatever constructive labor he might be entitled to). But his claim crucially depends on his ability to prove the amount of the bonus with reasonable certainty, which he cannot do if he cannot establish what it was with definiteness.

MATTHEW v. OTTO

Claim:

6. Breach of contract. Matthew will sue Otto for breach of contract, claiming that Otto promised he would persuade Nicole to settle their dispute and pay Matthew \$20,000, and Otto failed to persuade Nicole to change its position.

Defense:

7. No negligence. Otto has argued that he is not liable because "he was not negligent." But a defendant can be liable for breach of contract even if the defendant is not negligent. See, e.g., Sullivan v. O'Connor. This defense is not valid.

Remedy:

8. Expectation damages. Matthew will seek expectation damages. His loss in value is the \$20,000 payment that Otto promised he would obtain. His other loss is any damages that he owes to Nicole, see below, because he would not owe additional damages if Otto had settled with Nicole. He has not avoided any costs because he has already paid Otto. His other loss avoided would be any damages that he obtains from Nicole, see above.

NICOLE v. MATTHEW

Claim:

9. Breach of contract. Nicole will sue Matthew for breach of contract, claiming that he promised to work for three more years and only worked for one.

Defense:

10. Nicole's Breach. Matthew will argue that he was excused from performing because Nicole breached the contract by paying him an inadequate bonus. (We talked about how breach by one party might excuse another's performance in both Luten Bridge v. Rockingham County and Jacob & Youngs v. Kent.) Nicole of course will respond that it did not breach the

contract. (Note that Matthew cannot successfully argue that his promise to work for three more years lacked consideration. Even if Nicole's promise to pay him a bonus was illusory, Matthew still received his salary.)

Remedy:

11. Damages. The problem says that Nicole is interested only in return of its bonus and the costs of finding another executive to replace Matthew. If Nicole seeks expectation damages, it can recover the costs of finding a replacement as other loss. These damages are foreseeable and they can be proved with reasonable certainty. But Matthew will say that Nicole has no right to return of his bonus because Nicole would have had to pay that amount if the contract had not been breached. Matthew has lost two year's of his labor but it has saved two years of paying him his salary and his double bonus. Unless Matthew was being paid a salary that exceeded what he is worth (which would be hard for Nicole to argue, given that it is upset that he quit), Nicole has not suffered any other damages.

OTHER

12. Other

Information about the Final Examination
in CONTRACTS I (Course No. 202-11)

Professor Gregory E. Maggs

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

Below are the checklists that I used in grading the answers. These checklists are not model answers. They are not model answers because the instructions required all answers to be written in essay form. Please note that this grading guide are not definitive solutions. Everyone sees things in a slightly different way. I attempted to be flexible and generous when grading. I usually found ways of awarding points when answers discussed issues not specifically listed on the grading guide or when they characterized issues differently from the grading guide.

One important point requires mention: Whenever you take an examination, you should read and follow the examination instructions. The instructions on this final examination limited answers to 4500 words, mandated that answers be written in essay form, and required indenting the first line of each paragraph and including a blank line between paragraphs. Some answers did not follow one or more of these instructions.

PROBLEM 1.

[4 points for items 1 & 6; 2 for items 10 & 11; 3 for items 2-5, 7-9, & 12]

BILL v. ANA

Claim:

1. Breach of Contract. Bill might sue Ana for breach of contract, claiming that she promised to grant him an easement on her land, and then broke this promise when she told him that she would not grant the easement.

Defense:

2. No Offer. Ana will argue that her statement regarding the easement was not an offer. Instead, she was just making a "suggestion" and was not manifesting a willingness to enter a bargain. Owen v. Tunison. As a result, she will contend no contract was formed.
3. Statute of Frauds. Ana further will argue that a promise to convey an interest in land must be evidenced by a signed writing under the statute of frauds, and she never signed a writing. Rest. § 125(1). An easement, as the problem itself says, is an "interest in land." Bill might respond that the statute of frauds should not apply because he relied on Ana's promise when he hired Claudette. Monarco v. Lo Greco, Rest. 139(1). Ana may reply that many jurisdictions do not follow Monarco, and that Bill's

reliance on her suggestion could not have been reasonably expected because he acted so quickly.

Remedies:

4. Specific Performance. If Bill still wants to proceed with the revised plan (which he may not, given that he was only relocating the property to avoid upsetting Ana), and if Ana has not yet conveyed the land to the new buyer (which is unclear from the facts), Bill might seek specific performance of Ana's promise to grant the easement. To counter Ana's likely objections, Bill would argue that damages are inadequate because an easement is an interest in land, which is unique, that it would be difficult to assess how valuable the easement would be, and that the bargain was fair because he gave up his original plans for Ana's benefit.
5. Expectation Damages. Bill alternatively might seek expectation damages equal to his loss in value plus other loss minus costs avoided and other loss avoided. His loss in value is the value of the easement (e.g., what it might cost him to buy the easement from the new owner). His other loss would include any damages that he must pay Claudette (see below) and any profits that he might have lost because of delay or because of not being able to locate the building at the back of his lot. His costs avoided and other loss avoided are the additional costs and losses that he would have incurred in moving the building to the back of his property. Ana may respond that the value of the easement, the lost profit, and the losses and costs associated are both avoidable (e.g., if he builds in another place on his property), Parker v. 20th Cent. Fox; Rest. § 350(1), and impossible to prove with reasonable certainty (e.g., if the new building was for a new business). Collatz v. Fox; Rest. 352

CLAUDETTE v. BILL

Claim:

6. Breach of Contract. Claudette might sue Bill for breach of contract, claiming that (1) he promised to pay her \$5000 for planning the additional structure; (2) promised to pay her an additional \$2000 for the revised plan; and (3) promised to pay her \$175,000 to build the additional structure, and then broke all three of these promises. (The facts do not indicate that he has kept any of them.)

Defenses:

7. No Consideration/No Acceptance (\$5000). Bill may argue that his initial promise to pay \$5000 is not enforceable because it lacked consideration. He will assert that Claudette's return "promise" that "she will try to do it soon" was illusory and therefore does not count as consideration because she did not make a commitment to perform. Rest. § 2. Although Claudette ultimately did produce the plans, Bill will say that the contract is to be tested by the agreement, and not what was done under it. Strong v. Sheffield. Another way of saying essentially the same thing is that Claudette never accepted his offer; he sought a promise in return, and she never made a real promise. Claudette might respond that complete performance was a permissible type of acceptance, Rest. § 32, and she completely performed.
8. No promise (\$2000 and \$75,000). Bill will argue that he never actually promised to pay the additional \$2000 for the revised plan or the \$175,000 for the structure. But Ana may argue that these promises were implied in his statement that she could get started if she wanted the construction job. Rest. § 4; Wood v. Lucy.

9. No acceptance (\$75,000). Bill also may argue that, even if he made an offer to pay \$75,000 for the structure, Ana never accepted this offer or never provided notice of her acceptance. He will say that she was required to "start next week" and she never got beyond "making plans to commence building." But Ana may respond that making plans is a form of starting. Cf. Evertite Roofing v. Green. She will also argue that Bill received notice of her acceptance, before he attempted to revoke, when he saw her working at the site. Cf. White v. Corlies & Tift.
10. Indefiniteness (\$75,000). Bill may argue that his promise to pay the price of the construction is too indefinite to enforce because the \$175,000 figure was only an estimate. Claudette and he never agreed on a specific price. Varney v. Ditmars; Rest. § 33.
11. Mutual Mistake (\$2000 and \$75,000). Bill's statement to Claudette suggests that he also will argue that he does not have to keep his promises to pay for the revised plans and the construction because Claudette and he were mutually "mistaken" about whether Ana would grant the easement. Rest. § 152; Sherwood v. Walker. But Claudette will respond that the parties were not mistaken about any facts; they just made a poor prediction about what Ana would do. Cf. Wood v. Boynton.

Remedy:

12. Expectation Damages. Claudette might seek expectation damages equal to (1) \$5000 for preparing the initial plans (her loss in value is what Bill promised to pay and she avoided no costs); (2) \$2000 for preparing the supplemental plans (same); and (3) \$175,000 minus the costs that she avoided by not having to construct the additional structure.

OTHER

13. Other

Comments responding to recurring statements in exam answers:

- (a) If Ana's statement to Bill is not an offer, Bill's reliance on the statement could not create contractual liability. Indeed, even reliance on an actual offer leads to contractual liability only in a few jurisdictions. Rest. § 87(2); Drennan v. Star Paving.
- (b) If Ana's statement is an offer, Bill clearly accepted it, and it seems very unlikely that Ana would argue that there is no basis for enforcement. The basis for enforcement would be Bill's relocating his planned building; that's something Ana wanted in exchange for her promise. In addition, Bill's reliance might be a basis for enforcement.
- (c) If Bill promised to pay \$2000 for the revised plan, this would not be a modification without consideration of the original promise to pay \$5000 because Bill would be paying for something new (i.e., the revision).
- (d) Bill's promise to pay for the construction is not within the statute of frauds just because the construction might take more than a year. Rest. § 130; C.R. Lewin v. Flagship Properties.
- (e) Bill would not have invited Claudette to accept an offer to build the new building by completely performing because he would have wanted a commitment from her that she would finish. Cf. White v. Corlies & Tift.

PROBLEM 2.

[4 points for items 1-9]

DANNY v. ERIKA (Settlement Agreement)

Claim:

1. Breach of Contract. Danny might sue Erika for breach of contract, claiming Erika promised in the settlement agreement to return \$250,000 and she did not return it.

Defenses:

2. Nondisclosure. The facts indicate that Erika is arguing that her promise to settle for \$250,000 is voidable because Danny did not disclose his attorney's advice. But Danny will respond that he had no duty to disclose these facts to her. See Swinton v. Whitonsville Savings Bank. They clearly were dealing at arms length when they were settling a contentious lawsuit.
3. No consideration. Erika also might argue that her promise to settle lacks consideration because Danny did not have a good faith and reasonable belief in the possible validity of his claim given what his attorney told him. See Fiege v. Boehm. But Danny might respond that he believed his claim was valid but simply predicted that the jury would not award him more than \$250,000 in damages for the minor breach.

Remedy:

4. Expectation Damages. If the settlement agreement is enforceable, Danny will seek expectation damages of \$250,000.

DANNY v. ERIKA (Original Agreement)

Claim:

5. Breach of Contract. Alternatively, if the settlement agreement is not enforceable, Danny might sue Erika for breach of contract, claiming that Erika promised not to wear anyone else's watches for 24 months and she broke that promise when she wore Fred's watch while making another advertisement. (Note that even though the damages for the second claim in theory might be larger than for the first claim, the facts suggest that Danny would prefer to bring the first claim because his attorney thought that settling was preferable.)

Defense:

6. Statute of Frauds. Erika, according to the facts, is arguing that she does not have to keep her promise not to wear anyone else's watch for 24 months because she and Danny never put anything in writing. She may be thinking of the one-year provision of the statute of frauds, Rest. § 130(1), given that her promise could not possibly be completely performed in one year. But Danny may successfully respond that once one party has completely performed, the one-year provision no longer apply. Rest. § 130(2).

Remedy:

7. Liquidated Damages. If the settlement agreement is not enforceable, Danny will seek liquidated damages under the original contract in the

amount of \$2 million (i.e. forfeiture of the entire fee). Erika may argue that this amount is unreasonably large in view of the actual or anticipated damages. Rest. § 356; Gustafson v. State. She will point out that perspective customers would not know that she wore Fred's watch because Fred was not going to run his advertisement until after the contract period. But Fred might respond that, at the time the contract was made, estimating possible damages would be very difficult.

8. Expectation Damages. If Danny cannot recover liquidated damages, he will seek expectation damages. His loss in value is whatever Erika's promise was worth (possibly \$2 million, if that was the going price for these kinds of promises). His other loss is the additional profits that he would have made if Erika had not worn the competitor's watch. He has not avoided any costs because he already has paid the full \$2 million. Erika will assert that these damages cannot be proved with reasonable certainty because no one knows what her promise was really worth or what profits he might have lost (and, indeed, he may have made more profits because of the publicity). Rest. § 352; Collatz v. Fox Amusements. She also may assert that he can recover only nominal damages. Rest. § 346(2).

DANNY v. FRED

Claim:

9. Restitution. Danny might sue Fred for restitution, claiming that he was unjustly enriched by Danny's dispute with Erika. He will assert that Fred, by his own admission, was enriched by \$500,000, and that it would be unjust for Fred to retain this benefit because it stemmed from Fred's making an advertisement in violation of Erika's contract with Danny. Rest. Restitution § 1. But Fred might respond that this enrichment was not at Danny's expense because they both profited from the publicity. In addition, Fred will say that Danny will be fully compensated by pursuing a remedy from Erika. Callano v. Oakwood Park Homes Corp.

OTHER

10. *Other*

11.

Comments responding to recurring statements in exam answers:

(a) The facts do not say that Fred broke any promise to Erika. They just say that Danny found out that Erika had worn Fred's watch while making an advertisement. Maybe Fred told him.

(b) The possibility that Erika might die within one year does not mean that she could fully complete her promise within one year. Maybe she cannot wear watches when she is dead. But two years still would have to elapse before the promise was kept.

(c) The facts indicate that Erika is arguing that her original contract with Danny is unenforceable. This may be a bad litigation strategy. If the contract is unenforceable, then she might have to return some or all of the \$2 million that Danny paid to her on the mistaken belief that the contract was enforceable.

PROBLEM 3.

[4 points for items 1-9]

Note the typographical error in the final sentence of the facts. The word "with" should be "whether."

THE HENRI COMPANY v. GRACE

Claim:

1. Breach of Contract. The Henri Company may sue Grace for breach of contract, claiming that she promised that the Henri Company could repurchase her shares at a price of \$50 a share if she left the company, and that she broke this promise when she refused to sell her 100 shares. Essentially, she has made an option contract: she has offered to sell the shares for \$50 and promised to keep the offer open.

Defenses:

2. Strict Construction. Grace may argue that the contract says that the Henri Company may repurchase the shares that it has "sold" to her and the Henri Company did not in fact "sell" her any shares. Instead, the company transferred shares to her as part of her compensation. She will argue that the contract language should be construed against the Henri Company because the company drafted it. Rest. § 206; Galligan v. Arovitch.
3. No Consideration. Grace might argue her promise to keep open her offer to sell at \$50 lacks consideration because she has bargained for nothing in exchange for this promise. Dickinson v. Dodds. Although the Henri Company would pay her \$50 for any shares that it purchases, the company has not agreed to buy any shares. The Henri Company will respond in two ways. First, it will assert that it relied on her promise by continuing to employ her and compensate her with additional shares. Therefore, it will assert that her promise should be enforced on the basis of promissory estoppel. Rest. § 90. Second, it will assert that some courts have concluded an employer's forbearance from terminating an employee at will can be consideration. Lake Land Employment v. Columber.
4. Infancy. Grace also might have a defense of infancy. Rest. § 14. The facts indicate that she worked for the company for several years to "earn money for college." Most people begin college when they are 18. Accordingly, she may have been younger than 18 when she began working and signed the agreement.

Remedies:

5. Specific Performance. We know that the Henri Company will seek specific performance because the facts say that the company wants Grace to return the stock. If Grace is liable, it is not clear why she would oppose returning the stock as opposed to paying damages. Even if she also faces liability to St. Ida's Church, she presumably can satisfy that liability by paying damages. If for some reason Grace did oppose specific performance, she might argue that damages would be an adequate remedy because the Henri Company could always purchase 50 shares of the stock on the market (maybe even from St. Ida's Church). Rest. § 359(1). If the Henri Company cannot obtain specific performance, it would be entitled to expectation damages equal to \$5000. Its loss in value would be \$10,000 (i.e., the market price of the shares) and its costs avoided would be \$5,000 (i.e., the contract price for the shares).

ST. IDA'S CHURCH v. GRACE

Claim:

6. Breach of Contract. St. Ida's Church might sue Grace for breach of contract, claiming that she promised to transfer her shares of stock to the church and did not do it.

Defenses:

7. No Consideration. Grace may argue her promise lacks consideration because it was a gift. St. Ida's may respond that the naming of "Grace's Fund" is that the consideration. Allegheny College. Grace may respond, however, that this is just a condition to the gift and not consideration. Allegheny College (dissent); Kirksey v. Kirksey.
8. No Promissory Estoppel. Grace also might argue that the promise should not be enforceable on the basis of promissory estoppel. She will point out that the facts say that St. Ida's would have had the funds available even without the promise. As a result, she will contend, St. Ida's did not have relied on the promise or that enforcement is not necessary to prevent injustice. Rest. § 90; Cohen v. Cowles Media.

Remedies:

9. Expectation Damages. St. Ida's will seek expectation damages equal to \$10,000, which is the value of the stock.

OTHER

10. *Other*

PROBLEM 4.

[2 points for items 6 & 10; 4 for items 1-5 & 7-9]

LARRY v. KATE

Claim & Remedy:

1. Rescission and Restitution. Larry may sue Kate to rescind his promise to pay Joaquin's debt and obtain restitution of his payment. He will argue that the promise is voidable because he was induced to make the payment by a half-truth, which is a form of misrepresentation. Rest. § 162. Although Kate told him that Larry had not repaid the loan, she apparently did not tell him the loan was discharged by the period of limitations because the facts say that Larry did not know the history of the transaction. Kannovos v. Annino.

KATE v. JOAQUIN

Claim:

2. Breach of Contract. If Kate has to repay Larry, she might sue Joaquin for breach of contract, claiming that Joaquin (1) initially promised to repay her loan and did not do it; and (2) subsequently promised (i.e., assured her) that he would repay and did not repay.

Defenses:

3. Statute of Limitations. As the facts indicate, Joaquin will assert that the statute of limitations has discharged the original debt.

4. Mutual Mistake. Joaquin may claim that the original debt is also unenforceable because it was induced by a mutual mistake in the calculation of his prospective sales. Rest. § 155; Sherwood v. Walker. But Kate may respond that she and Joaquin merely made a poor prediction about what future sales would be. Wood v. Boynton.
5. No Consideration. Joaquin will argue that his second promise, the promise to pay the discharged debt, is not enforceable because he received no consideration ("I am not getting anything out of it"). Mills v. Wyman; Feinberg v. Pfeiffer. In his view, he no longer owed her any money because the statute of limitations already had discharged his debt. But Kate may respond that the promise is enforceable on the special basis of moral obligation because it is a promise reaffirming a debt previously discharged by the statute of limitations. Rest. § 82(1).

Remedies:

6. Expectation Damages. Kate will seek expectation damages equal to her loss in value (i.e., the principal, interest, etc., due on the loan under the contract terms), minus her costs avoided (i.e., nothing, since she has already lent Joaquin the money).

LARRY v. JOAQUIN

Claim:

7. Breach of Contract. If Larry cannot rescind his promise to Kate and obtain restitution, Larry may sue Joaquin for breach of contract, claiming that Larry promised to repay him with interest for paying Kate and Joaquin broke that promise when he refused to pay (i.e., "settle accounts").

Defenses:

8. Statute of Frauds. The facts indicate that Joaquin is arguing that he does not have to keep his promise because it was not evidenced by a signed writing ("he won't pay anything unless Larry shows him something in writing"). It is true that the promise was to pay in 18 months, which is more than a year away. But Joaquin's promise could be performed before then if Joaquin made the payment early. Rest. § 130(1); C.R. Lewin v. Flagship Properties.
9. No Consideration. Joaquin also may argue that his promise to repay his uncle lacks consideration because his promise was not bargained for. Mills v. Wyman; Feinberg v. Pfeiffer. Larry might argue that the promise was made in recognition of a material benefit. Webb v. McGowin; Rest. § 86(1).

Remedies:

10. Expectation Damages. Larry may seek expectation damages equal to his loss in value (i.e., the amount of the debt plus 10% interest) minus his costs avoided (i.e., nothing).

OTHER

11. Other

Comments responding to recurring statements in exam answers:

(a) Larry's promise to Kate might have been unenforceable because it lacked consideration or did not comply with the statute of frauds. But Larry already has kept his promise. Lack of consideration or non-compliance with the statute of frauds are not bases for rescinding a promise that already has been kept.

(b) Courts generally do not order specific performance of a promise to pay money because damages are an adequate remedy. Rest. § 359(1).

(c) Joaquin made two promises to Kate and a good answer needs to recognize and discuss both of these promises because the second promise is only enforceable if the first was enforceable.

PROBLEM 5.

[4 points for items 1-9]

MINDY v. NICHOLAS

Claim:

1. Breach of Contract. Mindy may sue Nicholas for breach of contract, claiming that Nicholas promised to provide an advertising package for \$10,000 and broke this promise.

Defenses:

2. No Offer. Nicholas may defend on grounds that he never made an offer to sell an advertising package for \$10,000. His statement that no package could be less than \$10,000 was just preliminary negotiations. Owen v. Tunison.
3. No acceptance. Nicholas also may assert that even if it was Mindy who made an offer (i.e., when she ordered a \$10,000 advertising package), Nicholas never accepted this offer because he did not respond to it. Mindy might contend that his silence constitutes an acceptance because of past dealings in which silence was an acceptance. Rest. § 69(1)(c); Hobbs v. Massasoit. But Nicholas may assert that one "previous occasion" is insufficient to give Mindy reason to think that his silence was an acceptance.
4. Indefiniteness. The facts further indicate that Nicholas is asserting that any promise to provide a \$10,000 package was too indefinite to enforce ("he could not perform because he did not have a clear idea of what she wanted"). Rest. § 33; Varney v. Ditmar.
5. Public Policy. Nicholas also might argue that enforcement of any promise to advertise the technology would violate public policy because some of Mindy's claims about the efficacy of the technology are fraudulent. Rest. § 178(1). Even if no precedent already says that a promise to produce fraudulent advertising violates public policy, he might contend that a court should create a new rule to this effect. Cf. Bush v. Black Industries.

Remedies:

6. Expectation Damages. Mindy might seek expectation damages equal to her loss in value (i.e., the value of an advertising package, which she would contend is \$15,000 because that was the cost of Odette's substitute performance) plus other loss (i.e., the profits that she did not earn) minus costs avoided (i.e., the \$10,000 price that she would have paid

Nicholas). Nicholas will argue that she avoided any lost profits by hiring Odette to produce alternative advertising. Although Mindy expected to earn large profits, and ultimately did not earn them, Nicholas will argue that Mindy simply overestimated how much she would make. If he is correct then her other loss is \$0 and she is entitled to only \$5000 in expectation damages.

MINDY v. ODETTE

Claim:

7. Breach of Contract. Mindy might sue Odette for breach of contract, claiming that Odette promised that she would spell Mindy's name correctly and broke that promise. Even if Odette did not make this promise explicitly in the contract, spelling the name of a client correctly surely is an implied term in an advertising contract. Rest. § 202(1); Wood v. Lucy.

Remedy:

8. Expectation Damages. Mindy might seek expectation damages equal to \$6000. She will claim that her loss in value equals what it would have cost to remedy the defect (i.e., \$6000) and that she has not avoided any costs because she paid Odette in advance. But Odette might argue that the loss in value is limited to the loss in market value (i.e., nothing) because the cost to complete would be grossly disproportionate to the probable loss in value to Mindy ("reprinting the materials would cost \$6000 and almost surely would not produce more sales"). Rest. § 348(2); Jacob & Youngs v. Kent. But Mindy may subjectively care a great deal about how her name is spelled on advertising even if an incorrect spelling did not cause her to lose profits. Still, given that the advertisements have already been made and used, it would seem odd to give her this money to correct the problem now.

MINDY v. ODETTE

Claim:

9. Rescission and Restitution. The facts suggest the Mindy might sue to rescind her promise to pay Odette because "Odette took advantage of her duress." Although duress is a possible ground for voiding contracts, Odette might argue in response that no duress occurred in the legal sense of the term. Rest. §§ 175(1) & 176(1). Neither she nor Nicholas induced her to enter the contract with an improper threat, and Mindy surely had the reasonable alternative of hiring someone else to create the advertising

OTHER

10. Other

Information about the Final Examination
in CONTRACTS I (Course No. 202-11)

Prof. Gregory E. Maggs

Once grades are released, you may pick up your examination answer and score sheet from my secretary, Ms. Rosalie Kouassi, whose desk is located at STU314A.

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

Grades were awarded in conformity with the law school's mandatory grading distribution requirements. The class mean was the maximum 3.25, reflecting the exceptionally high quality of the answers.

Below are the checklists that I used in grading the answers. These checklists are not model answers. They are not model answers because the instructions required all answers to be written in essay form. Please note that these grading guides are not definitive solutions. Everyone sees things in a slightly different way. I attempted to be flexible and generous when grading. I usually found ways of awarding points when answers discussed issues not specifically listed on the grading guide or when they characterized issues differently from the grading guide.

Nearly everyone complied with the examination instruction requiring answers to be written in essay form. This is good practice for your future work as interns and summer associates. But there was one subject of concern that I should mention. Examination instruction number 5 said: "To make your answers easier to read, you must indent the first line of each paragraph and include a blank line between paragraphs." Unfortunately, only about 20 students complied with this instruction. As a result, most of the exams were difficult to read. In the future, I hope that everyone will follow the examination instructions. (Incidentally, as general practice, you should indent the first line of paragraphs and skip a line between paragraphs whenever you type single-spaced essays or memoranda.)

PROBLEM I.

[4 points for items 1 & 4; 3 points for the rest]

ANDREA v. BARRY

Claim:

11. Breach of contract. Andrea may sue Barry for breach of contract, claiming that Barry promised to work for her "for a good many years" after attending the conference, and broke this promise when he quit to work for Chantel a short time later.

Defenses:

12. No acceptance. Barry will argue that, even if Andrea offered to pay for the conference in exchange for a promise from him to work for her, he did not accept the offer because he did not answer her email. He will assert that, generally, silence cannot constitute acceptance of an offer. See Rest. § 69. But Andrea will respond that Barry made the promise implicitly when he attended the conference, received the training, and then accepted the promotion. Rest. § 69(1)(a).
13. No assent to be bound. Barry will argue that even if he made an implied promise, he did not assent to be bound by this promise given that "he did not want to make a commitment." But this undisclosed subjective intent is not controlling if a reasonable person would think that he was accepting, which seems plausible on these facts because that is what Andrea did believe. Lucy v. Zehmer.
14. No consideration. Barry also will argue that there was no consideration for his promise. Andrea's paying for the conference was not bargained for because Barry did not seek it. And Barry's promotion was not bargained for because it was not given until after he had attended the conference. Feinberg v. Pfeiffer.

But Andrea may make two responses. First, Barry's promise should be enforceable on grounds of promissory estoppel because she relied on it in paying for the conference. Rest. § 90. Second, some jurisdictions do not require a strict bargain when an employee receives benefits that he otherwise would not receive after making a promise. CAB v. Ingram.

15. Statute of Frauds. Barry also will argue that the statute of frauds bars enforcement of any promise to work for a good many years because the promise could not be completed within a year. Rest. § 130(1).

Andrea may respond that Barry only committed to work for her for a good many years "if [the] business lasts so long," and the business might have lasted less than a year. But Barry will argue that the possibility of the business failing within a year should be viewed as matter of early termination rather than complete performance. Coan v. Orsinger.

Note: When one party complete his or her performance, the statute of frauds no longer applies. Rest § 130(2). But Andrea has not completed her performance. Although she paid for the conference, she still would have to pay his salary for a good many years.

16. Lack of definiteness. Barry also will argue that "a fair number of years" is too indefinite to enforce. Rest. § 33; Varney v. Ditmars.

Remedies:

17. Expectation damages. Andrea will seek expectation damages. Her loss in value (Barry's work for a good many years) probably equals her costs avoided (Barry's salary for a good many years), but her other loss would include the cost of training another employee to do the work (thousands of dollars) plus any profits lost while the training was taking place.

Note: Andrea's expectation damages do not include the cost of training because she would have incurred those costs if Barry had kept his alleged promise.

BARRY v. CHANTEL

Claim:

18. Breach of Contract. Barry may sue Chantel for breach of contract, claiming that she promised to employ him for three years and broke that promise when she fired him.

Defenses:

19. Statute of Frauds. Chantel will argue that her oral promise is not enforceable under the statute of frauds because it could not be completed in one year. (The fact that Barry signed a writing is irrelevant because the statute of frauds requires the signature of the "party to be charged" -- Andrea, the defendant.) But Barry may respond that he relied on her promise when he quit his job with Andrea. Rest. 139; Monarco v. Lo Greco.
20. Misrepresentation (half-truth). Chantel also will argue that she does not have to keep her promise because it was induced by a half-truth. Although Barry told her that he was eager to start immediately, he did not tell her that her friend, Andrea, was expecting him to continue working for her. Kannavos v. Annino. Barry will respond that he only made a bare non-disclosure. Swinton v. Whitinsville Savings Bank. Or he may argue that the omission is not material because a commitment to Andrea would not affect Chantel.

Remedies:

21. Expectation Damages. Barry will seek expectation damages equal to the loss value (the salary that Chantel was going to pay him) minus his costs avoided. His costs avoided equal the difference between the costs that he expected and the costs that he actually incurred. The costs that he expected equal three years' labor. The costs he actually incurred equal one year of constructive labor if he could not find comparable work during the year he was unemployed. Parker v. 20th Century Fox. In addition he should argue that his labor should be valued at "the fraction of his old salary" that he is now being paid because that is what his labor is worth on the market.

OTHER

22. Other

PROBLEM 6.

[4 points for item 7; 2 points for item 2; 3 points for the rest]

ERIN v. DEAN COUNTY

Claim:

1. Breach of contract. Erin might sue Dean County for breach of contract, claiming that Dean County promised to pay her \$800,000 and broke that promise when it paid her only \$790,000 (i.e., Dean County withheld \$10,000).

Defense:

2. Liquidated Damage Clause. Dean County will argue that it was entitled to withhold \$10,000 pursuant to the liquidated damage clause in the contract.

Note: This is a liquidated damages clause, not an exculpation clause.

Responses:

3. Strict construction. Erin will argue that the clause should be strictly construed to apply only to "delays in construction," not delays caused by waiting for an inspection. Rest. § 206; Galligan v. Arovitch. In this case, the construction itself was completed on time.
4. Penalty. Erin also will argue that the clause is unenforceable as a penalty because it is unreasonably large in light of both actual and anticipated damages. Rest. § 356(1). The facts make clear that the delay "did not harm Dean County" because the ramp could not be used until the highway was complete. And the liquidated damages were not reasonable in light of anticipated damages because the \$10,000 figure was not graduated in any way that might approximate actual damages (i.e., the measurement was the same no matter how much delay occurred). Cf. Dave Gustafson & Co. v. State. But Dean County may argue in response that the liquidated damages at issue are only 1/80th of the total contract price. Because they are so small, it will argue that they are inherently reasonable; they are similar to a small un-graduated late fee that a tenant might pay a landlord for being late with a rental payment, etc.

Remedies

5. Expectation damages. Erin will seek expectation damages equal to her loss in value (\$10,000). When the plaintiff seeks expectation damages from the defendant, but the plaintiff also has breached the contract (as Erin did here by being late), the court typically must subtract from the expectation damages awarded an allowance for any injury suffered by the defendant. See Jacob & Youngs v. Kent. But here the facts make clear that the delay "did not harm Dean County." So although Dean County is entitled to an allowance for damages, the allowance is zero (just as it was in Jacob & Youngs).

ERIN v. FELIX

Claim:

6. Breach of Contract. Erin might sue Felix for breach of contract, claiming that Felix promised to do the land grading for \$75,000 and did not do it.

Defenses:

7. Revocation. Felix might argue that he revoked his offer when he sent the email explaining that he had made a mistake. Erin might reply in two ways. First, she might assert that Felix cannot revoke his bid because she relied on it in submitting her own bid to Dean County. See Drennen v. Star Paving. But not all jurisdictions agree with this case. Second, she might assert that the acceptance is ineffective under the mailbox rule because she had already dispatched her acceptance. Rest. § 63. Felix will respond that the mailbox rule does not apply because Erin did not dispatch an effective acceptance (see below).
8. No acceptance (mirror image rule). Felix will argue that Erin's purported acceptance was not effective as an acceptance because it was not the mirror image of Felix's offer. M. & St. L. v. Columbus Rolling-Mill. The acceptance contained an additional term, namely that Felix would complete the work in 3 weeks. Depending on the context, Erin may contend that this term was implicit in the original offer and thus not really a change in the specifications. See Fairmount Glass v. Crunden Martin Woodenware (quality of bottles issue).

Remedy:

9. Expectation Damages. Erin will seek expectation damages equal to her loss in value (i.e., the value of the land grading work, which Erin will calculate as the \$120,000 that it cost her to do the work) minus her costs avoided (i.e., the \$75,000 that she would have had to pay to Felix). Felix will respond that the loss in value should not be valued at \$120,000. This figure is "shocking," which suggests that someone else could have done the work for much less.

ERIN v. FELIX

Claim:

10. Breach of Contract. Erin alternatively might sue Felix for breach of contract, claiming that Felix promised to do the land grading for \$90,000 and did not do it.

Defenses:

11. No offer. Felix might argue that the parties do not have a contract because he never made an offer. When he said that he could not perform for less than \$90,000, he was not offering to do the work for \$90,000, but merely stating the price at which negotiations would start. See Owen v. Tunison.

Remedy:

12. Expectation Damages. Erin will seek expectation damages as described above, except that her costs avoided will be \$90,000 instead of \$75,000.

OTHER

13. Other

PROBLEM 7.

[4 points for items 1, 5, 8; 3 for the rest]

INGRID v. GABRIELLE

Claim:

1. Breach of contract. Ingrid might sue Gabrielle for breach of contract, claiming that Ingrid promised to send her a check for \$300 and did not do it.

Defenses:

2. No Consideration. Gabrielle will argue that her promise is not enforceable because there was no consideration for it. Allowing Gabrielle to spend the night was not bargained for because Ingrid did not ask Gabrielle for compensation. See Feinberg v. Pfeiffer. But Gabrielle may make two responses. First, even if Ingrid did not ask for compensation, an implicit bargain might have been made (like the implicit bargain between a barber and a customer who sits in the barber's chair for a haircut without discussing payment). Second, at least in some jurisdictions, a promise made in recognition of a material benefit received may be enforceable on the basis of moral obligation. See Webb v. McGowin; Rest. § 86.

3. Unilateral mistake. Gabrielle also may argue that her promise was induced by a unilateral mistake, namely that Humberto would reimburse her. Rest. § 153. But Ingrid may make several arguments in reply. First, Gabrielle did not make a mistake of fact but instead only made a poor prediction. See Wood v. Boynton. Second, Gabrielle should bear the risk of loss given her greater expertise in the law. Rest. § 154; Stees v. Leonard. Third, not all jurisdictions recognize unilateral mistake as a defense.

Remedies:

4. Expectation damages. Ingrid will seek expectation damages equal to her loss in value (\$300).

INGRID v. GABRIELLE

Claim:

5. Restitution. Ingrid alternatively might seek to recover from Gabrielle on grounds that Gabrielle would be unjustly enriched if she did not have to pay for spending the night in Ingrid's inn. Rest. Restitution § 1.
6. Volunteer. Gabrielle may argue that Ingrid cannot recover under a theory of restitution because she provided the lodging as a volunteer. Rest. Restitution § 57. But Ingrid may respond that when a professional provides a benefit, there is a presumption that the professional is not acting as a volunteer and expects compensation. Cf. Cotnam v. Wisdom.

Remedy:

7. Restitution. Ingrid might seek the full \$300 in restitution, but Gabrielle will argue that she is only entitled to the reasonable value of the benefit conferred. Rest. Restitution § 155. The facts suggest that the reasonable value may be less than \$300 because that amount is described as "generous."

GABRIELLE v. HUMBERTO TRANSIT

Claim:

8. Breach of contract. Gabrielle might sue Humberto Transit for breach of contract, claiming that Humberto promised to take her to her destination and broke that promise when the bus broke down.

Defense:

9. Settlement. Humberto will argue that Gabrielle already has settled her breach of contract claim and therefore no longer has a claim.

Response:

10. Misrepresentation. Gabrielle will respond that the settlement is not enforceable because it was induced by a material misrepresentation. Rest. § 164. Consequential damages (as a law student should know) are recoverable if they are foreseeable, and damages for lodging and injury to luggage are clearly foreseeable if a bus breaks down.

Remedy:

11. Expectation Damages. Gabrielle already has received a refund of her ticket, which is her loss in value. But she will still want compensation for her other loss which includes (1) any additional cost of the ticket

from the rival bus company; (2) the damage to her suitcase and its contents; and (3) her loss of vacation time.

Humberto may respond that Gabrielle cannot recover for the value of her loss of vacation time because she cannot prove the value with reasonable certainty. Rest. § 352. In addition, Humberto might argue that she could have avoided some of the additional cost of the "upscale" bus ticket by purchasing a less expensive alternative method of transportation. (But how much difference can there really be in bus tickets?)

OTHER

12. Other

PROBLEM 8.

[6 points for items 3, 6; 2 points for items 4, 9; 3 points for the rest]

KAREN v. LORENZO

Claim:

1. Breach of contract. Karen might sue Lorenzo for breach of contract, claiming that he promised to clean the drapery but broke this promise when he shredded it. (Note: Karen also might have a tort claim for negligence, see Sullivan v. O'Connor, but that possibility is beyond the scope of this examination.) The facts indicate that Lorenzo already has admitted liability; the only question is the remedy.

Remedy:

2. Expectation damages. Karen will seek her loss in value, which is the cost of the dry cleaning, plus her other loss, which is the \$800 for the stained drapery and \$5000 for the cost of replacing all of the drapery in the party room. Of this total amount, the facts say Lorenzo already has paid \$200.

Remedy Limitations:

3. Contractual limitation of liability. Lorenzo will argue that a clause in their contract limits his liability to a maximum of \$200. But Karen will make two replies. First, she will assert that she did not assent to the term because she did not have reason to know that the dry cleaning receipt contained contractual terms. See Klar v. H.M. Parcel. Second, strictly construed, the clause applies only to "garments" and not to drapery. (Limitations on liability also can be challenged as being unconscionably small, see Henningsen v. Bloomfield Motors, but a \$200 limitation of liability for damaged garments at a dry cleaner does not seem to fit that description.)
4. Unforeseeability. Lorenzo also may argue that the \$5000 liability was unforeseeable. Karen told him that he was cleaning "just an old curtain." She did not inform him of the special circumstances, namely, that damage to the one curtain would require replacing all the curtains in the entire party room. Rest. § 351; Hadley v. Baxendale.

KAREN v. JERRY

5. Breach of contract. Karen may sue Jerry for breach of contract, claiming that he promised to cover Lorenzo's liability and (although not stated in the facts explicitly, he presumably) has not done it.

Note: Jerry made three promises to Karen: (1) he would pay for all damage to the hotel; (2) he would settle his liability with Karen by taking the drapery to Lorenzo; (3) he would cover Lorenzo's liability. Karen has no claim against Jerry for breaching the first two promises. He settled any liability arising out of the first promise and he kept the second promise. Karen's claim, if any, is based on the third promise.

Defenses

6. No consideration: Jerry may argue that his promise lacks consideration. Although Jerry did make an enforceable promise to "pay for all damage to hotel property," Karen and he settled his liability for that promise by agreeing that he would take the stained drapery to Lorenzo for dry cleaning. Jerry will contend that he received no additional consideration for his promise to "cover Lorenzo's liability." Karen might make three replies. First, she might argue that Jerry and she mutually agreed to cancel their original settlement and to form a new bargain in which he agreed to cover Lorenzo's liability to settle his original liability. See Schwartzreich v. Bauman-Basch. Second, she may argue that the promise is enforceable because she relied on it. Third, she may argue that Jerry actually did receive something for his promise: the peace of mind he sought in "putting the matter behind him."
7. Statute of Frauds. Jerry also may argue that his promise is not enforceable because it is not evidenced by a signed writing as the statute of frauds requires for suretyship promises. Jerry will argue that this is a suretyship promise because he is promising a creditor (Karen) that he will pay the debt of the principal obligor (Lorenzo). Cf. Longman v. Alumni Ass'n.

Note: This is not a contract to buy or sell goods for a price of \$500 or more. No one is buying or selling goods.

8. Infancy. The facts say that Jerry is a recent high school graduate. As a result, he may have been less than 18 years old at the time he made the promise because some high school seniors are only 17 at graduation. If he was less than 18, his promise would be voidable on grounds of infancy. Rest. § 14; Kiefer v. Fred Howe Motors. The facts do not indicate that Jerry is an emancipated infant and this contract is not a contract for necessities, so Jerry does not have to make restitution.

Remedy:

9. Expectation Damages. Karen will seek expectation damages. Because Jerry has promised to cover Lorenzo's liability, his liability would be the same as Lorenzo's, as discussed above.

OTHER

10. Other

PROBLEM 9.

[5 points for items 1, 2, 3, 6; 4 points for the rest]

MELISSA v. NOEL

Claim:

1. Breach of contract. Melissa may sue Noel for breach of contract, claiming that he promised to build a wharf with 10-foot ramps and broke that promise by building a wharf with 8-foot ramps.

Defense:

2. Settlement. Noel will argue that Melissa settled her contract claim when they agreed that Noel would drop his tort claim. Melissa will argue that the settlement agreement is not enforceable; she received no consideration because Noel apparently did not have a good faith belief in the possible validity of what he termed a "bogus charge." Fiege v. Boehm. It is also possible that Melissa could challenge the settlement on grounds of duress, arguing that it was induced by an improper threat to use civil process in bad faith. Rest. § 175. But she might have difficulty showing that she had no reasonable alternative but to settle.

Remedies:

3. Expectation Damages. Melissa will seek expectation damages. Her loss in value is the difference between a wharf with 10-foot ramps and a wharf with 8-foot ramps. Melissa will argue that this difference in value is the cost of paying Olga to reconstruct the wharf. Her other loss equals her lost profits for 7 weeks' delay in opening the casino and any liability to the performers whose contracts Melissa had to cancel during this period. (Although the casino's opening was delayed for a total of ten weeks, three of those weeks are Olga's responsibility.) Melissa's costs avoided are the expected costs of running the Casino for this period which she did not have to pay because the casino was not open.

Remedy Limitations:

4. Uncertainty. Noel may argue that Melissa cannot recover her lost profit because she cannot prove the lost profits for a new business with reasonable certainty. Rest. § 352. But Melissa will argue that the lost profits can be inferred from the initial profits that the casino made when it eventually did open. Cf. Fera v. Village Plaza.
5. Cost to Remedy. Noel also may argue that Melissa cannot recover the cost to remedy the defect because that cost would be grossly disproportionate to the probable loss in value to Melissa. Rest § 348(2); Jacob & Youngs v. Kent. The facts also do not suggest that Melissa had a sentimental attachment to the wharf or its location. Therefore, her loss in value was probably similar to the market value. Jacob & Youngs v. Kent. Apparently the costs of rebuilding exceeded the market value because, as Olga said, it would make more sense to sell the wharf and start over somewhere else. But of course not all courts restrict the right to recover the cost to complete or remedy defective construction. See Groves v. John Wunder.

MELISSA v. OLGA

Claim:

6. Breach of contract. Melissa also may sue Olga for breach of contract, claiming that Olga promised to complete the work in 7 weeks but took 10 weeks. Olga does not appear to have any defenses.

Remedies:

7. Expectation Damages. Melissa will seek expectation damages. She does not appear to have suffered a loss in value because Olga did the work. Her other loss and costs avoided are the same as described for Noel, except only for the last 3 weeks.

PERFORMERS v. MELISSA

8. Breach of contract. The performers scheduled to provide entertainment at the casino may sue Melissa for breach of contract, claiming that Melissa "broke off agreements that she had made with them. The problem does not contain additional facts about these contracts.

OTHER

9. Other

Information about the Final Examination
in CONTRACTS I (Course No. 202-1A & 1B)

Prof. Gregory E. Maggs

Once grades are released, you may pick up your examination and score sheet from my secretary, Ms. Rosalie Kouassi, whose desk is located at STU314A. You may discuss your examination with me during my office hours, which are on Mondays from 3:00 p.m. to 5:00 p.m.

Each of the problems on the exam presented a fact pattern based on an actual case and asked you to write an essay identifying and discussing the claims and defenses that the parties might assert, and the remedies that they might seek. In grading the examinations, I awarded points based on how well your essays identified and discussed the claims, defenses, and remedies. Scores ranged from 69 total points to 129 total points, with an average score of 102 points.

Grades were awarded in conformity with the law school's mandatory grading distribution requirements. Pursuant to instructions from the Associate Dean for Academic Affairs, sections 11A and 11B were graded together as one class. This table shows the distribution of grades:

Grade	Number Awarded
A+	2
A	17
A-	27
B+	37
B	24
B-	21
C+	7
C	2
C-	1
D	0
F	0

Below are the checklists that I used in grading the answers. These checklists are not model answers. They are not model answers because the instructions require all answers to be written in essay form. Please note that these grading guides are not definitive solutions. Everyone sees things in a slightly different way. I attempted to be flexible and generous when grading. I usually found ways of awarding points when answers discussed issues not specifically listed on the grading guide or when they characterized issues differently from the grading guide.

PROBLEM I.

This problem was inspired by Herron v. Wells Fargo Financial, Inc., 2006 WL 2422831 (D. Or. 2006), but the facts were changed to add more issues. [Maximum points: 5 for # 3; 3 for ## 1, 12 & 15; 1 for # 11; and 2 for the rest.]

Note: In this problem, there were twelve communications, which for the purpose of this grading guide are identified as follows:

- (a) Beryl said CFS was looking for an attorney.
- (b) Alberto told Beryl about his background.
- (c) Beryl described the employment terms.
- (d) Alberto said he wanted the job with a qualification.
- (e) Beryl described the salary.
- (f) Alberto responded, "I'm sold! ..."
- (g) Beryl said CFS would need a two-year commitment, etc.
- (h) Alberto said that was fine.
- (i) Beryl asked Alberto to call her, etc.
- (j) Beryl said employment decisions are not made in casinos.
- (k) Beryl said she would think it over and call.
- (l) Beryl said CFS would not hire Alberto.

ALBERTO v. CFS

Claim:

- 10. Breach of Contract. Alberto might sue CFS Financial for breach of contract, claiming that it hired him to work as an attorney in a foreign country for 2 years (or 1 year if the modification to 2 years is not enforceable, see below), with further employment for life if he can secure regulatory approvals, at a salary that exceeds his current salary, and that CFS broke this promise when Beryl told him that CFS would not hire him.
- 11. Breach of Contract. Alberto alternatively might sue CFS for breach of contract, claiming that CFS Financial implicitly promised that it would negotiate with him to completion of an employment agreement. He will assert that he asked to work out the details in the morning, that CFS agreed to this arrangement when Beryl told him to call her, and that CFS breached that promise by failing to negotiate further and to reach an agreement. Channel Home Centers v. Grossman; Hoffman v. Red Owl Stores.

Defenses:

- 12. No offer. CFS will argue that the alleged contract of employment is not enforceable because none of the 12 communications listed above was an offer; on the contrary, all of them were preliminary negotiations. More specifically, she could assert:

(a), (b), (i), (j), (k), and (l) clearly did not manifest a willingness to enter into bargain, see Rest. § 24;

(c), (e), and (g) described an offer, but did not say that the offer would be made to Alberto, see Harvey v. Facey;

(d) indicated that Alberto would not take the job unless his salary was matched, not that he would take it, see Owen v. Tunison;

(f) could not have been an offer because Alberto indicated further negotiations were necessary to resolve the details; cf. Toys, Inc. v. F.M. Burlington; and

(h) was an assent to a change in the terms under discussion, not an offer expressing willingness to be bound by those terms, cf. White v. Corlies & Tift (assent to change in specs.)

13. No acceptance. CFS also will argue that even if an offer was made, there was no acceptance. All of the communications except (f) and (h) stated different terms or conditions, and therefore could not be acceptances. See Minn. & St. Louis Rwy. v. Columbus Rolling Mill. And (f) and (h) could not be acceptances for the same reasons that they were not offers (see above).

14. Lack of Definiteness. CFS also might argue that any promise that was made would be too indefinite to enforce because parties never agreed on essential terms, like the exact amount of the salary, when the job would start, where the job would be, etc. See Varney v. Ditmars.

But Alberto may argue that the requirement of definiteness should not apply because he relied on the various promises by researching regulatory law and hiring a nanny. The requirement of definiteness is relaxed when enforcement is sought on the basis of reliance. See Hoffman v. Red Owl Stores.

15. No Assent to Be Bound. CFS may argue (as Beryl already has argued) that she did not assent to be bound because "business presidents do not make final employment decisions in casino." She might contend that Alberto should have known from the context that they had not reached an agreement. Lucy v. Zehmer.

16. Statute of Frauds. CFS might argue that the alleged promise to employ someone for two years is not enforceable under the statute of frauds because it is not evidenced by a signed writing. A promise to employ someone for two years cannot possibly be completed in exactly one year or less. Rest. § 130(1).

But Alberto might respond to this defense in several ways. First, Alberto may argue that the statute of frauds, at most, makes unenforceable the modification extending the term of employment to 2 years. If this modification is unenforceable, the original 1-year term would remain in effect, and a promise that can be fully performed with one year or less is not within the statute of frauds.

Second, Alberto may argued that CFS in fact promised to employ him for life provided regulatory approval could be secured, and that this could be completed within one year because Alberto could die before the end of one year.

Third, Alberto could argued that he relied on the promise by turning away clients, researching, and hiring a nanny. This reliance, he may assert, can overcome the statute of frauds. See Monarco v. Lo Greco; Rest. 139.

But not all jurisdictions accept this theory, and CFS might argue his reliance was not reasonable (he should have known that they did not have an agreement based on their last conversation), and also was not very great.

Fourth, Alberto may argue that the napkin contains a signed writing and thus satisfies the statute of frauds. But CFS can respond that the napkin does not address essential terms (like the salary, starting date, location, etc.).

17. Non-Liability for Failed Negotiations. CFS also might argue that it has no duty to negotiate in good faith. See Rest. § 205 (imposing a duty of good faith only in the performance and enforcement of contracts, not the making of contracts). CFS further will assert that it has no liability for failed negotiations absent a promise to negotiate and absent assurances during negotiations, which did not occur. Cf. Channel Home Centers; Hoffman v. Red Owl Stores.

Remedies:

18. Expectation Damages. Alberto might seek expectation damages equal to his loss in value (i.e., the salary that he was promised) minus costs and other losses avoided (i.e., what he can continue to make as a self-employed attorney and what he does not have to pay his nanny that he would have had to pay her). Rest. § 347.

Note: Expectation damages would not include the losses he suffered from turning away clients because he would have had to turn them away if CFS had kept the promise. Rest. § 349.

19. Reliance Damages. Alternatively, Alberto might seek reliance damages equal to his costs of conducting research, the loss from turning clients away, and the damages that he has to pay to his former nanny. Here too, CFS will argue that Alberto's reliance was not reasonable, given the lack of a definite contract, etc.

Remedy Limitations:

20. Uncertainty. CFS might argue that Alberto cannot prove his damages with reasonable certainty because the parties never established what salary he would receive. Rest. § 352.

NANNY v. ALBERTO

Claim:

21. Breach of Contract. The nanny might sue Alberto for breach of contract, claiming that he promised to employ her and then broke the promise.

Defense:

22. Mutual Mistake. Alberto might defend on grounds of mutual mistake, contending that both parties mistakenly assumed that CFS would hire Alberto. Sherwin v. Walker; Rest. § 152.

Remedy:

23. Expectation Damages. The nanny could recover her loss in value (the promised salary) minus her costs/other loss avoided (what she can make doing some other job). Rest. § 347. The problem does not describe

these figures or indicate whether uncertainty or other limitations may prevent or reduce recovery.

OTHER

24. Other

PROBLEM II.

This problem was inspired by Bailey, Moore, Glazer, Schaefer & Proto, LLP v. Hippeau, 2006 WL 5738881, but the facts were substantially changed to increase the number of issues. [Maximum points: 4 for # 1; 3 for ## 6, 8, 9, & 13; 2 for the rest].

DEBBIE v. ERNESTO

Claim:

1. Breach of contract. Debby might sue Ernesto for breach of contract. She will claim that Ernesto (1) originally promised to pay her \$60,000 six years ago for accounting services, and (2) recently renewed this obligation by promising to "pay you what I owe you." She will assert that Ernesto has broken both of these promises because he has not paid her.

Defenses:

2. Period of Limitations (original promise): As the facts say, Ernesto will argue that the original promise was discharged by the statute of limitations.
3. No Breach (subsequent promise): Ernesto also will argue that he did not breach the second promise. He promised to pay her what he owed her, but he did not owe her anything because the statute of limitations discharged the original debt.
4. No Basis for Enforcement (subsequent promise): Ernesto also might argue that even if his subsequent promise meant that he would pay Debby \$60,000, this promise lacks consideration because he received nothing in exchange for it. Rest. § 71.

He will assert that assert that Debby's coming to his office mere was a condition, and was not something sought and given in exchange. See Kirksey v. Kirksey.

But Debbie may counter that the promise is enforceable on the basis of "moral obligation" because it is promise to pay a debt previously discharged by the statute of limitations. See note (1), p. 44; Rest. § 82(1).

In addition, if Debby is required to pay Florence (see below), she might argue that Ernesto's promise is enforceable on the basis of reliance. Rest. § 90; Feinberg v. Pfeiffer.

5. Mutual Mistake (subsequent promise). Ernesto also will argue that his subsequent promise is not enforceable because it was induced by mutual mistake, namely, the incorrect assumption of both parties that Ernesto still owed \$60,000 to Debby. Rest. § 152; Sherwood v. Walker.

Remedy:

6. Expectation Damages. Debby might seek expectation damages equal to her loss in value (\$60,000) and other loss. Her other loss, she will claim, equals the unspecified amount of additional profit that she lost when she could not expand her business and when she had to turn away business when Florence quit; she would not have suffered either of these losses if Ernesto had kept his promise to pay her \$60,000. Debby will assert that she does not have any costs avoided or other loss avoided.
7. Reliance Damages. Alternatively, Debby might seek reliance damages. If Ernesto had not renewed his promise to pay \$60,000, Debby would not have promised Florence \$15,000, Florence would not have quit, and Debby would not have had to turn away new business. Debby therefore will seek as reliance damages the amount of her liability to Florence (see below) and the lost profit from the new business that she had to turn away when Florence quit.

Remedy Limitations:

8. Avoidability/Uncertainty/Unforeseeability. Ernesto might argue the profit Debby may have lost from not expanding her business and from not taking on new clients when Florence quit are not recoverable for three reasons. First, the lost profit was avoidable. Debby could have borrowed money from someone else to expand her business and could have hired someone to replace Florence. See Rest. § 350(1); Parker v. 20th Century Fox. Second, the lost profit was not foreseeable at the time Ernesto made the promise they would not arise in ordinary circumstances. See Rest. § 351(1); Hadley v. Baxendale. Third, the lost profit from the expansion and from the new business, given that it is new, cannot be proved with reasonable certainty. See Rest. § 352; Fera v. Village Plaza.

FLORENCE v. DEBBY

Claim:

9. Breach of Contract. Florence might sue Debby for breach of contract, claiming that she promised to pay her a \$15,000 bonus and did not do it.

Defense:

10. No Basis for Enforcement. Debby might argue that her promise is not enforceable because it lacks consideration. It was simply a promise to make a gift, with nothing being given in exchange. But Florence might respond that the promise was enforceable on the basis of reliance because she bought non-refundable plane tickets based on the promise. See Rest. § 90; Feinberg v. Pfeiffer. The parties then will dispute whether Debby reasonably could expect this reliance and whether failing to enforce the promise would result in injustice.
11. Mutual Mistake. Debby also might argue that the promise is unenforceable because it was induced by a mutual mistake when Debby and Florence both assumed that Ernesto would pay Debby. See Rest. § 152. But Florence may respond that they made a poor prediction rather than a mistake of fact. Rest. § 151.

Remedy:

12. Expectation/Reliance Damages. Florence might seek expectation damages equal to the \$15,000 that she was promised. But Debby might argue that,

if her promise is enforceable on the basis of reliance, the remedy should be limited as justice requires. See Rest. § 90(1)'s second sentence. Accordingly, Debby will assert that Florence should not recover more than the amount that she spent in reliance on the promise, which apparently is the cost of her non-refundable airline tickets.

OTHER

13. Other

The problem does not indicate whether Florence broke a contract by when she quit her employment.

PROBLEM III.

This problem was inspired by Cox v. Burdick, 907 A.2d 1282 (Conn. App. 2006), but the facts were substantially changed to increase the number of issues. [Maximum points: 2 for ## 2-4 & 12; 3 for the rest.]

GORDON v. HELENE

Claim:

1. Breach of Contract. Gordon may sue Helene for breach of contract, claiming that she promised to pay him \$145,000 for his home and has not paid him.

Defenses:

2. Duress (Breach of Contract in Bad Faith). Helene may argue that she does not have to keep her promise because it was induced by duress, namely, his improper threat to breach their original contract in bad faith. Rest. §§ 175(1), 176(1)(d). Gordon acted in bad faith because he simply wanted more money and realized Helene would have difficulty enforcing the first promise. But Gordon may argue that Helene cannot assert the defense of duress because she had a reasonable alternative--namely, she did not have to agree to modification--especially since she had the advice of counsel.
3. Undue Influence (overreaching). Helene, according to the facts, specifically has argued she did not want to settle but that her attorney pushed her into the settlement. (This argument sounds like the defense of "undue influence" by "one who is not a party to the transaction." See Rest. § 177(1)&(3). But answers were not expected to address this defense in detail because the assigned reading did not cover undue influence/overreaching in a thorough manner; this subject was discussed briefly in McKinnon v. Benedict (last paragraph) and in U.C.C. § 2-302 cmt. 1.)
4. Mental Incapacity. Helene also might argue that her promise is voidable because she lacked mental capacity. Although there is no evidence that she could not understand the transaction, she will assert that her post-traumatic stress disorder prevented her from acting reasonably. Rest. § 15(1)(b); Ortelere v. Teachers' Retirement. But Gordon may respond that Helene in fact did act reasonable; as even her attorney agreed, it made more sense for her to pay the additional money than to continue with the expensive lawsuit.
5. Lack of Consideration (Pre-Existing Duty Rule). Helene also might argue that, under the pre-existing duty rule, there was no consideration for

her promise to pay the additional \$7,000. Rest. § 73; Alaska Packers' v. Domenico. But Gordon may respond the settlement agreement cancelled the original contract when it discharged "all liability and obligations," and that he therefore had no pre-existing duty. Schwartzreich v. Bauman-Basch.

6. Lack of Consideration (Improper Settlement). Helene also will argue that there is no consideration for her promise to pay the additional \$7000 because Gordon extracted the settlement when he did not have a good faith and reasonable belief in the possible validity of any defense that he might have asserted to prevent Helene from obtaining the property for \$138,000. Rest. § 74(1); Fiege v. Boehm.

Remedy:

7. Expectation Damages. Gordon may seek expectation damages equal to his loss in value (the \$145,000 that Helene now refuses to pay) minus his costs avoided (i.e., the market value of the home which Gordon presumably will believe is less than \$145,000 if he bothers to bring a lawsuit).

HELENE v. GORDON

Claim:

8. Breach of Contract. Helene might sue Gordon for breach of contract, claiming that he promised to sell the house to her for \$138,000 and now is refusing to sell it to her.

Defense:

9. Cancellation. Gordon will argue that the original agreement was cancelled by the settlement agreement. Cf. Schwartzreich v. Bauman-Basch. (Indeed, he may assert that principles of res judicata bar further litigation of the claim because a court already has entered judgment for Gordon.) Helene might argue that the settlement agreement is not enforceable for the reasons discussed above.

Remedy:

10. Specific Performance. Helene will seek specific performance, which she will argue is available for a contract for the sale of land. Cf. Tuckwiller v. Tuckwiller.

HELENE v. ISAAC

Claim:

11. Breach of Contract. Helene also might sue Isaac for breach of contract, claiming that he specifically promised that he would obtain a judgment against Gordon and did not do it. Cf. O'Connor v. Sullivan (promise of specific results by physician).

Defense:

12. Modification (Implied). Isaac may respond that Helene consented to an implied modification of his promise when she agreed to the settlement. (Helene, though, may argue that this implied promise is unenforceable because her attorney pushed her into it.)

Remedy:

13. Expectation Damages. Helene will seek her loss in value (the value of obtaining a judgment, which might be worth difference between the market value of the house -- perhaps \$145,000 and the \$138,000 purchase price) minus her costs avoided (i.e., the total the expected cost of litigation minus the \$2000 she already had paid her attorney).

OTHER

14. Other

Note: Helene has little incentive to sue Gordon for rescission of the settlement agreement because she has not paid him anything yet. Instead, she will seek to void the settlement agreement (1) if he sues her to enforce the settlement or (2) if she sue him to enforce the original agreement and he raises the settlement as a defense.

PROBLEM IV.

This problem was inspired by Angelo Iafrate Const., L.L.C. v. Bond Paving Co., Inc., 2006 WL 297169, but the facts were changed to add more issues. [Maximum points: 2 for 2, 7 & 10; 3 for the rest.]

KIRK v. JOYCE (1st parking lot)

Claim:

1. Breach of Contract. Kirk might sue Joyce for breach of contract, claiming that she promised to pay him \$100,000 for paving the first parking lot, and that she broke this promise when she only paid him \$90,000.

Defense:

2. No Breach. Joyce will argue that she did not breach the contract. She will say that she was allowed to subtract \$10,000 because the liquidated damages clause provided \$1000 every day that the work was late and that the work was 10 days late. Dave Gustafson v. State.

Reply:

3. Penalty. Kirk will argue that the \$1000-a-day payment is a penalty because it is not reasonably related to (1) the actual loss given that Joyce did not need the first parking lot immediately, or (2) the anticipated loss given that the payment was designed to insure that Kirk "would keep his end of the bargain" rather than that Joyce would be compensated for her loss. Rest. § 356(1).

Remedy:

4. Expectation Damages. Kirk will seek his loss in value, which is the difference between what Joyce promised to pay him (\$100,000) and the amount that she actually paid him (\$90,000), which comes to \$10,000). Kirk avoided no costs because he completed the work. Although Joyce has a right to withhold an allowance for her actual damages, see Jacob & Youngs v. Kent, Kirk will argue that she suffered no actual damages because she did not need the parking lot immediately.

KIRK v. LESLIE (first parking lot)

Claim:

5. Breach of Contract. Kirk might sue Leslie for breach of contract, claiming that Leslie promised to do the grinding work and broke the promise when she did the work in a defective manner.

need to address here how the problem clearly says that this was a breach; and that there is no defense -- quote Cardozo on how we never say that the defendant has to do less than what he promised

Remedy:

6. Expectation Damages. Kirk might seek expectation damages. He claim his loss in value is the costs to remedy the defective construction work, which is \$20,000. Rest. § 348(2)(b). He will claim his other loss is the \$10,000 in liquidated damages that Joyce withheld (unless Kirk is able to recover that amount, see above). Kirk avoided no costs because he already has paid Leslie.

Remedy Limitation:

7. Limitation on Cost to Complete Remedy. Leslie might argue that Kirk cannot recover the cost to remedy/complete because that amount was grossly disproportionate to the probable loss in value to Kirk given that "most people would not care the problem." See Rest. § 348(2); Jacob & Youngs v. Kent; Peevyhouse v. Garland Coal. (Importantly, § 348(2) requires comparing the cost to remedy to the probable loss in value to the plaintiff, not to the market value.) But Kirk could respond that cost to complete or remedy is not grossly disproportionate to the probable loss in value to Kirk because Kirk has to please Joyce and Joyce is "fussy." The facts confirm this view because Kirk actually spent the money to complete the work. In addition, Kirk might argue that the court should follow Groves v. John Wunder and award him the cost to complete or remedy even if that cost would be grossly disproportionate.

Note: It is incorrect to argue that this cost was not foreseeable. The cost to remedy a defect is always foreseeable. Whether the parties contemplated that the cosmetic problems were defects in the first place is another question.

MICHAEL v. KIRK (second parking lot)

Claim:

8. Breach of Contract. Michael might sue Kirk for breach of contract, claiming that Kirk promised to pay him \$50,000 for grinding and scraping the second parking lot, and that Kirk only paid him \$25,000.

Remedy:

9. Expectation Damages. Michael will seek expectation damages. Michael's loss in value is the difference between what Kirk promised to pay him (\$50,000) and what Kirk actually paid him (\$25,000), which is \$25,000. Michael's cost avoided is the difference between the costs that Michael expected to incur in doing the work (\$40,000) and the amount that he actually spent (\$25,000 in the initial work and \$5,000 restoring the work to a safe condition). His other loss avoided is the profit that he was able to make on another job, which is \$2000. The total of the expectation damages therefore is $(\$50,000 - \$25,000) - (\$40,000 - (\$25,000 + 5,000)) - \$2000 = \$13,000$.

Remedy Limitation:

10. Avoidability. Kirk might argue that Michael could have avoided \$5000 of these damages because Michael did not have to spend the additional \$5000 to return the property to a safe condition. In that case, damages would only be \$8000. Rest. § 350(1). But Michael may respond that the costs of restoring the property to a safe condition could not be done without "undue risk" of liability. See id.

KIRK v. JOYCE (second parking lot)

Claim:

11. Breach of Contract. Kirk might sue Joyce for breach of contract, claiming that she promised to pay him \$100,000 for renovating the second parking lot, and broke that promise when she paid him only \$30,000.

Remedy:

12. Expectation Damages. Kirk will seek expectation damages. His loss in value is the difference between what Joyce promised to pay him (\$100,000), and what she did pay him (\$30,000), which is \$70,000. Kirk's other loss is the amount of damages that he must pay Michael, which is \$8,000 (unless that figure is reduced because some of could have been avoided, see above). Kirk's costs avoided is the difference between what he expected to pay to complete the work (\$50,000 to Michael and \$30,000 to someone else, or a total of \$80,000) minus the costs that he actually incurred (\$25,000 actually paid to Michael). The total of the expectation damages is therefore $\$70,000 + \$8,000 - (\$80,000 - \$25,000) = \$23,000$.

OTHER

13. Other

Note: The problem does not make clear whether Joyce and Kirk entered two contracts for \$100,000 or one contract for \$200,000. Either assumption was acceptable.

PROBLEM V.

This problem was inspired by Shoreline Communications, Inc. v. Norwich Taxi, LLC, 797 A.2d 1165 (Conn. App. 2002), but the facts were substantially changed to add more issues. [Maximum points: 5 for # 2; 2 for ## 5, 10-12; 1 for # 13; 3 for the rest.]

NADINE v. OSCAR

Claim:

1. Breach of Contract. Nadine might sue Oscar for breach of contract, claiming that he promised to pay her \$1000 a month in rent for a year, and that he only paid the first month's rent.

Defenses:

2. Misrepresentation/Half-Truth. Oscar might defend on grounds that he was induced to enter the lease based on Nadine's material misrepresentation that the tower was "a good tower for communicating with taxis."

Nadine might respond in several ways:

First, Nadine might argue that her statement was just puffing.

Second, Nadine might assert that her statement was not true; the tower was good for communicating with taxis (Patty later used it without difficulty). But Oscar will reply that even if what she said was true for some people (like Patty), her statement was a half-truth because it was not true for him. See Kannavos v. Annino.

Third, Nadine might argue that she cannot be held liable for a bare non-disclose. See Swinton v. Whitinsville Savings Bank.

3. Unilateral Mistake. Oscar also might argue that the contract that the contract is voidable because it was induced by a unilateral mistake that the tower would be sufficient for his purposes. Rest. § 153. But Nadine may argue that (1) Oscar made a poor predication rather than a mistake of fact, since he knew that he did not whether the tower would work, and (2) that Oscar should bear the risk because he decided to give the tower "a try" any way.

Remedy:

4. Expectation Damages. Nadine will seek expectation damages. Her loss in value is the difference between what Oscar promised to pay (\$12,000) and what he actually paid (\$1000). Her costs avoided are the difference between the costs that she expected and the costs that she actually incurred. She expected the cost of being unable to rent the tower to someone else for 12 months (a total cost of \$12,000, if that is the rent should could recover). She will argue that she actually incurred the cost of not being able to rent the tower for seven months (a total cost of \$7,000) because she was unable to rent for the first month while Oscar was in possession and for an six additional months until she found a new tenant (Patty). Her claimed expectation damages therefore will be $(\$12,000 - \$1000) - (\$12,000 - \$7,000) = \$6,000$. [Alternatively, it might be possible to read the facts to say that she could rent after a total of six months rather than seven months.]

Remedy Limitations:

5. Avoidability. Oscar may argue that Nadine could have avoided some of the damages if she had used reasonable efforts to find another tenant instead of "doing little." Rest. § 350; Parker v. 20th Century Fox.

OSCAR v. NADINE

Claim:

6. Breach of Contract. Oscar might sue Nadine for breach of contract, claiming that she promised him a tower that would be good for communicating with taxis, and that she failed to deliver it.

Defenses:

7. No Promise (Puffing). Nadine will defend on grounds that she was just puffing, and not actually promising that the tower would work. And she

will added that the tower is good for communicating with taxies, as Patty discovered. (See her replies above.)

Remedy:

8. Expectation Damages. If Oscar sues for breach of contract, he will seek expectation damages. His loss in value is the difference between what Nadine promised (a suitable tower for 12 months) and what she delivered (an unsuitable tower for one month). A suitable tower apparently is worth \$1100 a month because that is what a substitute would cost; so a suitable tower for 12 months would be worth $12 * \$1100$, which is \$13,200. The unsuitable tower apparent was worth \$1000. Therefore, Oscar's loss in value was $\$13,200 - \1000 , which is \$12,000. The problem provides not evidence of other loss. Oscar's costs avoided equals the cost that he expected to incur (the \$12,000 that he promised to Nadine) minus the costs that he actually incurred (the \$1000 that he actually paid her), or \$11,000. His expectation damages therefore are: $\$(13,200 - \$1000) - (\$12,000 - \$1,000) = \$1,200$. (Oscar might also include any profit that he lost during the first month as other loss, but the facts do not say whether there was any.)

PATTY v. NADINE

Claim:

9. Breach of Contract. Patty might sue Nadine for breach of contract, claiming that Nadine promised to maintain the tower and did not do it.

Remedy:

10. Expectation Damages: Patty will seek expectation damages. Her loss in value and her costs avoided will cancel each other out because Nadine has excused Patty from paying rent. But Patty will assert that her other loss includes \$4000 for damage to her transmitting equipment and \$20,000 in lost profit.

Remedy Limitations:

11. Exculpation Clause: Nadine will argue that she limited her liability with the clause saying that she would not be responsible for damage to equipment. Nadine may argue that this clause includes all of the loss resulting from the destruction of Patty's equipment, including not only the property loss but also the consequential lost profit.

Replies:

12. Unconscionability. Patty may argue the clause is unconscionable because it is overly oppressive. Rest. § 208; Henningsen v. Bloomfield Motors. But Nadine may argue that limitations on liability for property loss are not usually unconscionable. Cf. Klar v. H&M Parcel Service (saying that bailor has a legitimate right to limit liability, providing there is adequate notice)
13. Strict Construction. Patty also may argue that the clause "no liability for damage to lessee's equipment," should be strictly construed against Nadine because Nadine drafted it. Rest § 206. Strictly construed, it would exclude liability only for the damage to her equipment (\$4000) and not her lost profits (\$20,000) that arose from the damage to the equipment. Nadine may respond that this interpretation is unreasonable because it would make no sense to exculpate herself from a small amount of liability but not a larger amount of liability.

OTHER

14. Other

Information about the Final Examination
in CONTRACTS I (Course No. 202-12)

Prof. Gregory E. Maggs

Each of the problems on the exam presented a fact pattern based on an actual case and asked you to write an essay identifying and discussing the claims and defenses that the parties might assert, and the remedies that they might seek. In grading, I awarded points based on how well your essays identified and discussed the claims, defenses, and remedies. Scores ranged from 61 total points to 140 total points, with an average score of 109 points.

Grades were awarded in conformity with the law school's mandatory grading distribution requirements. This table shows the distribution of grades:

Grade	Number Awarded
A+	1
A	10
A-	16
B+	22
B	17
B-	12
C+	2
C	3

Below are the checklists that I used in grading answers. These checklists are not model answers. They are not model answers because the instructions require all answers to be written in essay form. Please note that these grading guides are not definitive solutions. Everyone sees things in a slightly different way. I attempted to be flexible and generous when grading. I usually found ways of awarding points when answers discussed issues not specifically listed on the grading guide or when they characterized issues differently from the grading guide.

PROBLEM II.

This problem was inspired by GMH Associates, Inc. v. Prudential Realty Group, 752 A.2d 889 (Pa. Super. 2000), but the facts have been substantially altered. (Scoring: 3 points for items 2-4, 13; 1 point for items 10,14,17-18; 2 points for the rest, except no specific number of points for item 19.)

MINKE v. PILOT (Letter of Interest)

Claim:

1. Breach of Contract (Promises in the Letter of Interest). Minke might sue Pilot for breach of contract, claiming that Pilot promised in the Letter of

Interest that he would (1) endeavor to complete the sale by July 1 and (2) sell the property for \$1.7 million, and that Pilot broke both of these promises.

Defenses:

2. Statute of Frauds. If Pilot did not sign the letter of interest (the facts say only that Minke signed it), Pilot might defend on grounds of the statute of frauds. The statute of frauds requires contracts for the sale of land to be evidenced by a writing signed by the party to be charged. Rest. § 125.

Minke might respond that the promise is enforceable, notwithstanding the statute of frauds, because she relied on it in leasing in the property to Gray. Rest. § 139; Monarco v. Lo Greco. But Pilot might reply that Minke actually did not rely on him because she knew of his reputation for shady dealing. And of course only some courts recognize reliance as an exception to the statute of frauds.

3. No assent to be bound/Indefiniteness. Pilot also might defend on grounds that he did not assent to be bound. Lucy v. Zehmer. The statements in the Letter of Interest expressed mere aspirations, not actual promises. Rest. § 2. And even if the statements were promises, he will say that they are too indefinite to enforce because there is no way to determine an appropriate remedy given the open negotiations about the price and the time of the sale. Rest. § 33; Varney v. Ditmars.

But Minke will respond that while Pilot may not have promised to complete the sale by July 3, he did promise to "endeavor" to complete the agreement at the expected price. She will say that Pilot did not "endeavor" because he was seeking to find other buyers.

Minke also might argue that the requirement of definiteness is lower when enforcement is sought on the basis of reliance. Hoffman v. Red Owl Stores. Minke will say that she relied by leasing the property, but again the facts indicate they she did not trust Pilot, and therefore arguably did rely.

4. Cancellation/Modification. Pilot also might defend on grounds that he was not bound by the promise to complete the sale by July 3 because Minke and Pilot canceled that deadline before it arrived. She agreed to extend the closing date to July 31. Schwartzreich v. Bauman-Basch.

Minke will respond that there was no cancellation, just a modification, and that the modification is unenforceable because it lacked consideration. Rest. § 73; Alaska Packers v. Domenico. She also will assert that there were no new circumstances that justified a change in the contract. Cf. Rest. § 89; Watkins & Sons v. Carrig.

Minke also may argue that the modification is voidable because it was induced by a fraudulent misrepresentation. Rest. 164(1). She will assert that Pilot induced her to agree by saying that he needed more time to prepare legal documents, when he really was just attempting to sell the property to another buyer.

Remedy:

5. Expectation Damages: Given that more than a year has passed since the property has been conveyed to another buyer, specific performance is not possible. So Minke will seek expectation damages, which equal the loss in value (the value of the property, presumably \$2.0 million, because that is what it ultimately sold for) plus other loss (the profit she could have made from renting the property to Gray and the cost of the "inconvenience"

resulting from the extension of the closing date), minus costs avoided (the \$1.7 million price she would have had to pay, etc.).

MINKE v. PILOT (Take the property off the market / close by July 31)

Claim:

6. Breach of Contract (promise to take property off the market). Minke might sue Pilot for breach of contract, claiming that Pilot orally promised to take the property off the market if she would sign the Letter of Interest and that he broke this promise by negotiating with other potential buyers.
7. Breach of Contract (promise to close by July 31). If Minke fails to prevail in her argument that the extension of the date of closing is unenforceable (see above), Minke also might sue Pilot for breach of contract, claiming that Pilot promised to close the sale on July 31, and that he broke this promise because he never sold the property to her.

Defense:

8. No Basis for Enforcement. Pilot might assert that there is no basis for enforcing his promise to take the property off the market because he got nothing of value in exchange. Cf. Channel Home Centers v. Grossman (signed letter of intent was valuable because it could be shown to potential lenders). But Minke will contend that the signature on the letter of interest was sought and given in exchange for her signing the document, and that the value of the consideration does not matter. Cf. Fiege v. Boehm. Minke alternatively might argue that the promise is enforceable on the basis of reliance, but again it is not clear that she actually relied given Pilot's reputation for shady dealing.
9. Waiver. Pilot might argue that Minke waived whatever rights she had to close on the July 31 closing date when she began to renegotiate the price after July 5. Cf. F.M. Burlington v. Toys Inc.

Remedy:

10. Expectation Damages: Minke will argue that, if Pilot had taken the property off the market, and had closed on July 31, she would have been able to acquire the property for \$1.7 million, as originally agreed. She will seek expectation damages as described above.

MINKE v. PILOT (Subsequent promise to sell for \$1.9 million)

Claim:

11. Breach of Contract (Subsequent Promise to Sell). If Minke does not prevail on her claim that Pilot promised to sell the property for \$1.7 million, Minke also might sue Pilot for breach of contract, claiming that Pilot promised to sell her the property for \$1.9 million, and did not do it.

Defense:

12. Statute of Frauds. Pilot will argue that the alleged promise is not enforceable because it is not evidenced by a writing signed by him as the statute of frauds requires for contracts for the sale of land. Rest. § 125. The facts say that he made the purported offer over the telephone.
13. No Offer and Acceptance. Pilot also will argue that his statement that \$1.9 million was needed was not an offer but merely preliminary negotiations and that it could not be accepted. Indeed, the language specifically contemplated that Minke would make the "offer." Cf. Int'l Filter v. Conroe.

But Minke will respond that Pilot specifically said that the property could be hers for \$1.9 million, and that is an offer (a manifestation of willingness to enter a bargain conditioned on her acceptance), which she accepted. She will also say that her acceptance is effective because she dispatched it (and indeed Pilot received it), before she learned that Pilot had accepted another offer. Cf. Dickinson v. Dodds.

Remedy:

14. Expectation Damages: Minke will seek expectation damages, calculated as above, but with the cost avoided equal to \$1.9 million.

GRAY v. MINKE (Promise to Lease the Property)

Claim:

15. Breach of Contract. Gray might sue Minke for breach of contract, claiming that Minke promised to lease the property (presumably in exchange for rent), and did not do it.

Remedy:

16. Expectation Damages. Gray will seek expectation damages equal to his loss in value (the value of possession of the property) and other loss (lost profits he might have earned if he had the property and also the additional 5% rent that he had to pay), minus costs avoided (the cost of the rent that he would have paid Minke).

Remedy Limitations:

17. Avoidability. Minke will argue that Gray could have avoided some of these losses by immediately agreeing to rent the property for a higher price. Rest. § 350; Parker v. 20th Century Fox.
18. Uncertainty. Minke also might argue that Gray cannot prove the lost profit with reasonable certainty, given that Gray did not previously occupy property. Rest. § 352; Fera v. Village Plaza.

OTHER

19. Other

Note: In general, there is no implied duty of good faith in negotiations. The implied duty of good faith arises only in the performance and enforcement of contracts. Rest. § 205.

PROBLEM III.

This problem was inspired by Kimball v. Anesthesia Specialists, 809 So.2d 405 (La. 2001), but the facts have been substantially altered. (Scoring: 4 points for items 1-3,5,6,8; 3 for the rest, except no specific number of points for item 11.)

BOWHEAD v. GREENLAND

Claim:

1. Breach on contract. Bowhead might sue Greenland for breach of contract, claiming that Greenland promised not to practice in any health care facility regularly serviced by Bowhead, and that Greenland violated that promise by working for Blue Hospital.

Defenses:

2. No Breach (Strict Construction). Greenland first might argue that he is not in breach of the agreement. Read literally, clause 8.01 says that Greenland may not practice at health care facilities served by Bowhead during the "term" of the agreement. Greenland will argue that he is not practicing during the "term" of the agreement because the agreement could be terminated "at any time" and it was terminated when Greenland left Bowhead. Although Bowhead might object that this interpretation greatly undercuts the value and evident purpose of the non-competition clause, Greenland will argue that clause should be strictly construed against Bowhead because Bowhead drafted it. Galligan v. Arovitch; Rest. § 206.

3. No Consideration. Greenland also might argue that there was no consideration for his promise not to compete in the new agreement. It was simply a term added to the previous bargain. Alaska Packers v. Domenico; Rest. § 74.

Bowhead might respond that there was additional consideration. The extension of Greenland's hours would appear to increase the Greenland's compensation because Greenland shares in Bowhead's profits and because he also receives a payment for his services which would increase if he worked longer hours.

Alternatively, Bowhead might argue that an employer may add a covenant not to compete to an employment contract that is terminable at will notwithstanding traditional rules regarding consideration. Central Adjustment v. Ingram.

4. Duress. Greenland also might argue that he was induced by duress to sign the new agreement. Rest. §§ 175(1), 176(1). He will assert that the company was threatening to break the existing contract in bad faith, knowing that he had no reasonable alternative at the time but to agree.

Remedies:

5. Specific Performance/Injunction. In addition to retaining the \$25,000 that it owed Greenland (discussed below), Bowhead will seek an order or injunction requiring Green to stop working for Blue Hospital. But Greenland might argue that the bargain was grossly uneven because he received very little consideration for it, and that a court therefore should deny specific performance. McKinnon v. Benedict; Rest. § 364(1)(c).

GREENLAND v. BOWHEAD

Claim:

6. Breach of Contract. Greenland will claim that Bowhead promised to pay him compensation for his services and a share of the profits, and that it broke that promise by retaining "\$25,000 that he was owed at the time he left."

Defense:

7. No Breach (Clause 8.02): Bowhead will argue that it is not in breach because clause 8.02 says that it may retain any sums owed to Dr. Greenland if he violates the agreement. It will assert that this clause establishes a form of liquidated damages. Rest. § 356(1); Dave Gustafson v. State. (Greenland can make the same arguments, discussed above, for why the clause was not violated or is not enforceable.)

Response:

8. Penalty. In addition to disputing Bowhead's assertion that he violated the agreement (see above), Greenland also will argue that clause 8.02 is not really a form of liquidated damages but is instead a penalty and that it is therefore unenforceable on grounds of public policy. Rest. § 356(1). He will assert that the amount of money forfeited (\$25,000) is unreasonably large in relation to the difficulties of proof and the actual or anticipated loss. Bowhead easily could determine how much business it lost because of Greenland's occasional practice at Blue Hospital.

Remedy:

9. Expectation Damages. Greenland will seek expectation damages equal to \$25,000, the amount that he was owed by Bowhead.

Remedy Limitations:

10. Allowance for Actual Damages. If the liquidated damage clause is not enforceable, Bowhead will seek to have subtracted from Dr. Greenland's recovery an allowance for any actual damages that it has suffered. See Jacob & Youngs v. Kent (holding that a homeowner had to pay builders who were in breach but could withhold an allowance for damages).

OTHER

11. Other

PROBLEM IV.

This problem was inspired by Thomas v. Georgas, 2004 WL 1465831 (Cal. App.), but the facts have been substantially altered. (Scoring: 4 points for items 1-4,6,10; 3 for the rest, except no specific number of points for item 19.)

ORCA v. SEI (breach of settlement agreement)

Claim:

1. Breach of contract. Orca might sue Sei for breach of contract, claiming that Sei promised to pay her \$26,000 to drop the lawsuit, and that he refused to pay her.

Defenses:

2. Indefiniteness/No Assent to Be Bound. Sei might argue that the settlement agreement is too indefinite to enforce because it does not specify how or when the payment is to be made, and therefore is not "reasonable certain." Rest. § 33(1); Varney v. Ditmars. But Orca might respond that the settlement agreement satisfies the requirement of definiteness because there is a basis for determining whether there was a breach (here, Sei said he would not pay, and that's clearly a breach) and for determining an appropriate remedy (\$26,000, the amount of the settlement). Rest. § 33(2).

As a slightly different and alternative approach, Sei might argue that the failure to agree on the details shows that they were still in preliminary negotiations and had not yet reached a complete bargain. Rest. § 33(3).

3. Incapacity. Sei also may argue that he lacked capacity to form the settlement agreement because his pain and his medication prevented him from acting reasonably and that Orca had reason to know of his condition because she knew of his injuries. Rest. § 15(1)(b); Ortelere v. Teachers'

Retirement. But only some states accept that definition of incapacity. And Orca might contend that she did not have reason to know Sei was unable to act reasonably, even though she knew of his injuries, especially because he had the aid of counsel. Cf. Cundick v. Broadbent.

4. No Consideration. Sei further may argue that there was no consideration for the settlement because Orca did not have a valid claim (see below) and could not have had a reasonable belief in its possible validity. Rest. § 74(1); Fiege v. Boehm. But Orca of course will claim that she believed the claim to be valid and had reason to do so, based on the arguments given below.

Remedy:

5. Expectation Damages. Orca will seek \$26,000 in expectation damages.

ORCA v. SEI (breach of original contract)

Claim:

6. Breach of Contract. If the settlement agreement is unenforceable, or if Sei's breach of the settlement agreement excuses Orca's agreement not sue, Orca might sue Sei for breach of the original contract concerning the restaurant, claiming that Sei promised to sell the restaurant operations and lease the restaurant business to her, and that he did not do it.

Defenses:

7. Indefiniteness. Sei will argue that the rental agreement is too indefinite to enforce because the amount of future rent increases is unspecified and there is no criteria for calculating it. Rest. § 33; Varney v. Ditmars. Cf. Toys Inc. v. F.M. Burlington (rent to be set at prevailing rate).

Orca may respond that promissory estoppel allows her to enforce the original agreement, notwithstanding the problem of indefiniteness, because she relied on the promise by quitting her job. Rest. § 90; Hoffman v. Red Owl Stores.

8. Non-Disclosure/Confidential Relations. Sei further will argue that Orca had a duty to disclose what the appraiser had told her. He will say that they were not negotiating at arm's length. Instead, they had a confidential relation, with Orca offering to help Sei as a lifelong friend and at a time when he was injured. Rest. § 161(d).
9. Statute of Frauds. Sei also will argue that the promise is not enforceable because it could not possibly be completed in one year given that the lease was for 5 years. Rest. § 130(1). (This contract does not involve the sale of any land. It is conceivable that the sale of the restaurant operations could be characterized as hybrid involving both the sale of business operations and the sale of goods--like business equipment--and that a court might require a signed writing for this reason.)

Orca may argue that promissory estoppel allows her to enforce the original agreement, notwithstanding the statute of frauds because she relied on the promise by quitting her job. Rest. § 139; Monarco v. Lo Greco.

Remedy:

10. Expectation Damages. Orca will seek expectation damages. For the restaurant business, that will be her loss in value (which presumably is the \$255,000 appraised value) minus her costs expected (the price of \$230,000). Presumably, the appraised value takes into account the profit that could be

made from the business to the extent that it can be determined with reasonable certainty.

For the rental agreement, Orca's expectation damages will be her loss in value (the value of the lease, or what it would cost for her to rent comparable property) minus her costs avoided (\$2000 per month, subject to debate about the size of future increases).

OTHER

11. Other

PROBLEM V.

This problem was inspired by Bragdon v. Twenty-Five Twelve Assocs., 856 A.2d 1165 (2004), but the facts have been substantially altered. (Scoring: 4 points for items 1,5,6,8; 2 points for item 7; 3 points for the rest, except no specific number of points for item 12.)

ESTATE OF FRASIER v. CUVIER (Room without a View)

Claim:

1. Breach of Contract. On behalf of Frasier's estate, Bryde might sue Cuvier for breach of contract, arguing that Cuvier promised to provide Cuvier with a room with a view and did not do it.

Defense:

2. No Basis for Enforcement. Cuvier might respond that the promise lacks a basis for enforcement. It will say that Frasier gave nothing in exchange for the promise. Rest. § 71. But Bryde might respond that Cuvier's promise to give him a new room was not an isolated promise, but instead was part of the overall bargain to stay at Cuvier, and that his promise to pay \$85 a day was the consideration in that bargain.

Alternatively, Bryde might argue that Frasier relied on the promise by not moving to a different facility. But Cuvier will argue that it is not clear that Frasier would have done anything differently if the promise had not been made. Cf. Feinberg v. Pfeiffer. Cuvier also might argue that the reliance was not reasonable once it became clear, after a few months, that there was no room available.

Remedy:

3. Expectation Damages. For Frasier's estate, Bryde will seek expectation damages, but it is not clear that the loss in value (the benefit of the room with a better view) would exceed the costs avoided (the additional amount that Frasier would have had to pay for a better room, given that Cuvier charged different rates for different rooms).

Remedy Limitations:

4. Avoidability/Uncertainty. Cuvier might argue that Frasier could have avoided some of the damages by moving to a different location. Rest. § 350; Luten Bridge v. Rockingham County. In addition, to the extent that Frasier is damaged based on his subjective disappointment about the view, Cuvier will argue that Bryde cannot prove the loss with reasonable certainty

(especially now that Fraiser is dead and cannot testify about how he felt). Rest. § 352; Collatz v. Fox Amusement.

ESTATE OF FRASIER v. CUVIER (overcharges)

Claim:

5. Unjust Enrichment. Bryde might sue Cuvier on behalf of Fraiser's estate, claiming that Cuvier was unjustly enriched by Frasier's rental payments to the extent that they exceed his contractual obligation to pay only \$85 a day.

Defense:

6. Modification of Contract. Cuvier will defend on ground that Cuvier and Frasier implicitly modified the contract when Frasier repeatedly paid the price stated in the bills and did not object.

Bryde might argue that Frasier's silence could not be deemed to be acceptance of the proposed modifications. Rest. § 69. But Cuvier would respond that there was more than silence because Frasier sent in the additional payments. Cf. Hobbes v. Massasoit.

Bryde also might assert that there was no consideration for the increases in the room rates. Cuvier had a pre-existing duty to provide the rooms at a rate of \$85. Domenico v. Alaska Packers, Rest. § 73. But Cuvier will assert that the change was reasonable in light of changed circumstances, namely, inflation of all prices over time. Watkins & Sons v. Carriq, Rest. § 89.

Remedy:

7. Restitution. Bryde will seek restitution of the overcharges, which is a "substantial" amount.

HECTOR v. ESTATE OF FRASIER

Claim:

8. Breach of Contract. Hector might sue Frasier's estate for breach of contract, claiming that Frasier promised (1) to let him live in his house and (2) to sell him his car, but that Bryde refuses to honor these promises.

Defense:

9. Termination of Offer. Bryde initially will argue that the offers terminated upon Frasier's death and that Hector therefore cannot accept them. Rest. § 48; Earle v. Angel. (Bryde also will argue that, even if the offer had been accepted prior to Frasier's death, it is reasonable to find an implied term in the agreement that the contract would end upon Frasier's death.)
10. No Basis for Enforcement. Bryde will argue that Frasier's promise to allow Hector to live in the house was a promise to make a gift and therefore lacks consideration. Kirksey v. Kirksey. But Frasier will respond that it was a bargain, in which Hector would be providing the services of house-sitting (i.e., occupying and watching over the otherwise vacant house) and perhaps visiting Frasier.

Hector also might assert that Frasier's promise is enforceable on the basis of promissory estoppel because he has relied on the promise by looking for

a new job. Rest. § 90. But Bryde will argue that this reliance was so minimal that enforcing the promise is not necessary to prevent injustice.

Remedy:

11. Expectation Damages. Hector would seek expectation damages equal to his loss in value with respect to staying in the house (perhaps what a comparable rental would cost) and with respect to the sale of the car (the market value of the car) minus his costs avoided (the \$400 he promised to pay for the car).

OTHER

12. Other

PROBLEM VI.

This problem was inspired by Howie v. Atlantic Home Inspection, 62 Va. Cir. 164 (2003), but the facts have been substantially altered. (Scoring: 3 points for items 1,4,5,7,9,11; 2 points for the rest, except no specific number of points for item 16.)

PIKE v. FIN (Rescission)

Claim:

1. Rescission. If Pike does not want to keep the house, Pike might sue Fin to rescind the purchase, asserting that the sale was induced by material misrepresentations. Rest. § 162(2). He will assert that (1) Fin made a material misrepresentation when she inaccurately described the house as "sturdy," Rest. 162(1); (2) Fin evidently concealed the damage with wallpaper with result being that the inspector could not detect it; and (3) Fin told a half-truth when she identified mice in the attic as an additional problem when the house had other more serious problems, Kannavos v. Annino.

Defenses:

2. Puffing. Fin will argue that her statement that house was sturdy was merely puffing or opinion and not an assertion of fact.
3. Bare Non-Disclosure. Fin will argue that her wallpapering did not amount to a concealment. She had already put the wallpaper on the walls before she decided to sell the property. She also will argue that her failure to identify more problems beyond the mice was simply a bare non-disclosure. Swinton v. Whitonsville Savings Bank.

Remedy:

4. Rescission and Restitution. Pike will seek to rescind the contract and have his payment of the purchase price of the house restored to him. Kannavos v. Annino. Fin will insist of return on the property as a condition to rescission. Rest. § 7 cmt. 6 (syllabus appendix).

PIKE v. FIN (Breach of Contract)

Claim:

5. Breach of Contract. If Pike wants to keep the house, Pike alternatively might sue Fin for breach of contract, claiming that she promised or warranted that the house would be sturdy and would be free of problems other than mice in the attic, and that these warranties were violated by the structural problems in the property.

Defense:

6. No Promise/Warranty. Fin will defend on grounds that she did not make any warranties, using essentially the same arguments (listed above) for why she did not make any misrepresentations.

Remedy:

7. Expectation Damages. Pike would seek expectation damages, equal to his loss in value (the difference between the house as promised and what he received, measured by the market value or the cost to repair, Rest. § 348(2)) plus his other loss (the damage to his possessions and his personal injuries), less his costs avoided (presumably none because he paid the purchase price).

Remedy Limitations:

8. Unforeseeability. Fin might argue that the damages were not foreseeable at the time the contract was made. Hadley v. Baxendale; Rest. § 351(1). But Pike will respond that property damage and injury arise in the ordinary course of events when a house has important structural problems.

Note that Dall will also argue that the damages were not foreseeable at the time the contract was made. Hadley v. Baxendale; Rest. § 351(1). But Pike again will respond that property damage and person injuries arise in the ordinary course of events when defects in a house are overlooked.

PIKE v. DALL

Claim:

9. Breach of Contract (or possibly negligence): Pike will sue Dall, claiming that he implicitly promise to perform a competent inspection of the house, and breached that promise by failing to detect the structural damage. (Alternatively, he might claim that Dall was negligent in the performance of his professional services. Cf. Sullivan v. O'Connor).

Defense:

10. No breach of Contract/Negligence. Dall may argue that he did conduct a thorough inspection and that he never promised a specific result. Cf. Sullivan v. O'Connor. Even if he did not discover the problem with the foundation, he therefore did breach a contract or act negligently.

Remedy:

11. Expectation Damages. Pike will seek expectation damages equal to his loss in value (the difference in cost between a competent and incompetent inspection), plus his other loss (which would include his personal injuries and damage to the house and property, to the extent it is not compensated by Fin), minus his costs avoided (presumably nothing because he already has paid).

Remedy Limitations: (see also #8 above)

12. Exculpation Clause. Dall will assert that the contract contained an exculpation clause, absolving him of liability for the cost of repairing or replacing defects or conditions.

Response to Remedy Limitations:

13. Strict Construction. Pike will argue that he is not seeking the "cost of repairing or replacing any defects or conditions." He does not want to repair the house; he just wants compensation. Despite the evident intent of Dall, Pike will argue that the contract should be read against him because he drafted it. Galligan v. Arovitch
14. Adequate Notice. Pike also will argue that he did not have adequate notice that the report would contain contractual terms and that he did not assent to them. Klar v. H & M Parcel Service; Rest. § 211(1).
15. Unconscionability (or Public Policy). Pike will argue that it is unconscionable for Dall to disclaim liability for negligence that causes personal injuries. Henningsen v. Bloomfield Motors; Rest. § 208

OTHER

16. Other

Information about the Final Examination
in CONTRACTS I (Course No. 202-14)

Prof. Gregory E. Maggs

PROBLEM I.

This problem was partially inspired by *Hyatt Corporation v. Women's International Bowling Congress Inc.*, 80 F. Supp.2d 88 (W.D.N.Y. 1999).

(Maximum 3 points each item.)

BATES HOTEL v. AUBURN BOWLING CONFERENCE

Claim:

1. Breach of Contract (implicit promise in reservation). Bates might sue Auburn for breach of contract, claiming that Auburn made an implicit promise in connection with the reservation for this year's tournament and then broke that promise. Bates will argue that the implicit promise was that Auburn either would find 300 bowlers to stay at the hotel or alternatively would pay for any unused rooms. Auburn will deny that it made any implicit promise, but the facts suggest that the reservation may have contained terms that the parties did not spell out. Bates would argue that the agreement over the reservation would not make sense unless it contained this implicit promise because otherwise Auburn would not be making any substantial commitment (other than promising to pay the possible cancellation fee and promising to negotiate about next year's tournament). Cf. *Wood v. Lucy, Lady Duff-Gordon*.
2. Breach of Contract (subsequent notice). Bates also might sue Auburn for breach of contract, claiming that Auburn promised to pay for the unused hotel rooms when it accepted the subsequent notice without responding, and that Auburn broke this promise when it did not pay for them.

Defenses:

3. Statute of Frauds. Auburn might argue that the statute of frauds bars enforcement of any implied promise in the reservation because the parties made the contract over the telephone. Auburn would argue that the one-year provision of the statute of frauds prevents enforcement of their oral agreement because a contract regarding an annual tournament may contemplate a performance that would take at least a year. Rest. § 130(1). Complete performance could not take the promise out of the statute of frauds because Bates and Auburn still have not negotiated about next year's tournament. Rest. § 130(2).
4. No acceptance. Auburn also will argue that the notice sent by Bates was an offer to modify the initial agreement and that Auburn's silence was not an acceptance. Rest. § 69(1). But Bates will argue that Auburn went ahead and accepted the benefits of the agreement, and therefore there was more than silence. Rest. § 69(1)(a); *Hobbs v. Massasoit Whip Co.*
5. No Consideration. Auburn also will argue that, if the initial agreement did not include a promise to pay for the unused rooms, a subsequent promise to pay for the unused rooms would lack consideration. Rest. § 73; *Alaska Packers v. Domenico*. If Auburn's silence could be an acceptance in this

case, however, then Bates might argue that the promise should be enforced under a theory of promissory estoppel even if there is no consideration.

6. Mutual Mistake. Auburn also might argue that the contract is not enforceable based on mutual mistake of fact. Both parties assumed that 300 guests would attend, and in fact fewer than that did. Bates would respond that there was no mistake of fact, just a poor prediction. Rest. § 151; cf. Wood v. Boynton.

Remedies:

7. Expectation Damages. Bates, as the problem says, will seek expectation damages equal to \$100,000. The loss in value is \$100,000, but there may have been some costs avoided (like the cost of cleaning the rooms).

Remedy Limitations:

8. Avoidability. Auburn will argue that Bates can not recover any portion of the \$100,000 that Bates avoided or could have avoided without undue hardship, burden, or humiliation could have avoided. It avoided some and could have avoided more by renting the rooms to other guests. Rockingham County v. Luten Bridge; Rest. § 350.
9. Liquidated Damages. Auburn will argue that the contract established liquidated damages of \$15,000 if the tournament was cancelled. It does not make sense that Auburn would have to pay more if the tournament occurred.

BATES HOTELS v. CONTESTANTS SHARING ROOMS

Claim:

10. Unjust Enrichment. Bates might sue the contestants who shared rooms under a theory that they would be unjustly enriched if they could stay at the hotel without paying. Cf. Cotnam v. Wisdom.

[Alternatively, Bates might sue the contestants whose rooms they shared, alleging that they promised to pay the surcharge. More facts are needed to assess which is the better approach.]

Remedy:

11. Restitution. Bates would seek the reasonable value of the room (probably \$100 a night) from the contestants who stayed without paying. Restatement of Restitution § 155(1).

OTHER

12. Other

A refusal to negotiate about lodging for next year's tournament would constitute a breach of the oral agreement, but it is not clear that either party has refused to negotiate.

PROBLEM II.

This problem was partially inspired by Helprin v. Harcourt, 277 F. Supp.2d 327 (S.D.N.Y. 2003).

(Maximum 3 points for items 5,12, 13; 1 points for item 9; 2 points for the rest.)

DRAKE v. EMORY

Claim:

1. Breach of Contract (promise to publish). Drake might sue Emory for breach of contract, claiming that Emory promised to publish and market her second book and did not do it.
2. Breach of Contract (promise to act in good faith). Drake also might sue Emory for breach of contract, saying that Emory implicitly promised to assess the literary merit of her second book in good faith, Rest. § 205, and that it did not act good faith because it considered the likelihood of commercial success instead of literary merit.

Defenses:

3. No breach. The facts make clear that Emory will argue that it did not breach the contract because it only promised to publish the book if it had "literary merit" and, in its view, the book did not have it. (As noted below, this does not necessarily mean that Emory has breached the contract.)
4. No consideration (illusory promises). If Emory wants to get out of the contract altogether, Emory also might argue that its promises lack consideration because Drake's promises are illusory. Drake had no deadline for writing the books and never had to produce them. *Strong v. Sheffield*. Drake, however, might argue that it was implied that she would write the books within a reasonable time, and therefore that her promise was not illusory. *Wood v. Lucy, Lady Duff-Gordon*.
5. Lack of Definiteness. Emory similarly might argue that the entire contract lacks definiteness because no standard exists for determine what constitutes literary merit. *Varney v. Ditmars*. Drake, however, will argue that critics can determine literary merit. In addition, a court at least can ascertain whether Emory acted in good faith in determine whether the book had literary merit.

Emory also might argue that the contract lacks definiteness because no standard exists for determining a "customary share of the profits." *Varney v. Ditmars*. Drake, however, again may argue that the party's past dealing or industry standards give meaning to this phrase.

Remedies:

6. Specific Performance. Drake might seek specific performance, arguing that he does not have an adequate remedy at law because of the uncertainty of damages. (For various reasons, some not covered in this course, a court probably would not require a publisher to publish a book.)
7. Expectation Damages. Drake will seek expectation damages equal to the royalties that she would have made from publication of the second book plus the value of the literary acclaim she would have won.

Remedy Limitations:

8. Uncertainty. Emory will argue that Drake cannot prove with reasonable certainty either the amount of royalties that she would have received or the value of any literary acclaim. Rest. § 352; *Vera v. Village Plaza*.
9. Avoidability. Emory also will argue that Drake could avoid damages without undue burden, risk, or humiliation by having someone else publish the book. Rest. § 350; *Parker v. 20th Century Fox*. But that is only true if the book is likely to have commercial success.

FURMAN v. EMORY

Claim:

10. Breach of Contract (Promise to Pay for Advertising). Furman might sue Emory for breach of contract, arguing that Emory implicitly promised to pay it \$100,000 for developing advertising and broke the promise.
11. Breach of Contract (Assurances During Negotiations). Alternatively, Furman might argue that even if the parties never got beyond preliminary negotiations, Emory made assurances during the negotiations (i.e., that it would need a \$100,000 campaign and that it would send a contract) and that it knew Furman would rely on them. Hoffman v. Red Owl Stores.

Defenses:

12. Preliminary Negotiations. Emory will argue that the parties never formed a contract, but merely engaged in preliminary negotiations. It said that it would be needing an advertising campaign, not that it was committing to make a contract with Furman. Indeed, the statement that Emory was "going to send a contract" makes clear that it had not yet formed a bargain. Owen v. Tunison. Furman, however, may respond that Emory made an offer that could be accepted either by signing the contract that would be sent or by commencing work. Allied Steel v. Ford. But Emory might reply that Furman never gave notice that it started work.

Remedy:

13. Expectation Damages: Emory will seek expectation damages equal to its loss in value (i.e., \$100,000 contract price) minus its costs avoided. Its costs avoided were the costs it expected (which were probably less than \$100,000, if Furman expected to make a profit) minus the \$10,000 costs incurred.
14. Reliance Damages. Alternatively, if Furman can only enforce the assurances made during preliminary negotiations, then reliance damages of \$10,000 might be a more appropriate remedy. Hoffman v. Red Owl Stores.

EMORY v. DRAKE

Claim & Remedy

15. Unjust Enrichment/Restitution. The facts say that Emory believes that the arrangement is not working out and would like Drake to return the advance. Emory's ability to recover the money back would depend on the arguments for declaring the contract void, identified above. (Points given only once above.) If the contract is unenforceable, then it would seem that an advance paid under the mistaken belief that the contract was enforceable would produce unjust enrichment. Emory would want to receive back either the \$2 million or some fraction of that given that one book has been written.

Note: Emory probably does not have a very good argument that Drake actually has breached the contract at this point. Even if Drake wrote one book that did not have literary merit, that would not appear to mean that Drake was in breach of contract; it would only mean that she still had to produce four additional books having literary merit. Eventually, Emory might sue Drake for failing to produce four additional books within a reasonable time. But it does not appear that a reasonable time for producing five books has passed. Also, it would have to give up its arguments that the contracts is too illusory or indefinite to enforce.

OTHER

16. Other

Note: Even if the contract was not evidenced by a signed writing, the statute of frauds would not appear to apply because all the promises theoretically could have been performed in a year (even if that is unrealistic.)

PROBLEM III.

This problem was partially inspired by *Ursidae v. Zimmermann*, 2001 WL 1326437 (Cal. App.).

(Maximum 2 points for item 12; 1 point for item 11; 3 points for the rest.)

IONA v. GAUCHER [Rescission]

Claim:

1. Rescission for Misrepresentation. Iona might sue Gaucher, seeking to rescind the sale of the car wash based on grounds of misrepresentation. Gaucher, through Hamilton, described the premises as a car wash with minor equipment problems. The equipment problems were substantial. The statement, moreover, was a half-truth because the business had additional problems (falling plaster, blocked drains, and contamination) that needed to be addressed before the business could be operated as a car wash. *Kanovos v. Anino*.
2. Rescission Based on Unilateral Mistake. Iona alternatively might argue that the contract should be voided based on her unilateral mistake that the premises did not have the various problems described. Restatement § 153. Gaucher will respond that rescission based on unilateral mistake is not warranted. Iona could have discovered the problems before buying the property by making a cursory examination of the premises and by looking at the cities order.

Defenses:

3. Bare Non-Disclosure. Gaucher will argue that he and Hamilton engaged in a bare non-disclosure and have no liability. *Swinton v. Whitensville Savings Bank*.
4. Opinion/Puffing. Gaucher also would argue that he merely engaged in the statement of an opinion or in puffing when he said the problems were minor.

Remedy:

5. Rescission and Restitution. Iona will seek rescission of the contract and the restitution of the \$600,000 that she paid.

IONA v. GAUCHER

Claim:

6. Breach of Contract. If Iona does not rescind the sale, Iona alternatively might sue Gaucher for breach of contract, claiming that Gaucher (through Hamilton) promised to sell her a car wash that had only minor equipment problems and needed a tank removed, but in fact sold her a car wash with many additional problems. (Gaucher will deny that it made these problems, based on the arguments above.)

Remedy:

7. Expectation Damages. Iona will seek the cost to remedy these defects (approximately \$720,000) in order to put her in the position that she would be in if the promise had been kept.

Remedy Limitations:

8. Cost to Remedy. Gaucher will argued that \$720,000, the cost to remedy the defect, is grossly disproportionate to probably loss in value of the business, given the business Iona thought the business would only be worth \$600,000 without the defects. Rest. § 348(2)(b); Jacob & Youngs v. Kent. He would seek to limit the damages to the market value (presumably \$600,000).

IONA v. HAMILTON

Claim:

9. Breach of Contract. Iona also might sue Hamilton for breach of contract, claiming that he promised to pay her \$40,000 and did not do it.

Defenses:

10. No Consideration. Hamilton would argue that his promise lacked consideration and therefore is not enforceable. His promise to pay her \$40,000 to keep her happy was a merely a gift. He did not bargain for anything in exchange.

Remedy:

11. Expectation Damages. Iona would seek expectation damages equal to \$40,000.

GAUCHER v. HAMILTON

Claim:

12. Unjust Enrichment & Restitution. If the sale to Iona falls through, Gaucher may have a claim of unjust enrichment against Hamilton. Gaucher would ask for restitution of the \$100,000 commission.

OTHER

13. Other

PROBLEM IV.

(This problem was partially inspired by Malone v. Bob Bernhardt Paving, 2003 WL 22670852 (N.Y. App. Div.).)

PLEASE NOTE: I regret that I made a mistake in writing this problem. The second paragraph of problem says that Kalamazoo's payment of \$100,000 arrived on January 10. The last sentence of the final paragraph contradicts this sentence by saying that Kalamazoo now does not want to pay the \$100,000. Most answers assumed that this last sentence meant that Kalamazoo wanted the \$100,000 returned and did not want to pay the additional \$20,000. This grading key reflects that reasonable interpretation. For exams that interpreted the contradictory facts in a different way I made necessary adjustments in grading.

JUNIATA v. KALAMAZOO

Claim:

1. Breach of Contract. Juniata might sue Kalamazoo for breach of contract, alleging that Kalamazoo promised to make a \$100,000 settlement payment by December 31 but did not make the payment until January 10.

Defenses:

2. No Consideration. Kalamazoo might argue in defense that its promise to pay the \$100,00 payment lacked consideration. Juniata's surrender of her claim against Kalamazoo was not consideration because Juniata did not have a good faith and reasonable belief in its possible validity. Fiege v. Boehm; Rest. § 74(1). Kalamazoo would assert that Juniata should have known the cause of her injury from her brother's experience. Juniata, however, could argue that she did not know the actual cause until she had the test, much as Hilda Boehm did not know who was the father until the baby's blood was tested.
3. Mutual Mistake. Kalamazoo also might argue that he was induced to make the promise by a mutual mistake. Sherwood v. Walker. Both he and Juniata thought that Kalamazoo had caused the injury, when in fact he had not. Juniata, however, may respond that Kalamazoo should bear the risk of mistake because he was aware that his knowledge of what caused the injury was limited but he decided to settle anyway. Rest. § 154(b).
4. Misrepresentation. Kalamazoo also might argue that his promise was induced by a material misrepresentation, namely, Juniata's false allegation that Kalamazoo's negligence caused her injury. Rest. § 164(1). Juniata, however, might argue that an allegation is not an assertion of fact, but a mere supposition about what facts might be shown, and therefore is not a misrepresentation. Rest. § 159.
5. Duress. Kalamazoo also might argue that his promise to pay \$100,000 was induced by an improper threat, namely a threat to sue him in bad faith when Juniata did not honestly believe that she had a claim. Rest. § 176(1)(c). Juniata, however, might respond that she did not act in bad faith because she did not know that Kalamazoo had not caused her injury. In addition, she will assert that Kalamazoo had a reasonable alternative of litigating rather than settling, especially since he appears to have had \$100,000 on hand. Rest. § 175(1).

Remedy:

6. Liquidated Damages. Juniata would seek liquidated damages of \$20,000 from Kalamazoo under the clause in the contract saying that Kalamazoo would pay \$20,000 if he did not make the payment by January 1st. Kalamazoo might argue in response that the amount of liquidated damages is unreasonably large because the payment was only a few days late and it was not graduated. Gustafson v. State; Rest. § 356(1). Juniata, however, may respond that the penalty was not unreasonable in light of actual damages if she in fact owes \$40,000 to Lehigh.
7. Expectation Damages. Juniata alternatively might seek expectation damages, arguing that she incurred an "other loss" equal to her liability to Lehigh, which possibly is \$40,000 (as discussed below).

Remedy Limitations:

8. Unforeseeability. Kalamazoo also would argue that expectation damages could not include the liability to Lehigh as "other loss" because this liability was unforeseeable. The liability arose out of special circumstances of which Kalamazoo was not aware (i.e., the secretive import scheme). Hadley v. Baxendale; Rest. § 351.

KALAMAZOO v. JUNIATA

Claim:

9. Rescission & Restitution. Kalamazoo would seek to rescind the settlement agreement based on mutual mistake, duress, or misrepresentation, as described above. Juniata would resist rescission raising her same arguments. If the contract is rescinded, Kalamazoo would seek restitution of the \$100,000 payment that already was made (under the interpretation of the facts that the payment was made).

LEHIGH v. JUNIATA

Claim:

10. Breach of Contract. Lehigh might sue Juniata for breach of contract, claiming that Juniata promise to lend him \$100,000 by January 1 and did not do it.

Defenses:

11. No Consideration. Juniata might argue that her promise to lend money to Lehigh lacks consideration because the facts do not indicate that Lehigh was going to pay interest or do anything else in exchange for the loan. Lehigh might argue that the promise should be enforceable on the basis of promissory estoppel even if there is no consideration. *Feinberg v. Pfeiffer*; Rest. § 90. Juniata, however, might dispute whether injustice really would result from the failure to enforce the scheme, especially given that the government has banned the importation of the fish.
12. Public Policy. Juniata might argue that enforcing the promise would violate public policy because enforcement of promises like this would encourage others to enter schemes to import goods while the government was in the process of banning their importation. Cf. *Bush v. Black Industries*. Lehigh will argue that the promise was to lend money, and lending money does not violate public policy. Moreover, the importation scheme itself did not violate public policy at the time contract was made because the importation of the glowing fish was not yet illegal.

Remedy:

13. Expectation Damages. Lehigh will seek expectation damages equal to his lost profit, or \$40,000.

Remedy Limitations:

14. Uncertainty. Juniata will argue that Lehigh cannot prove his lost profit with reasonable certainty because there was no market for the fish. The government has banned the importation of the fish and the facts say that Lehigh was going to have a monopoly, meaning that there was no other seller. Rest. § 352; *Fera v. Village Plaza*.
15. Avoidability. In addition, Juniata might argue that Lehigh could have avoided some of the damages by getting a loan from someone else. Rest. § 350; *Parker v. 20th Century Fox*.

OTHER

16. Other

Note:

The mailbox rule says only that acceptances are effective upon dispatch. It has no application to this problem.

PROBLEM V.

(This problem was partially inspired by *Eastern Account Systems, Inc. v. Southern New England Telephone Co.*, 35 Conn. L. Rptr. 183 (Conn. Super. 2003).)

NORTHWESTERN ADJUSTMENT v. OCCIDENTAL HOSPITAL

Claim:

1. Breach of Contract. Northwestern might sue Occidental Hospital for breach of contract, arguing that it promised to pay Northwestern a commission of 25% for collecting unpaid accounts, but broke the promise by giving the work to another collection agency.

Defenses:

2. No Offer and Acceptance. Occidental Hospital may argue that the parties never formed a contract through an offer and acceptance. Occidental Hospital will argue that it did not offer to pay Northwestern a commission of 25% to do the collection. On the contrary, it merely said that it "never pays more than 25%." *Owen v. Tunison*.

Remedy:

3. Expectation Damages. Northwestern would seek expectation damages equal to approximately \$20,000, the amount recovered by the other agency.

Remedy Limitations:

4. Avoidability. Occidental Hospital might argue that Northwestern cannot recover the full \$20,000 because it could have avoided the damages by using its resources to serve other customers. *Parker v. 20th Cent. Fox*; Rest. § 350(1).
5. Uncertainty. Occidental Hospital alternatively might argue that the Northwestern can prove with certainty that it would have made \$20,000 profit because of its cost structure and its success in collection might have differed from the other company that Occidental hired. *Fera v. Village Plaza*; Rest. § 352. Northwestern, however, may respond that it only needs to prove damages with reasonable certainty, and that the profit the competitor made is a close enough comparison.

NORTHWESTERN ADJUSTMENT v. MARQUETTE COMMUNICATIONS

Claim:

6. Breach of Contract. If Northwestern loses its contract action against Occidental Hospital, Northwestern Adjustment might sue Marquette Communications for breach of contract, claiming that Marquette promised to provide telephone service and interrupted this service for two days.

Defense:

7. No Breach. Marquette might argue in defense that the contract permitted it to shut off telephone charges after sending a delinquency notice, and that it did send such a notice. It therefore did not breach the contract. Northwestern might argue in response that telephone service contract should be strictly construed against the telephone company, which almost certainly drafted it. Galligan v. Arovitch; § 206. Strictly construed, the contract requires the delinquency notice to be for "unpaid charges" -- not "alleged unpaid charges" -- and therefore Marquette had not basis for shutting off the telephone service.

Response:

8. Unconscionability. If its strict construction argument does not prevail, Northwestern also could argue that a clause allowing Marquette to shut off service when charges are disputed is unconscionable. Rest. § 208. Marquette, however, will respond that the clause serves an important function that keeps costs down for everyone; as the facts say, the clause prevents delinquent customers from contesting their bills simply to gain a few additional days of service.

Remedies:

9. Expectation Damages: Northwestern will ask for expectation damages, equal to the approximately \$20,000 in profit that it would have made if the suspension of service had not caused it to lose the proposed contract with Occidental Hospital.

Remedy Limitations:

10. Unforeseeability: Marquette might argue that Northwestern cannot recover for the loss of the contract with Occidental because that loss was unforeseeable. Hadley v. Baxendale; Rest. § 351. Northwestern, however, may respond that when loss of business is an event that arises in the ordinary course of events when commercial telephone service is suspended.
11. Avoidability. Marquette also might argue that Northwestern could have avoided the problem either by using other means (like email) to inform Occidental and others with whom it was negotiating that its telephone service was out. Parker v. 20th Cent. Fox; Rest. § 350(1).

[Points for discussing avoidability and uncertainty regarding the loss of the alleged contract with Occidental given only above.]

OTHER

12. Other

Note:

Northwestern is not going to argue that Marquette's promise to provide telephone service is illusory. If Marquette's promise is illusory, then Northwestern would have not claim.

Marquette made a mistake, but it was in the performance of the contract, not the making of contract.

Final Examination In

CONTRACTS I

(Course No. 202-11, 12; 3 credits)

ANSWER GUIDE

Fall 2002 Contract I Grading Guide

PROBLEM I.

This problem was inspired by *Hunt v. Coker*, 741 So.2d 1011 (Miss. App. 1999). (Maximum 3 points for 1, 10, 13; 1 point for 14; 2 points for the rest.)

BUCHANAN v. ACCOMACK [contract to sell]

Claim:

1. Breach of Contract. Buchanan might sue Accomack for breach of contract, claiming that Accomack promised to sell her building and her insurance business to him three months after he moved into the building, and that Accomack then did not sell the building and the business to him.

Defense:

2. No Consideration. Accomack may argued that her promise lacks consideration because Buchanan never made a commitment to pay any price. See *Strong v. Sheffield*. Buchanan, however, may assert that the parties implicitly agreed that he would pay a reasonable price based on how well the combined business worked. Cf. *Wood v. Lucy*.
3. Indefiniteness. Alternatively, even if Buchanan promised to pay a reasonable price, that price is too indefinite to enforce. What is reasonable could be almost anything. See *Varney v. Ditmars*; Restatement § 33.
4. Statute of Frauds. Accomack also might assert that her promise to sell the building comes within the Statute of Frauds. She would argue the written agreement does not satisfy the statute of frauds because it does not state the price, which is an essential term. See text pp. 277-278.

Reply:

5. Promissory Estoppel/Part Performance. Buchanan may assert that he also may overcome both the requirements of consideration, definiteness, and the statute of frauds based on promissory estoppel because he relied on the promise by moving his business. See Restatement § 90; *Feinberg v. Pfeiffer* (consideration); *Hoffman v. Red Owl Stores* (indefiniteness); *Monarco v. Lo Greco* (statute of frauds). But not all states agree about the statute of frauds. The part performance doctrine also may provide an exception to the statute of frauds. *Johnson Farms v. McEnroe*.

Remedy:

6. Expectation Damages. Buchanan might seek expectation damages, equal to amount necessary to put him in the position that he would have been if

the sale had taken place. (Specific performance appears to be impossible because the property already has been conveyed.)

Expectation damages would include the loss in value of the business and the building (i.e., the market value), plus other loss (i.e., the profit Buchanan would have made), minus the cost avoided (i.e., what Buchanan would have had to pay for the business) and minus other cost avoided (i.e., what he can make at his old location that he could not have made if the sale had gone through).

Remedy Limitation:

7. Uncertainty. Accomack will argue that even if the promise is enforceable, Buchanan cannot prove expectation damages with reasonable certainty. The parties never agreed on the purchase price and no one knows how much money Buchanan would have made. See *Collatz v. Fox*.

Buchanan, however, will argue that a court could use the price that the other buyer paid and the profit the other buyer is making to calculate the damages with reasonable certainty.

8. Avoidability. Accomack also will argue that the Buchanan can avoid some of the lost profit by finding a substitute transaction (i.e., merging with another insurance agent or finding a better location). See *Parker v. 20th Century Fox*.

Alternative Remedy:

9. Reliance Damages. As an alternative, Buchanan might seek reliance damages. These would include the costs of moving his business twice, informing his customers of the moves, and the loss of customers. See *Hoffman v. Red Owl Stores*.

BUCHANAN v. ACCOMACK [contract to negotiate in good faith]

Claim:

10. Breach of Contract. Buchanan alternatively might argue that Accomack implicitly promised negotiate the price in good faith, and breached that promise by negotiating with other buyers. See Restatement § 205; *Channel Home Centers v. Grossman*.

Defenses (see also above):

11. No breach. Accomack may assert in response that she in fact negotiated in good faith. She contacted other buyers after Buchanan refused to pay a reasonable price. The subsequent purchase paid a higher price than what Buchanan was offering and still made a handsome profit.

Remedy:

12. Damages. For this claim, Buchanan would seek similar damages to those discussed above. Accomack similarly will contend that they cannot be proved with reasonable certainty.

BUCHANAN v. ACCOMACK [restitution]

Claim:

13. Unjust Enrichment. If no contract is enforceable, Buchanan might claim

that the Accomack was unjustly enriched because some of Buchanan's clients decided to stay with Accomack after Buchanan moved his business back to its original location. See *Cotnam v. Wisdom*.

Remedy:

14. Restitution. Buchanan would receive the reasonable value of the clients' business.

Other

15. Other

It seems unlikely that Accomack will sue Buchanan because Accomack avoided loss by selling to another purchaser.

PROBLEM II.

This problem was inspired by *Bias v. Wright*, 2002 WL 31529005 (Cal. App.). My apologies for the errors in the first paragraph; Charlotte told Dickenson (not Charlotte!) that she would pay for the harm suffered and Dickenson is a "he" not a "she." (Maximum 3 points for 1, 13; 2 points for the rest.)

DICKENSON V. CHARLOTTE

Claim:

1. Breach of Contract. Dickenson might sue Charlotte for breach of contract, claiming that Charlotte made four promises and did not keep any them: (1) she promised to "pay for whatever harm" he suffered; (2) she promised that she "will settle"; (3) she promised to settle for "\$15,000, payment in 180 days"; and (4) she promised to pay an "increase" of \$10,000 for his additional medical bills.

Generally Applicable Defenses:

2. No Consideration. Charlotte might argue that all of her promises to settle lacked consideration. Although Dickenson promised to settle his claim against her in exchange, a promise to settle a claim is not consideration unless the person making the claim had a good faith and reasonable belief in its possible validity. See *Fiege v. Boehm*. Although more facts are needed, Dickenson's sly smile and the subsequent discovery of what actually happened strongly suggests that Dickenson did not have a good faith and reasonable belief in the possible validity of his claim.
3. Misrepresentation. Charlotte might argue that all of her promises are voidable because they were induced by a misrepresentation that she had run a red light. Dickenson, however, might argue that he only expressed an opinion or belief, and did not state a fact. See Restatement § 164(1)
4. Mutual Mistake of Fact. Charlotte might argue that all of her promises are voidable based on a mutual mistake of fact, saying that both parties mistaken believed Charlotte had run the red light. See *Sherwood v. Walker*.
5. Unitateral Mistake of Fact. Charlotte alternatively might argue all of her promises are voidable because she mistakenly thought that she had run the red light, and that it would be unconscionable to hold her to

her promise. See Restatement § 153.

6. Duress. Charlotte also might assert that all of her promises were induced by duress. Dickenson's threat to sue her was an improper threat if he did not have a good faith belief in his claim. See Restatement § 176(1)(c).

Defenses Applicable to First Promise (to pay "for whatever harm"):

7. No acceptance. Charlotte might argue that her first promise was merely an offer, and Dickenson did accept it. On the contrary, instead of indicating acceptance, he made a counteroffer asking for \$15,000. See Restatement § 39.
8. Incapacity. Charlotte might argue that her first promise is voidable because she was too mentally shaken immediately after the accident to act reasonably and Dickenson had reason to know about it. See Restatement § 15(1); *Ortelere v. Teacher's Retirement*.
9. No Consideration. Charlotte also might argue that her first promise lacks consideration because she sought nothing in exchange. She also has no "moral obligation" because she did not receive any benefit.

Defenses Applicable to Second Promise:

10. Lapse of Initial Offer. Charlotte might argue that her second promise ("I will settle") was not acceptance of Dickenson's offer because Dickenson's offer already had lapsed due to the passage of time before she attempted to accept. See Restatement § 41.
11. Improper Means of Acceptance. Charlotte also might argue that her second promise ("I will settle") was not a proper acceptance because it was not done in proper manner. Being in writing, the Dickenson's offer invited a written acceptance; in fact, Dickenson also insisted on a writing. See Restatement § 30; cf. *Allied Steel v. Ford*.

Defense Applicable to Third Promise:

12. Mirror Image Rule. Charlotte might argue that her third promise (to settle "for \$15,000, payment to be made in 180 days") was not the mirror image of Dickenson's offer because it stated that payment did not have to be made for 180 days. See *Minn. & St. Louis Rwy. v. Columbus Rolling Mill*; Restatement § 59.

Defense Applicable to Fourth Promise:

13. Pre-Existing Duty Rule. Charlotte might argue that her fourth promise (to pay the "increase") is not enforceable because Dickenson had a pre-existing duty to settle for \$15,000. See *Alaska Packers v. Domenico*.

In response to the pre-existing duty rule argument, Dickenson might argue that the parties canceled any previous bargain and created a new one because he asked for a new settlement agreement. See *Schwartzreich v. Bauman-Basch*. But Charlotte may say that she viewed her promise as merely a promise of an increased payment.

Alternatively, in a jurisdiction that follows the modern modification rule, Dickenson might argue that additional payment is fair and reasonable in light of the additional medical expenses. See *Watkins & Sons v. Carrig*. But is it fair in light of the video?

Remedy:

14. Expectation Damages: Dickenson will seek \$25,000, \$15,000, or the actual value of the harm he suffered as expectation damages. (His recovery will depend on which, if any, of Charlotte's promises are enforceable.)

Other

15. Other

PROBLEM III.

This problem was inspired by *Fleischer v. Henvy*, 2000 WL 1889703 (Conn. Super.). (Maximum 3 points for 1 and 6; 2 points for the rest.)

ESSEX (owner) v. GRAYSON (trainer)

Claim:

1. Breach of Contract. Essex might sue Grayson for breach of contract, claiming that Grayson promised to train Fulvanna for police work, and failed to finish the training.

Defenses:

2. No breach. Grayson might argue kept his promise to "spend some time training" Fulvanna because he has given her some training. He never promised that to train her to pass a specific test. Essex, however, may respond that the promise to train the dog for police work implied that the dog would pass the standard test required of police dogs.
3. No Assent to be Bound. Alternatively, Grayson might argue that he never assented to be bound. Although what they said sounds a little like a bargain (proceeds from puppies in exchange for training), the parties were not thinking of an enforceable bargain; instead, each was merely doing a favor for the other. Cf. *Lucy v. Zehmer*. (Although this argument might spare Grayson from damages, it would undercut his breach of contract claim below.)
4. Statute of Frauds. Similarly, Grayson might argue that the statute of frauds makes the her promise enforceable because a promise to train a dog for police work could not possibly be kept in one year. The facts lend some support to this proposition because the dog was not trained after 18 months, but was it really impossible? (Again, although this argument might spare Grayson from paying damages, it would undercut his breach of contract claim.)

Remedy:

5. Expectation Damages. Essex would seek \$5000 in expectation damages, the cost to complete the training. See Restatement § 348(2). This amount is not grossly disproportionate to the probable loss in value to Essex because Essex could sell the dog for that much more money.

GRAYSON (trainer) v. ESSEX (owner)

Claim:

6. Breach of Contract. Grayson might sue Essex for breach of contract, claiming that Essex implicitly promised not to sterilize Fulvanna when Essex promised to let her keep the proceeds from Fulvanna's offspring.

Essex broke this implied promise by sterilizing the dog. (Note that Grayson's defenses above may undercut this claim.)

Defenses:

7. No Implicit Promise. Essex will argue that she did not make the alleged implicit promise. Although they contemplated that Fluvanna would have puppies, she never promised to withhold sterilization necessary to protect the dog's health.
8. Mutual Mistake. Alternatively, Essex might argue that the bargain is voidable because it was induced by a mutual mistake that Fulvanna would be able to have offspring and remain healthy. See *Sherwood v. Walker*. (This argument would spare Essex from damages, but would undercut her breach of contract claim.)
9. No Consideration. Similarly, although this argument also would undercut Essex's claim for breach of contract, Essex might assert that her promises to Grayson were merely conditional promises to make a gift. Although they sound like a bargain, and Essex received a benefit, the facts suggest Essex thought she was doing Grayson a favor. Cf. *Kirksey v. Kirksey*. (Again, this argument would spare Essex from damages, but would undercut her breach of contract claim.)

Grayson might reply that, even if Essex was only making a conditional promise to make a gift, this promise should be enforceable under promissory estoppel because Grayson relied on it. He trained the dog for 18 months; on the other hand, maybe he would have done it anyway.

First Choice Remedy:

10. Expectation Damages. Grayson will seek expectation damages, equal to \$12,000, which is the value of a dozen German Shepard puppies that Fulvanna might have had.

Remedy Limitations:

11. Uncertainty. Essex will argue that Grayson cannot prove with reasonable certainty that Fulvanna would have had a dozen puppies. But maybe expert testimony would suffice. See *Fera v. Village Plaza*.

Second Choice Remedy

12. Reliance Damages. Alternatively, Grayson will seek reliance damages. These would include the cost of the training.

GRAYSON (trainer) v. ESSEX (owner)

Claims:

13. Unjust Enrichment. If Grayson cannot prevail on a breach of contract claim, he might argue that he is entitled to restitution for the value of the training given to Fulvanna.

Grayson will claim that Essex is not entitled to restitution because she was a volunteer who trained the dog simply because she loved doing it.

Remedy:

14. Restitution. Grayson will seek restitution damages equal to the reasonable value conferred on Essex. If an trained dog is worth \$15,000, and it would cost \$5000 to complete Fulvanna's training, she is

worth \$10,000 (unless her sterilization has reduced that value). If she was worth \$1000 as an untrained puppy, Grayson has increased her value by \$9000.

Other

15. Other -- Essex may have a claim against the breeder.

PROBLEM IV.

This problem was inspired by *Azze v. Hanover Ins. Co*, 765 A.2d 1093 (N.J. Super. A.D. 2001). (Maximum 3 points for 1, 11; 2 points for the rest.)

MRS. HALIFAX v. ISLE

Claim:

1. Breach of Contract. Mrs. Halifax will claim that Isle implicitly promised not to break anything when he told her not to worry, and that he broke this promise when he ruptured the water bed.

Defenses:

2. No Implied Promise. Isle will assert in defense that he never made the implied promise. He simply told Mrs. Halifax not to worry. At most, he was promising to be careful.
3. No Assent to be Bound. Isle also will argue that, even if did make an implied promise, he did not assent to be bound by it. The context shows that he was just trying to help a neighbor. Cf. *Lucy v. Zehmer*.
4. No Consideration. Isle also will argue that there was no consideration for his alleged promise. He did not bargain for anything in exchange, but instead gratuitously offer to help. Cf. *Kirksey v. Kirksey*.

Mrs. Halifax may reply that, even if there is no consideration, the promise should be enforced on the basis of promissory estoppel. The promise implied by his words "don't worry" induced her to give him permission to attempt to move the bed, and he could foresee that they would. See Restatement § 90.

Remedies:

5. Expectation Damages. Mrs. Halifax will seek expectation damages, equal to her loss in value (i.e., what it would have cost to move the bed) plus the other loss (i.e., the damage to the property).

Remedy Limitations:

6. Unforeseeability. Isle may argue that the damage caused by the spilling water was unforeseeable. See *Hadley v. Baxendale*. But what other hazard could result from moving a water bed with the water in it?
7. Injustice. The second sentence of Restatement § 90 says that, when a promise is enforced on the basis of promissory estoppel, the remedy granted may be limited as justice requires. In this case, Isle will argue that he was merely trying to help, and that holding him liable for all the harm caused seems unjust.

MR. HALIFAX v. ISLE

Claim:

8. Breach of Contract. Mr. Halifax may claim that Isle promised to pay him \$200 if he could not move the bed, that Isle failed to move the bed, and that Isle did not pay him \$200.

Defenses:

9. Public Policy. Isle may argue that his agreement with Mr. Halifax was a bet or wager, and that gambling contracts are or should be unenforceable on the basis of public policy. See Restatement § 178(1); cf. Bush v. Black Industries.

Remedy:

10. Liquidated Damages. Mr. Halifax might seek \$200, saying that it was liquidated damages for failing to move the bed.

MR. & MRS. HALIFAX v. JAMES CITY INSURANCE CO.

Claim:

11. Breach of Contract. Mr. and Mrs. Halifax may claim that the James City Insurance Company promised to compensate them for property damage caused by water flowing from an appliance, that the water bed is an appliance, that water flowed from the bed causing damages, and that James City did not compensate them for the damage.

Defense:

12. No Breach. The James City Insurance Company may argue that it did not breach its promise to pay for water flowing from an appliance because a water bed is not an appliance. It will assert that an appliance refers only to common household machines like washing machines and dish washers, and that no one would describe a bed as an "appliance."

Reply:

13. Strict Construction. Mr. and Mrs. Halifax may argue that the term "appliance" is ambiguous. The term could refer not only to household machines, but to any electric, functional, household item including an electrically heated waterbed. Because the term is ambiguous, it should be construed against the insurance company because it drafted the policy. See Galligan v. Arovitch; Restatement § 206.

Remedy:

14. Expectation Damages. Mr. and Mrs. Halifax will seek expectation damages equal to the amount of the damage, up to the limit of the insurance policy, minus any deductible amount.

Other

15. Other

-- An ambiguity is whether Isle actually "moved" the bed.

Note: The coverage clause is not an exculpation clause because it enlarges rather than reduces the insurance company's liability. Mr. and Mrs. Halifax would not argue that the coverage clause in the insurance policy is unenforceable on grounds of public policy or unconscionability because then

they would no claim against the insurance company. These doctrines do not permit courts to add new terms to a contract.

PROBLEM V.

This problem was inspired by *Guthy-Renker Corp. v. Bernstein*, 1999 WL 1049072 (C.D. Cal.). (Maximum 3 points for each.)

LANCASTER v. KING GEORGE PRODUCTIONS

Claim:

1. Breach of Contract. Lancaster might sue King George for breach of contract, claiming that King George promised to pay him \$10,000 and to display his name on the photograph, and did not keep these promises.

First Remedy for Past Violations:

2. Liquidated Damages. Lancaster might seek liquidated damages for the broadcasts made after King George promised to pay \$500 for each future violations. King George broadcast the advertisement a total of 9,000 times. The facts do not say exactly how many of these occurred after the promise, but it is probably most of them because Lancaster "quickly discovered" the initial violation. The liquidated damages therefore could come close to \$4.5 million dollars (9000 * \$5000 = \$4.5 million).

Responses:

3. Penalty. King George Productions, however, will argue that the \$500 liquidated damages promise is unenforceable as a penalty because it is not reasonable in light of actual or anticipated damages. See Restatement § 356(1); cf. *Dave Gustafson v. State*. The purpose of the payment appears to be deter violations, rather than to compensate Lancaster for injury. Lancaster did not suffer this much damage from having the advertisement run in small television markets at off-peak hours. It is also 250 times the usual market rate.
4. No Consideration. King George Production also might argue that it received no new consideration for its promise to pay liquidated damages of \$500 for each violation. Lancaster never gave anything in exchange for this promise. Indeed, no bargain was proposed that he could accept.

Lancaster, however, might respond that the promise is enforceable based on promissory estoppel. In reliance on the promise, he decided to "wait and see" what would happen rather than immediately "take legal action." See *Feinberg v. Pfeiffer*; Restatement § 90. But can injustice be avoided only by enforcement of this promise?

Second Remedy for Past Violations:

5. Expectation Damages: For all broadcasts before the liquidated damages promise was made, and all subsequent broadcasts if the liquidated damages promise is not enforceable, Lancaster might seek expectation damages. These expectation damages would equal his loss in value (the \$10,000 price) plus other loss (any benefit to his reputation from having his name displayed on the picture). This other loss may be important to Lancaster because he appears to be planning a career in communications.

Response:

6. Uncertainty. King George Productions will claim that Lancaster cannot prove the benefit to his reputation with reasonable certainty. See *Collatz v. Fox Amusements*; Restatement § 352.

Remedy to Prevent Future Violations:

7. Specific Performance/Injunction. It is unclear whether Lancaster wants an injunction barring King George from displaying his photograph without his name in the future. On one hand, Lancaster has made clear that he wants his name displayed on the advertisement because he wants publicity. On the other hand, if he can recover the very high liquidated damages, he might prefer continued breaches.

LANCASTER v. KING GEORGE PRODUCTIONS

Claim:

8. Rescission. If Lancaster cannot collect liquidated damages, and if he was under 18 when he made the promise (as some college freshman are), Lancaster may seek to rescind his contract with King George on ground of infancy. See *Kiefer v. Fred Howe Motors*.
9. Unjust Enrichment. Lancaster then may seek restitution for the value of the use of his photograph. See *Cotnam v. Wisdom*.

Damages:

10. Restitution. Lancaster will seek payment of \$2 for each time the advertisement has run, which the facts suggest is the reasonable value. This would come to at least \$18,000, because the advertisement has run over 9000 times.

Other

11. Other

Final Examination In

CONTRACTS I

(Course No. 202-11, 12; 3 credits)

ANSWER GUIDE

PROBLEM I.

(maximum 3 points for 1, 8, 12, 14; 2 points for the rest)

FANS v. THE KINGS [Assurance]

Claim:

1. Breach of contract. The fans might claim that the Kings, through their public assurances made an implied promise to remain in their home city, and repudiated the promise by announcing their decision to move. Cf. Hoffman v. Red Owl Stores

Defenses:

2. No Implied Promise. The Kings will argue that they did not promise to remain in town, but instead merely said that they had no intention to leave in town. They did not undertake any commitment. Rest. § 2. Cf. Strong v. Sheffield.
3. No Basis for Enforcement. The Kings also will argue that, even if their assurances are construed to be an implied promise, the implied promise would lack consideration because the fans gave nothing in exchange for it. Rest. § 71.

The fans who bought tickets, however, might respond that the implied promise is enforceable on the basis of promissory estoppel because they relied on it when buying tickets. The facts say they wanted to reserve seats in hopes that the Kings would play better in the future, suggesting they would not have bought tickets if they knew the team was leaving. Rest. § 90. But how much injustice have they really suffered?

4. Indefiniteness. The Kings also will argue that any implied promise would be too indefinite to enforce because the team never said how long it would remain in town or what circumstance might change its intentions. Rest. § 33; Varney v. Ditmars.

The fans, however, might respond that less definiteness is required when a promise is enforced on the basis of promissory estoppel. Hoffman v. Red Owl Stores.

Remedies

5. Specific Performance. The fans might seek specific performance of the implied promise to remain in town. The Kings, however, may argue that specific performance is not available because there was not a fair exchange. The Kings received nothing in exchange for the assurance. Rest. § 364; McKinnon v. Benedict.

6. Expectation Damages. Alternatively, the fans might seek expectation damages. The broken promise made them worse off by diminishing their enjoyment of this season because it demoralized the team. It also deprived them of future enjoyment that they might have had from having the team stay in town. *Sullivan v. O'Connor*. The Kings will respond that the damages suffered by the decision to move cannot be measured with reasonable certainty. Rest. § 352; *Collatz v. Fox*.
7. Reliance Damages. Alternatively, if damages cannot be shown with reasonable certainty, the fans might seek reliance damages equal to the price of the tickets. Rest. § 349.

FANS v. THE KINGS [Renewal]

Claim:

8. Breach of Contract. The fans who bought tickets also might claim that Kings repudiated a promise in the tickets to allow them to renew their reserved seat locations.

Defense:

9. Revocation: The Kings might argue in response that the tickets merely contained an offer to allow ticket holders to renew, and that the Kings were free to revoke this offer prior to acceptance because the Kings never promised to keep this offer open. Rest. § 42; *Dickinson v. Dodds*. The fans might respond that the tickets contained an implicit promise to keep the offer open. Cf. *Drennan v. Star Paving*.

Remedies:

10. Expectation Damages. The fans might seek expectation damages to compensate them for the loss of right to renew. This right is presumable equal to the value of season tickets to the fans, minus the cost to renew.

FANS v. THE KINGS [Misrepresentation]

Claim:

11. Rescission. The fans also might seek to rescind the purchase of their tickets because the Kings induced them to buy the tickets by misrepresenting that they had not discussed moving with other cities. This statement may have been fraudulent and was definitely material because fans did not want to buy tickets if the team was going move. Rest. § 164(1).

Defense:

12. No Refund Clause. The Kings might argue that the tickets specifically say that no refund will made. The Fans, however, will assert their agreement to this term also was induced by the misrepresentation, and it is therefore not enforceable.

Remedy:

13. Refund of Purchase Price. The fans would seek a refund of the purchase price of the tickets. The Kings, however, might assert that the fans should have to make restitution for the value of the games that they did

see. Cf. Kiefer v. Fred Howe Motors.

OTHER

14. Other

If the public assurances were not evidenced by a signed writing (such as press release), and they were construed to be a promise to remain in town for more than one year, then the statute of frauds would be an issue. But see Monarco v. Lo Greco.

PROBLEM II.

(maximum 3 points for 1 and 17; 1 point for 1 and 16; 2 points for the rest)

BOTETOURT v. ROCKBRIDGE [firing]

Claim:

1. Breach of Contract. Botetourt may claim that Rockbridge expressly promised to pay it to represent Rockbridge and implicitly promised to act in good faith. It will assert that Rockbridge breached these promises when it terminated the representation simply because Botetourt would not file an unethical counterclaim.

Defense:

2. No Breach (Termination Clause). Rockbridge will argue that it did not breach the contract because the contract contained a termination clause allowing it to end the representation at any time.

Replies:

3. Strict Construction. Botetourt will argue that the Rockbridge only may terminate for a "cause" and that refusing to file a counterclaim is not a cause if filing the counterclaim would be unethical. Galligan v. Arovitch. Rockbridge will reply that any cause means any cause, whether good or bad.
4. Public Policy. Botetourt also will argue that a clause permitting a client to terminate an attorney for refusing to act in an unethical manner violates public policy. Cf. Bush v. Black Indus.

Remedy:

5. Expectation Damages. Botetourt might seek expectation damages equal to any payment owed for the 10 weeks of service plus the amount of money that Rockbridge would have paid if Rockbridge had not improperly terminated the representation, minus the cost of providing the representation.
6. Reliance Damages. As an alternative, Botetourt might seek reliance damages, equal to the costs it incurred in expanding its office and hiring new attorneys and staff. Rest. § 349.

Remedy Limitations:

7. Unforeseeability and Uncertainty. Rockbridge will argue that reliance damages were not foreseeable because Botetourt did not tell them about the need to expand the firm. Also, expectation damages are uncertain

because the duration of the representation was uncertain, especially because Rockbridge had a right to terminate. Rest. § 352; Collatz v. Fox

8. Avoidability. Rockbridge also will argue that Botetourt could avoid some loss by finding other work. Rest. § 350; Parker v. 20th Cent. Fox.

ROCKBRIDGE v. BOTETOURT [retainer]

Claim:

9. Rescission/Unjust Enrichment. Rockbridge wants to recover the retainer. One method be claim that its promise is void (for the reasons stated in nos. 12 and 13 below) and the seek restitution on grounds that Botetourt would be unjustly enriched if it can keep the \$1 million dollar retainer after doing only ten weeks of work. Cf. Cotnam v. Wisdom.
10. Breach of Contract. Another conceivable claim might be that Botetourt breached its promise to represent Rockbridge by refusing to file the counterclaim (especially if filing really was not unethical).

Defense to Restitution Claim:

11. No Unjust Enrichment (non-refundability clause). Botetourt will argue that Rockbridge by contract (1) agreed to make the retainer non-refundable, and (2) decided to terminate the representation; and (3) offered the terms on a take-or-leave it basis. Therefore, its retention is not unjust.

Basis for Rescission:

12. Unconscionability. Rockbridge might reply that the non-refundability clause is unconscionable because \$1 million is grossly excessive for having done only 10 weeks of work. Botetourt might respond that the parties were sophisticated and understood the risks that they were taking. Rest. § 208.
13. Public Policy/Dominant Purpose of the Contract. Rockbridge also might argue that the non-refundability clause violates public policy because a client should have the ability to discharge an attorney. Cf. Bush v. Black Indus. Or it might argue, as the facts suggest, that the clause conflicts with the stated right terminate.

Defenses to Contract Claim:

14. No breach. Botetourt also will argue that it did not breach the promise to represent Rockbridge because it could not file counterclaim consistent with legal ethics.
15. Statute of Frauds. Botetourt also might assert that its oral promise to represent Rockbridge is not enforceable because it could not possibly be completed within a year. (This strategy is risky, however, because it would call into question Botetourt's right to retain the \$1 million retainer.) Rockbridge might respond that the representation could be completed in year, even though it was estimated to take three. (The possibility that Rockbridge might terminate earlier does not take the promise out of the statute of frauds.) Coan v. Orsinger.

Remedy

16. Damages. As the facts state, Rockbridge is most interested in obtaining its \$1 million retainer.

OTHER

17. Other

Rockbridge does not have a statute of frauds defense unless it failed to sign the proposal sent to Botetourt. (Is that likely?)

Is the retainer a penalty clause? Is it even damages?

At will contracts are not illusory.

PROBLEM III.

(maximum 3 points for 1, 6, 11, and 14; 2 points for the rest)

ISLE v. SMYTH [landscaping work]

Claim:

1. Breach of Contract. Isle might claim that Smyth breached its promise to complete the landscaping work.

Defense:

2. Failed Negotiations. Although this argument may create doubt about its ability to retain the \$1 million payment already received, Smyth might argue that it never formed a contract with Isle. Its \$1.1 million bid was an offer. Cf. *Drennan v. Star Paving*. Isle's proposed written agreement was not a mirror image of the offer, and therefore was a counteroffer rather than an acceptance. *St. L. & Minn. R.R. v. Columbus Rolling Mill*. Smyth might assert that it never accepted that counteroffer; it merely read it and saw no objection. Silence ordinarily cannot be an acceptance. Cf. *Hobbs v. Massasoit*.

Isle might reply that Smyth in fact did accept the offer contained in the proposed written agreement merely by starting work. *Allied Steel v. Ford*.

3. Unilateral Mistake. Smyth also might seek to defend on grounds of unilateral mistake (a defense recognized by some courts). Rest. § 153.

Isle, however, might assert that Smyth cannot show the elements necessary for unilateral mistake. In particular, the mistake does not seem unconscionable and Isle did not know of it or cause it. Rest. § 153. In addition, because Smyth rather than Isle had expertise in the area, Smyth should bear the risk of mistake. Rest. § 154; *Lenoard v. Stees*.

Remedy:

4. Expectation Damages. Isle might seek expectation damages equal to \$300,000. Isle is worse off by the \$300,000 it spent to finish the work (loss in value) and by the \$100,000 it must pay to Bath (other loss). Isle is better off by \$100,000 because it has paid Smyth only \$1 million of the \$1.1 million promised (costs avoided).

Remedy Limitations:

5. Avoidability. Smyth might argue that Isle could have avoided some of the damages by hiring someone more experienced to finish the work. Smyth itself was willing to do the work for \$200,000, but would it be reasonable to hire Smyth after Smyth breached?

ISLE v. SMYTH [concrete planters]

Claim:

6. Breach of Contract. Isle might claim that Smyth promised to provide some unused concrete planters (misspelled as "planners" on the exam) if Isle went out to pick them up, and broke that promise by selling the planters to someone else.

Defenses:

7. No Basis for Enforcement. Smyth might assert that the promise was merely a conditional promise to make a gift, and therefore lacks consideration. Kirksey v. Kirksey.

Isle, however, might reply that its action of going out to pick up the planters was bargained for in exchange. It seems like an exchange because this effort was a burden on Isle and a benefit to Smith. Cf. Kirksey v. Kirksey.

In addition, Isle might argue that it relied on the promise by sending trucks out to pick up the planters. Rest. § 90; Fienberg v. Pfeiffer. Smyth, however, might argue that this reliance is so minimal that enforcement is not necessary to prevent injustice.

8. Statute of Frauds. If there is a bargain, and the value of picking up the goods is more than \$500, then the Smyth's promise would have to comply with the statute of frauds.

Remedies:

9. Expectation Damages. Isle might seek the value of the planters.

Remedy Limitations:

10. Requirements of Justice. If Isle is enforcing the promise based on promissory estoppel, the court may limit damages as justice requires. Rest. § 90. Smyth might argue that Isle should recover only the cost of driving out to pick them up.

BATH v. ISLE [lateness]

Claim:

11. Breach of Contract. Bath might claim that Isle breached its promise to meet the deadline for constructing the plaza. (Isle does not appear to have any defenses.)

Remedy:

12. Liquidated Damages. Bath might argue that it is entitled to \$100,000 as liquidated damages.

Remedy Limitations:

13. Penalty. Isle might argue that the \$100,000 amount is unenforceable as a penalty because it is unreasonable large in comparison to actual or anticipated damages. The amount of the damages is not graduated according to the length of delay. Rest. § 356(1); Gustafson v. State. Depending on the facts, however, \$100,000 might be reasonable in light of actual damages.

Other

14. Other

If Smyth were to prevail on its claim that it had not formed a contract with Isle, Isle might seek to recover some of the \$1 million payment made under a theory of restitution.

Isle never agreed to pay Smyth more money. Therefore, there is not question about whether a modification to the contract would be enforceable.

PROBLEM IV.

(maximum 3 points for 1, 7, 11, and 14; 2 points for the rest)

GOOCHLAND v. HALIFAX [promise to negotiate]

Claims:

1. Breach of Contract. Goochland might claim that Halifax implicitly promised to negotiate the sale of her idea when it agreed to meet with her and to discuss the details of the method and the compensation. It broke this promise when it canceled the meeting and developed a method without her. Channel Home Centers v. Grossman.

It is unlikely that Goochland would claim that Halifax broke a promise not to use her method before negotiations were concluded because, even if Halifax made such a promise, the facts make clear that Halifax did not use her method but instead developed its own method.

Defense:

2. Preliminary Negotiations. Halifax might contend that it never made any kind of agreement with Goochland and that this is simply a case of failed negotiations. Cases like Channel Home Centers are very different because they involved an express promise to negotiate to completion.
3. Indefiniteness. Halifax also might argue that promise to negotiate is too indefinite to enforce. The parties never agreed on the scope of the negotiation or the ultimate object.

Goochland, however, may argue that at minimum the parties agreed to meet and discuss terms, and Halifax did not do that. In addition, she relied on the implied promise when she revealed details of her plan. This type of reliance lowers the amount of definiteness needed. Hoffman v. Red Owl Stores.

Remedy:

4. Expectation Damages. Goochland might seek expectation damages equal to

the amount Halifax would have paid her, minus her cost in teaching Halifax the method. (It is not clear that Goochland has incurred any reliance damages.)

Remedy Limitations:

5. Avoidability. Halifax could assert that Goochland could avoid some of the claimed damages by selling her idea to others. Rest. § 350; Parker v. 20th Century Fox.
6. Uncertainty. Halifax also could assert that Goochland cannot prove her damages with reasonable certainty because the parties never agreed on what Halifax would pay. Rest. § 352; Collatz v. Fox Amusement.

GOOCHLAND v. HALIFAX [unjust enrichment]

Claim:

7. Unjust Enrichment. Goochland might claim that Halifax might be unjustly enriched unless it compensates her for suggesting the ribbon curling idea. Cotnam v. Wisdom.

Defense:

8. No Unjust Enrichment (no use of method). Halifax may assert that it did not use Goochland's method. But Goochland might assert that Halifax used her idea, and itself has acknowledged the benefit of this idea.
9. No Unjust Enrichment (volunteer). Halifax further might assert that Goochland volunteered her idea of developing a fast way to curl ribbons (as opposed to the actually method of doing it).

Remedy:

10. Restitution. Goochland might assert that the Halifax must pay her the reasonable value of the services. Cotnam v. Wisdom. In this case, made thousands of dollars using the method and teaching the method to others. Some of that money is attributable to her giving the idea to Halifax

GOOCHLAND v. HALIFAX [\$5000 payment]

Claim:

11. Breach of Contract. Goochland might claim that Halifax breached its promise to send \$5000.

Defenses:

12. No Basis for Enforcement. Halifax might claim that the promise lacks a basis for enforcement. There is consideration because Goochland had already given them the idea before they promised to pay \$5000. Feinberg v. Pfeiffer. In addition, no facts suggests that Goochland relied on the payment.

Goochland, however, may argue that the promise should be enforced on the basis of moral obligation because Halifax made the promise in recognition of a past benefit received. Rest. § 86; Webb v. McGowin. Not all courts, however, recognize this basis of enforcement. Dementas v. Estate of Tallas.

Remedy:

13. Expectation Damages. Goochland might seek \$5000 in damages.

Other

14. Other

PROBLEM V.

(maximum 3 points for 1, 6, 9, 14; 2 points for the rest)

DINWIDDIE v. RUSSELL [additional \$10,000]

Claim:

1. Breach of Contract. Dinwiddie might claim that Russell promised to pay her an additional \$10,000 to complete the car, and did not do it.

Defenses:

2. No Consideration (Pre-Existing Duty Rule). Russell also might argue that the promise to pay the additional \$10,000 lacks consideration because Dinwiddie had a pre-existing duty to complete the conversion for \$30,000. *Alaska Packers v. Domenico*.

Replies:

3. New Consideration. Dinwiddie might respond that there is new consideration for the additional \$10,000 promised because the parties agreed no change to the shape of the body would be made. This requirement arguably was not present in the original agreement.

4. Modern Modification Rule. Dinwiddie alternatively might argue that the promise should be enforceable without new consideration because the parties modified the contract in light of unforeseen circumstances. Rest. § 89; *Watkins & Sons v. Carrig*.

Remedy:

5. Expectation Damages: Dinwiddie might seek \$10,000 in expectation damages. (Russell, however, may have a counter-claim that might reduce this recovery; see below.)

RUSSELL v. DINWIDDIE [maintain shape of body]

Claim:

6. Breach of Contract. Russell may claim that Dinwiddie promised not to change the shape of the body, and breached this promise by changing the shape of the fenders. [Note: This claim also might be asserted as a defense, as in *Jacob & Youngs v. Kent*.]

Remedy:

7. Expectation Damages: Russell might seek expectation damages. He might argue that his loss in value is the difference between the value of his

car with the original shape of the fenders and the changed shape, which he might say should be measured by the \$4500 cost to repair.

Remedy Limitation:

8. Unavailability of Cost to Remedy: Dinwiddie might reply that Russell cannot collect the full amount of the cost to reshape the fenders because it is grossly disproportionate to the probable loss in value to Russell. The problem says that an ordinary person would not have noticed. Rest. § 342, *Jacob & Youngs v. Kent*.

Dinwiddie, however, might respond that he subjectively wanted the car to look a particular way, and \$4,500 is not grossly disproportionate given the overall price of the repairs. Also, the fact that he paid the \$4,500 confirms that it matters to him. This is not like two identical types of pipe.

RUSSELL v. CAROLINE [delay]

Claim:

9. Breach of Contract. Russell might claim that Caroline breached her promise to repair the fenders in one month.

Remedy:

10. Expectation Damages: Russell might seek expectation damages for the delay. Although he may have only a small loss in value because she did the work, he might argue that the delay caused two "other losses."

One "other loss" is the lost prize money that he might have made from racing during the summer. The following summer, this was \$42,000.

Another "other loss" is his loss of enjoyment from racing, which the facts say that he loved.

Remedy Limitations:

11. Avoidability. Caroline might argue that Russell must include as "other loss avoided" the amount of money that it would cost him to race. Last summer this was \$48,000. This may cancel out the "other loss." Rest. § 350.
12. Uncertainty. In addition, Caroline might assert that Russell cannot prove the damages from the loss of enjoyment with reasonable certainty. Rest. § 352; cf. *Collatz v. Fox Amusement*.
13. Unforeseeability. Caroline may argue that the damages were not foreseeable because she did not know that her delay would keep Russell from winning prize money. Russell, however, may argue that losses of prize money and enjoyment from racing arise in the ordinary course of events when dealing with race cars.

Other

14. Other

If Russell has not paid Caroline, she might seek the \$4500 from him. An assumption is that the fenders are part of the car's body.

Final Examination In
CONTRACTS I
(Course No. 202-14; 3 credits)
Professor Gregory E. Maggs

GRADING CHECKLIST

PROBLEM I.

(Maximum scores: two points for items 10-13;
three points for all other items)

Tazewell v. Pulaski [Breach of Lease]

Claim:

1. Breach of Contract. Tazewell might sue Pulaski for breach of contract, claiming Pulaski promised to lease her a space in his casino for 6 years at a rental rate of 7% or 8% of monthly sales (discussed below), and broke the promise by leasing to someone else.

Defenses:

2. No Offer/Acceptance by Pulaski. Pulaski will argue in defense that he and Tazewell do not have a lease because (1) he never accepted any offer that Tazewell may have made, and (2) he never made an offer that Tazewell could accept. In support of this defense, Pulaski will make four assertions:

First, his remark that there would be "little difficulty" in concluding an agreement was not an acceptance of Tazewell's August offer because it showed that he was not at the time accepting the offer, but at most might do so later. Tazewell has little response to this argument.

Second, his letter of Nov. 1 rejected rather than accepted Tazewell's offer to lease for 7% of monthly sales because it expressed an unwillingness to lease for less than 8%. Tazewell has little response to this argument.

Third, his letter of Nov. 1 was not an offer because the letter did not manifest a willingness to enter a bargain. It merely said that Pulaski would not rent for less than 8%, not that he would rent at 8%. Owen v. Tunison; Rest. 24. Tazewell, however, might respond that Pulaski's statement that "[o]therwise, everything else is fine" reasonably indicated that he was making an offer which she then accepted (see below).

Fourth, if Tazewell's response to his Nov. 1 letter is an offer, Pulaski never sent an acceptance in response. Tazewell also has little response to this argument.

3. No Acceptance by Tazewell. Pulaski also will argue in defense that,

even if his Nov. 1 letter was an offer, Tazewell did not accept it. On the contrary, Tazewell's response was a rejection and a counteroffer. It was not a mirror image of the purported offer because Tazewell indicated that she wanted a lease for only three years. *M. & St. L Railway v. Columbus Rolling-Mill*; Rest. 59. Tazewell will respond that she accepted the offer for 6 years, and merely requested a modification to reduce the term to 3 years.

Remedy:

4. Expectation Damages. Tazewell will seek expectation damages equal to the profit that she would have made in the casino, less any amount she avoids by relocating to a new store. Expectation damages would not include any expenses she would have incurred anyway, like storing her equipment before the new lease was to begin.

Remedy Limitations:

5. Uncertainty. Pulaski may argue that the amount of profit that she could recover cannot be proved with reasonable certainty because she never had a chance to run the store. Rest. 352.

Tazewell, however, has evidence of her past profits in her old store and her experience over the summer. She also might have expert witnesses testify. *Fera v. Village Plaza*.

Tazewell v. Pulaski [Breach Assurances Made During Failed Negotiations]

Claim:

6. Breach of Contract (Promissory Estoppel). Tazewell alternatively might sue Pulaski for breach of contract, claiming that Pulaski promised that "any financial issues" would be resolved and that "there would be little difficult in concluding an agreement," and that he broke these promises by leasing the space to another tenant while negotiations were continuing. *Hoffman v. Red Owl Stores*.

Defenses:

7. No Basis for Enforcement. Pulaski will argue in defense that Tazewell's promise lacks a basis for enforcement. No consideration was given in exchange for the assurances. The elements of promissory estoppel also are not satisfied. Although Pulaski's promises did induce her to close her old store, Pulaski may argue that no "injustice" would result from not enforcing his promises. Pulaski will assert that a court should hesitate to find liability during preliminary negotiations, that Tazewell knew that she did not have a lease at the time she closed her old store, and that he never said that closing the store would resolve the matter. This case is thus much different from others in which courts have enforced promises or assurances based on promissory estoppel. Cf. *Hoffman v. Red Owl Stores*; *Feinberg v. Pfeiffer*.
8. Indefiniteness. Pulaski also may argue in defense this promise is too indefinite to enforce. At the time it was made, the parties had no idea what the terms of the lease might be or what the financial issues might be. *Varney v. Ditmars*; Rest. 33.

Tazewell may respond that courts do not require as much definiteness in promissory estoppel actions. *Hoffman v. Red Owl Stores*, Rest. 90.

Remedy:

9. Reliance Damages. Tazewell would prefer expectation damages, but if she cannot recover them, she might seek reliance damages to put her in the position that she would have been in if the promise had not been made. Hoffman v. Red Owl Stores. These damages would include her expense of moving and loss of business.

Pulaski v. Tazewell [Summer Sales]

Claim:

10. Unjust Enrichment. Pulaski will argue that it would be unjust enrichment for Tazewell not to pay 8% of the profit she made running the vending cart during the summer. Note: Pulaski would have difficulty claiming the Tazewell breached a contract because she apparently never made a promise to pay.

Defense:

11. No Expectation of Compensation. Tazewell will argue that it would not be unjust enrichment because Pulaski allowed her to use the space to persuade her to sign a lease, with no expectation of compensation.

Remedy:

12. Reasonable Value. Pulaski could recover the reasonable value of giving her permission. This would not necessarily equal 8% of her sales.

Other

13. Other

There is no substantial statute of frauds issue here. Tazewell's first claim seeks to enforce a promise contained in the written Nov. 1 letter. Her second claim seeks to enforce an assurance or promise that a lease could be agreed upon. The subject of this assurance is not itself a lease and could be performed in one year.

Pulaski does not have a valid defense that 8% of sales is an illusory promise because Tazewell would have a duty to exercise reasonable efforts. Wood v. Lucy.

PROBLEM II.

(Maximum scores: two points for items 4, 7, 10-13;
three points for other items)

Culpeper v. Gloucester University School of Law

Claims:

1. Breach of Contract [Probation Rule]. Culpeper might sue Gloucester University for breach of contract, claiming that Gloucester promised in the Handbook to give him one semester of probation before dismissing him for having a GPA under 2.2, and breached that promise by dismissing him immediately after his grades fell.
2. Breach of Contract [Implied Term of Good Faith/Reasonableness]. Culpeper also may claim that, even if Gloucester had discretion to change the rules regarding dismissal, Gloucester breached an implied promise to act in a good faith and reasonable manner when it selected a

new rule in the middle of the semester, causing him a total forfeiture of 3 semesters of law school with no way of curing his default. Cf. *Wood v. Lucy*; *Mattei v. Hopper*.

Defense:

3. No Breach [Probation Rule]. Gloucester will argue that it did not breach the probation rule because it changed the rule in a manner permitted in the Handbook. *Lucy v. Zehmer*.

Responses:

4. Strict Construction. Culpeper will argue that, in the Handbook, Gloucester only reserved the right to change the "the tuition, fees, schedule, or academic program," and that the probation period does not fall within any of these categories. *Galligan v. Arovitch*.
5. Unconscionability. Culpeper also may argue that a clause allowing Gloucester to change any of its rules at any time is unconscionable and that the particular rule the law school chose is unconscionable. The law school theoretically could expel all of students on the eve of graduation, keeping their money and giving them nothing. Restatement 205; *Henningsen v. Bloomfield Motors*. Gloucester will reply that the educational process necessitates changes and there is nothing inherently improper about the clause because the implied duty of good faith would prevent any outrageous changes.

Defense:

6. Modification/Waiver. Gloucester also will argue that Culpeper agreed to the modification in the rules, or at least waived any objection, when he did not protest the change after receiving notice. *Toys Inc. v. F.M. Burlington*.

Responses:

7. No acceptance. Culpeper will argue that the change in the rules was at most a proposal to change the contract, which he did not accept by his silence. *Hobbs v. Massosoit*; Rest. 69.
8. No Consideration. Culpeper also will argue that, even if he did agree to the modification, it lacked consideration because he did not receive anything in exchange for giving up his right to probation. *Arzani v. People*. The modification also was not reasonable in view of changed circumstances such that no new consideration was needed because there were no changed circumstances. *Watkins & Sons v. Carrig*; Rest. 89.

Defense:

9. No breach of Implied Duty. Gloucester also will argue that, even if it did have an implied duty to act reasonably and in good faith, this duty did not prevent it from altering or eliminating a probation period which is not an unusual academic move.

Remedies:

10. Specific Performance. Culpeper will seek specific performance, meaning readmission into law school with a probation period. He will argue that damages would be inadequate because he cannot gain admission to any other accredited law school and may have difficulty proving damages. See Rest. 360

11. Expectation Damages. Culpeper alternatively will seek expectation damages. His loss in value is the loss of the promised probation period. His other loss includes his lost earnings as an attorney to the extent that they are not avoidable by other work.
12. Alternative Damages. Culpeper alternatively might seek reliance damages, equal to the tuition that he already has paid. As a last resort, he might ask the court to award nominal damages.

Remedy Limitations:

13. Uncertainty. Gloucester will respond that Culpeper cannot prove any damages with reasonable certainty. Even if he had been given a probation period, he might not have raised his GPA sufficiently. Also, there is no way to value the probation period or to estimate the earnings that Culpeper might have earned.

Other

14. Other

Culpeper's claim rests on an argument that Gloucester University promised him a semester of probation in the handbook. Accordingly, Culpeper does not want to argue that the handbook as a whole is invalid.

Lack of adequate notice is a weak argument because he read the notice put in his mail box.

PROBLEM III.

(Maximum scores: two points for items 2-7, 9, 11, 14;
three points for other items)

Loudoun v. Dickenson [Failure to Turn Tickets over Bedford]

Claims:

1. Breach of Contract. Loudoun may sue Dickenson for breach of contract, claiming that she made an implied promise to sell two of the tickets for each game to Bedford based on their long course of dealing, and she broke the promise by agreeing to sell the tickets to Wythe. Cf. Wood v. Lucy.
2. Rescission (Unilateral Mistake). Alternatively, Loudoun will seek to rescind his sale of the tickets to Dickenson based on his unilateral mistake in assuming that Dickenson would transfer the tickets to Bedford. Rest. 153.
3. Rescission (Non-Disclosure/Confidential Relation). Loudoun alternatively may seek to rescind on grounds that he and Dickenson were not dealing at arms' length because of their longstanding friendship. She therefore had a duty to disclose that she would not sell tickets to Bedford. Rest 161(d).

Defenses:

4. No Promise/Breach. Bedford will defend on grounds that she never made an implied promise to sell two tickets for each game to Bedford. If Loudoun had wanted Bedford to have the tickets, he should have given them to him directly as he had done in the past.

5. Bare Non-Disclosure. If the jurisdiction does not recognize unilateral mistake as a basis for rescission, Bedford may assert that she at most committed a bare non-disclosure. *Swinton v. Whitinsville Savings*.

Remedy:

6. Specific Performance. If Loudoun prevails on the breach of contract claim, he will seek specific performance, asking the court to require her to turn the tickets over to Bedford. Damages would not be an adequate remedy because no other tickets are available. *McKinnon v. Benedict*; Rest. 360.
7. Return of Tickets. Alternatively, if he prevails on either rescission claim, Loudoun will seek to have the tickets returned to him provided that he refunds the price.

Bedford v. Loudoun [Giving Tickets to Dickenson]

Claim:

8. Breach of Contract. Bedford (who is furious) might sue Loudoun for breach of contract, claiming that Loudoun breached an implied promise to sell two of the tickets for each game him each year. The implied promise arose from their long course of dealing. *Wood v. Lucy*.

Defenses:

9. No Promise/Bargain. Although this position might contradict his claim against Dickenson, Loudoun might defend on grounds that he never made an implied promise to sell two tickets for each game to Bedford. Each year, he just made a gift of the tickets to Bedford by selling them to him at face value, which is much less than actual value. Bedford might respond that the things exchanged do not have to be equal in value for a court to find a bargain. *Hamer v. Sidway*.
10. Statute of Frauds. Loudoun will argue that the implied promise to sell him two tickets for each game every year is not enforceable under the statute of frauds because it could not be completed in a year.

Remedy:

11. Expectation Damages. Because Loudoun does not have the tickets, Bedford may seek expectation damages, equal to the difference between the face value and actual value of the tickets. Loudoun, however, will assert that there is no difference in value because it is unlawful to sell the tickets for more than face value.

Wythe v. Dickenson [Raising the Price]

Claim:

12. Breach of Contract. Wythe might sue Dickenson for breach of contract, claiming that Dickenson broke her promise to sell the tickets at \$50 over face value when she later insisted on \$75.

Defenses:

13. Public Policy. Dickenson will assert that public policy prohibits enforcing a contract to sell the tickets over face value because the sale is illegal. She therefore does not have to sell at all. Wythe may

argue, however, that the law restricting resale is designed to protect buyers, not seller. She therefore should not be able to refuse to sell.

Remedy:

14. Specific Performance. Wythe may seek an order requiring Dickenson to turn over the tickets either at face value or at the original price upon which they agreed.

Other

15. Other

Any discussion of U.C.C. statute of frauds as applied to tickets

Any discussion of possible claims by the sports team

PROBLEM IV.

(Maximum scores: three points for all items)

Henrico v. SPS

Claim:

1. Breach of Contract. Henrico might sue SPS for breach of contract, claiming that SPS broke its promise to deliver the package in one day.

Defense:

2. Exculpation Clause. SPS will argue in defense that it has no liability beyond \$100 (which it already has paid) because of the exculpation clause in the contract.

Responses:

3. Strict Construction. Henrico will argue that the exculpation clause, strictly construed, refers only to the intrinsic value of whatever is shipped. It does not refer to consequential damages from late delivery. Galligan v. Arovitch; Rest. 205.
4. Adequate Notice. Henrico may argue that it did not have adequate notice that it was making a contract. It may have thought that it merely was indicating the type of shipment (one day) and the address of the recipient. Klar v. H & M Parcel; Rest. 211. On the other hand, his signature was required, and a signature is a typical requirement of a contract.
5. Public Policy/Unconscionability. Henrico may argue that it violates public policy to limit liability to so low an amount. Henningsen v. Bloomfield Motors; Rest. 208. SPS, however, will say that Henrico had the opportunity to declare a large amount. Also, SPS cannot keep the price for delivery low without limiting its liability. Cf. Klar v. H & M Parcel.

Remedies:

6. Expectation Damages. Henrico will seek expectation damages equal to \$400,000. It suffered \$1.4 million in other loss, but avoided \$1 million in costs.

Remedy Limitations:

7. Avoidability (Verifying delivery). SPS will argue that Henrico could have avoided the damages by contacting the DOT and making sure that the package arrived on December 17. If the package had not arrived, Henrico could have found alternative way to send a replacement package.
8. Avoidability (Substitute arrangements). SPS will argue that Henrico could have avoided some damages by finding alternative work to fill time freed by not having to perform under the highway contract. Parker v. 20th Century Fox.
9. Foreseeability. SPS will argue that it could not foresee that Henrico would lose \$400,000 by a late delivery, even if Henrico told the driver the nature of shipment.
10. Uncertainty (Fact of Loss). SPS will argue that Henrico cannot prove with reasonable certainty that it actually would have gotten the contract. Even though it was the low bidder, its bid might have been unacceptable. Collatz v. Fox Amusements; Rest. 352.
11. Uncertainty (Extent of Loss). SPS will argue that Henrico cannot prove with reasonable certainty that its costs of production would have been only \$1 million because it never produced beads of this type before. Indeed, there is reason for skepticism because Henrico had made the lowest bid. Perhaps Henrico can show evidence of similar projects or use expert testimony. Fera v. Village Plaza; Rest. 352.

Other

12. Other.

Henrico does not appear to have a claim against DOT. Nothing in the facts suggests that DOT accepted his offer. DOT made no offer of its own.

PROBLEM V.

(Maximum scores: three points for items 4, 7, 9, 14;
six points for item 11; two points for all other items)

Madison Games v. Washington Publishing

Claims:

1. Breach of Contract (Annual Fees). Madison Games might sue Washington Publishing for breach of contract, claiming that Washington Publishing breached its promise to pay the \$300,000 annual fee in the second and third years even though it sold the game in those years.
2. Breach of Contract (Promotion). Madison Games may claim that Washington Publishing breached an implied promise to use reasonable efforts to promote the game. Wood v. Lucy.
3. Breach of Contract (Royalties in Third Year). Madison Games may claim that Washington Publishing breached its promise to pay royalties on the \$10,000 worth of remaining inventory. (Alternatively, it might seek compensation on grounds of unjust enrichment if there is no enforceable contract in the third year.)

Defense:

4. Modification (Annual Fees). Washington Publishing may argue in defense that he does not have to pay the annual fees because the parties terminated the contract or modified it in view of the changed circumstances. *Schwartzreich v. Bauman-Basch, Watkins & Sons v. Carrig.*

Response:

5. No Acceptance. Madison Games may respond that Washington Publishing at most offered to modify the contract and that its silence cannot constitute an acceptance. *Hobbs v. Massasoit; Rest. 69.*

In response, Washington Publishing may contend that, in this business setting, silence does constitute acquiescence. Madison Games would be expected to protest if it did not agree because their contract was on an "at will" basis. Washington Publishing was indicating that it would terminate if it had to keep paying.

6. No Consideration. Madison Games also may argue that Washington Publishing had a pre-existing duty to pay \$300,000 a year and that there is no consideration for any modification. *Arzani v. People.*

Defense:

7. No Breach (Annual Fees in Third Year). Washington Publishing also may argue that, in any event, it did not have to pay the \$300,000 or royalties in the third year because it expressly had terminated the license agreement at the end of the second year. It will assert that it was implied that it could sell off its remaining inventory.

Response:

8. No Termination. Madison Games will argue that Washington Publishing really had not terminated the contract because it continued to sell its inventory.

Other Defense:

9. Mutual Mistake. Washington Publishing also may argue that the promise to pay \$300,000 annual was based on a mutual mistake about the size of annual sales. Madison Games will respond that the parties did not make a mutual mistake, just a poor prediction. *Wood v. Boynton.*
10. No Implied Promise (Advertising). Washington Publishing also will argue that there was no express requirement that it advertise the game and that there are two reasons such a duty should not be implied. First, the \$300,000 minimum payment is designed to provide compensation and give discretion to Washington Publishing. Second, the contract was terminable at will if Madison Games did not like the way Washington Publishing was exercising its discretion.

Remedies:

11. Expectation Damages. Madison Games might seek expectation damages. It will claim that its loss in value includes:
 - (a) \$600,000 for annual fees not paid in the third year;
 - (b) \$1,500 for royalties on the remaining inventory
 - (c) \$4 million for lost royalties

Remedy Limitations:

12. Uncertainty. Washington Publishing will assert that Madison Games cannot prove with reasonable certainty that it would have made \$4 million in royalties. *Fera v. Village Plaza*; Rest. 352.
13. Avoidability. Washington Publishing also may assert that Madison Games should have terminated the contract if it thought there was a breach. See *Luten Bridge v. Rockingham County*. Madison Games then could have avoided some of the loss by advertising itself or in make up the sales in the future. *Parker v. 20th Century Fox*.

Other

14. Other

A contract terminable at will is not illusory.

The George Washington University Law School
Associate Professor Gregory E. Maggs

Final Examination In Contracts I
(Course No. 202-14; 3 credits)
Administered December 17, 1999

ANSWER GUIDE

Problem I.

HENRY v. FROG KING

Claim:

1. Breach of Contract. Henry's claim that Frog King breached its promise to provide him the drug during the safety trial if the drug proved to be effective.

Defenses:

2. No consideration. Frog King's defense that there was no consideration because the promise was merely a conditional promise to make a gift. See *Kirksey v. Kirksey*.
3. Statute of Frauds. Frog King's defense that the statute of frauds made its promise unenforceable, unless in writing and signed, because the promise could not be completed in one year.
4. Indefiniteness/Implied Limitations. Frog King's defenses that its promise was too indefinite to enforce or that there was an implied term that the drug was not "effective" or would not be provided if it turned out to be dangerous. Cf. *Wood v. Lucy*.
5. Mutual Mistake. Frog King's defense that the parties made a mutual mistake in assuming that the drug was not potentially fatal. See *Sherwood v. Walker*.
6. Public Policy. Frog King's defense that it would violate public policy to enforce a promise to provide a drug that has proved to be dangerous. Cf. *Bush v. Black Industries*.

First Choice Remedy:

7. Specific Performance. Henry's desire for specific performance because the drug is experimental and not available for purchase with money.

Remedy Limitations:

8. Unfairness of Exchange. Frog King's argument that specific enforcement is inappropriate because the exchange is not fair; Frog King would have to produce a dangerous drug that it has decided not to develop, when Henry does not have to give up anything. See *McKinnon v. Benedict*.

Second Choice Remedy:

9. Damages. Henry's desire for expectation damages to

compensate him for the loss of the drug.

Remedy Limitations.

10. Uncertainty. Frog King's argument that Henry cannot prove the value of the drug with reasonable certainty because it is experimental and not available for purchase. Cf. Collatz v. Fox Amusements.

CINDERELLA v. FROG KING

Claim:

11. Claim for Compensation. Cinderella's claim (whether in contract or tort) against Frog King, seeking compensation for her injuries. Cf. Galligan, Klar, O'Callaghan, Henningsen (all of which involved tort claims).

Defenses:

12. Promise to Waive Claims. Frog King's defense that Cinderella waived her claims by contract because the instructions said that the drug came with no guarantees of effectiveness. Cf. Galligan, Klar, O'Callaghan, Henningsen.

Responses to Defenses:

13. No Consideration (Pre-existing Duty Rule). Cinderella's response that her promise not to bring a claim lacks consideration because Frog King already had promised to give her the drug. See Arzani v. State.
14. Strict Construction. Cinderella's response that the waiver, strictly construed, does not apply because she is not challenging the drug's efficacy, but instead its safety. See Galligan v. Arovitch.
15. Lack of Adequate Notice. Cinderella's response that she did not have adequate notice that she was assenting to contractual terms because instructions do not ordinarily contain contractual terms. See Klar v. H & M Parcel.
16. Unconscionability/Public Policy. Cinderella's response that a waiver of liability for injury is unconscionable or violates public policy. See O'Callaghan, Henningsen.

Remedy:

17. Damages. Cinderella's desire for damages applicable to her claim.

Other

18. Other

Problem II.

HANSEL v. DARK FOREST INSURANCE CO.

Claim:

1. Breach of Contract. Hansel's claim that Dark Forest breached its promise to compensate him for his losses.

Defenses:

2. No Acceptance. Dark Forest's defense that, although Hansel made an offer when he completed the insurance application, Dark Forest never accepted it as required by the offer, and Hansel's response that Dark Forest implicitly accepted the offer by retaining his premium payment. See *White v. Corlies & Tift*; *Allied Steel v. Ford*; *Conroe v. Int'l Filter*.
3. No Breach. Dark Forest's defense that its policy covers "uninsured" motorists and Hansel was struck by an "insured" motorist.

Remedy:

4. Expectation Damages. Hansel's desire for expectation damages necessary to compensate him for his medical bills according to the policy.

HANSEL v. DARK FOREST INSURANCE CO.

Claim:

5. Unjust Enrichment. Hansel's claim that, if an insurance contract was not formed, Dark Forest would be unjustly enriched by retaining his premium. Cf. *Cotnam v. Wisdom*.

Remedy:

6. Restitution. Hansel's desire for restitution of the premium payment.

GRETEL v. DARK FOREST INSURANCE CO.

Claim:

7. Breach of Contract. Gretel's claim that Dark Forest Insurance Company breached its promise to compensate her because it has refused to pay for her subsequent losses.

Defenses:

8. Settlement Agreement. Dark Forest's defense that Gretel agreed to take only \$1500 as compensation for all claims.

Responses to Defenses.

9. Strict Construction. Gretel's response that the settlement covers only claims that already had arisen out of the accident, or at least that ambiguities should be construed against the drafter. See *Galligan v. Arovitch*.
10. Lack of Consideration. Gretel's response that she received no consideration for agreeing to accept less than the full amount of her claim, and Dark Forest's reply that a promise

to forgo its defense that her claim was excessive can be consideration. Cf. Fiege v. Boehm.

11. Mutual Mistake. Gretel's defense that both she and Dark Forest were induced by a mutual mistake about the extent of her injuries to settle for \$1500. See Sherwood v. Walker.

Remedy:

12. Expectation Damages. Gretel's desire for complete compensation for the losses claimed after the settlement.

Other

13. Other

Problem III.

WOLF v. RED HOOD DISTRIBUTORS

Claim:

1. Breach of Contract. Wolf's claim that Red Hood breached an implied promise to use its best efforts to assist Grandma's Cupboard to find products, and Wolf's position that it never promised any specific level of work. Cf. Wood v. Lucy.

Defenses:

2. No Consideration (Illusory Promise) Red Hood's defense that there is no consideration for its alleged promise because Wolf's return promise of 3% of sales is illusory (given that there may be no sales), and Wolf's response that his return promise is not illusory because he had an implied duty to exercise best efforts. See Wood v. Lucy.
3. Indefiniteness. Red Hood's defense that the terms of the contract are too indefinite to enforce, and Wolf's response that Red Hood's assurances nonetheless can be enforced because he reasonably relied on them. See Hoffman v. Red Owl Stores.
4. No Assent to be Bound. Red Hood's defense that it did not assent to be bound, but merely made a gentleman's agreement as signified by the handshake. Cf. Lucy v. Zehmer.
5. Statute of Frauds. Red Hood's possible defense that this type of promise has to be in writing if it involves a sale goods with a price of \$500 (although it appears that Red Hood was only an agent, and not a seller).

Remedy:

6. Expectation Damages. Wolf's desire for expectation damages, equal to \$5000 per month times 100 schools, minus costs avoided and so forth.
7. Reliance Damages. Wolf's alternative desire for reliance damages, including some of the salary he lost when he quit his job to work on the project.

Remedy Limitations:

8. Avoidability. Red Hood's argument that Wolf could have avoided the problem by seeking the assistance of a different agent. See *Parker v. 20th Century Fox*
9. Uncertainty. Red Hood's argument that Wolf lacks proof that he would have earned all of this money. See *Collatz v. Fox Amusements*.

SCHOOLS v. WOLF/GRANDMA'S CUPBOARD

Claim:

10. Breach of Contract. The claims of the schools who agreed to participate in Grandma's Cupboard that Wolf broke his promises to them by backing out of the "long-term contracts."

Remedy:

11. Damages. The schools' desire for ten percent of the projected sales, minus costs avoided and so forth.

Remedy Limitations.

12. Avoidability. Wolf's argument that the schools could have avoided some of the losses by hiring someone else to purchase the groceries and make the sales. Cf. *Parker v. 20th Century Fox*.
13. Uncertainty. Although it may undercut his claim for damages against Red Hood, Wolf may argue that the schools cannot prove their losses with reasonable certainty. See *Fera v. Village Plaza*.

Other

14. Other

Problem IV.

HARE FREIGHT SERVICES v. RUMPELSTILTSKIN PROPERTIES

Claim:

1. Breach of Contract. Hare's claim that Rumpelstiltskin repudiated its promise to lease the pier to Hare for \$3.5 million.

Defenses:

2. No Offer/Acceptance. Rumpelstiltskin's defense that the communications between it and Hare did not form a contract but instead constituted only preliminary negotiations, offers, and counteroffers. See *Owen v. Tunison*; *St. Louis Rwy v. Columbus Rolling Mill*; *Int'l Filter v. Conroe Ice, Light & Gin*.
3. Indefiniteness. Rumpelstiltskin's defense that its alleged

promise to lease the pier is too indefinite to enforce because of the open issues about the truck yard and security deposit. See *Varney v. Ditmars*.

4. Statute of Frauds. Rumpelstiltskin's defense that its alleged promise to lease the premises for four years must be in writing and signed to be enforceable because it could not be completed in less than a year, and Hare's response that Rumpelstiltskin did sign the cover letter with the lease.

First Choice Remedy:

5. Specific Performance. Hare's desire for specific performance because it has been on the premises for many years and presumably does not want to move.

Remedy Limitations.

6. Adequacy of Money Damages. Rumpelstiltskin's argument that specific performance is inappropriate and that money damages would be adequate because this promise does not involve the sale of land.

Second Choice Remedy:

7. Damages. Hare's alternative desire for damages equal to the costs of moving and the additional amount that it must pay to rent another pier.

RUMPELSTILTSKIN v. HEDGEHOG

Claim:

8. Breach of Contract. Rumpelstiltskin's claim that Hedgehog breached its promise to rent the pier for \$4.5 million.

Defense:

9. Asserted Defense. Hedgehog's asserted (although seemingly invalid) defense that he does not have to keep the contract because it does not want to get involved in a dispute between Hare and Rumpelstiltskin that it did not know about.

Remedy:

10. Damages. Rumpelstiltskin's desire for expectation damages equal to \$4.5 million, minus any costs avoided, and so forth.

Remedy Limitations.

11. Avoidability. Hedgehog's argument that the amount of recovery must be reduced by the \$3.5 million that could have been avoided by entering an agreement with Hare.

Other

12. Other

Problem V.

SNOW WHITE v. GRUMPY TECHNOLOGY

Claim:

1. Breach of Contract. Snow White's claim that Grumpy Technology breached its promise to treat the entire 300,000 tons of soil.

Defenses:

2. Misrepresentation. Grumpy's defense that Snow White made a misrepresentation or committed a half-truth when it "neglected to reveal the full extent of the problem." See Kannavos v. Annino.
3. Unilateral Mistake. Grumpy's alternative defense that the contract should be voidable based on its unilateral mistake. Compare Swinton v. Whitinsville Savings Bank with Restatement (Second) § 153.
4. Cancellation/Claim for Breach. Grumpy's defense that Snow White canceled the original contract when it promised to renegotiate, cf. Schwartzreich v. Bauman-Basch, and also its possible claim for breach of this promise to renegotiate, cf. Channel Home Centers v. Grossman.

Remedy:

5. Expectation Damages. Snow White's desire for expectation damages measured as follows:

$$\begin{aligned} & \text{loss in value} + \text{other loss} - \text{cost avoided} - \text{other loss avoided} \\ &= \text{cost to remedy} \\ & \quad 100 \text{ tons not processed} + \text{penalty} - (\text{price} - \text{advance to Grumpy}) - \text{none} \\ &= \$850\text{K} + \$40\text{K} - (\$2400\text{K} - \$1800\text{K}) - 0 = \$290\text{K} \end{aligned}$$

Explanation: Snow White is worse off to the extent that it had to spend \$850,000 to remedy the defect, see Restatement 382(2), and another \$40,000 for the "penalty" paid to Ragamuffin (unless that penalty is reduced). It is better off to the extent that it avoided paying Grumpy \$600,000 of the total contract price.

SNOW WHITE v. RAGAMUFFIN

Claim:

6. Breach of Contract. Snow White's claim that Ragamuffin breached its promise to pay \$2.7 million when it withheld some of the price.

Defenses:

7. Liquidated Damages. Ragamuffin's defense that it was entitled to withhold \$40,000 as liquidated damages.

Response to Defenses:

8. Penalty: Snow White's response that the \$2,000 a day provision is a penalty because actual damages were only

\$1,000, and Ragamuffin's reply that \$2,000 was reasonable in light of the anticipated damages and the overall size of the contract. See *Dave Gustafson & Co. v. State*.

Remedy:

9. Damages. Snow White's desire to recover the remainder of the contract price, minus the actual costs of delay, which would be $\$40,000 - 20 * \$1000 = \$20,000$.

Other

10. Other

Final Examination In
CONTRACTS I
(Course No. 202-14; 3 credits)

ANSWER GUIDE

PROBLEM I.

(35 minutes)

Memphis Fashions v. Cleopatra Press

Claim:

1. Breach of Contract. Memphis will claim that Cleopatra breached its promise to guaranty the circulation and improve the quality of the magazine.

Defenses:

2. No Offer and Acceptance. Cleopatra will argue that Memphis's additional terms made a counter offer and that it never accepted terms. See *Minn. & St. Louis Rwy. v. Columbus Rolling Mill*.

Memphis, however, will contend that Cleopatra implicitly accepted them by saying that it was pleased Memphis had become an advertiser and then proceeding with the contract. Cf. *Allied Steel v. Ford Motor Co.*

3. Indefiniteness. Cleopatra also will argue that the additional terms are too indefinite to enforce because they do not state the level of circulation guaranteed and there is no objective way to measure the quality of the magazine. See *Varney v. Ditmars*.
4. Statute of Frauds. Cleopatra also will argue that the statute of frauds bars enforcement of the promise because it could not be completed in a year; it would take more than a year to run 6 issues of a bimonthly magazine. Perhaps Cleopatra could put 24 pages in one issue.

Remedy:

5. Expectation Damages. Memphis will want expectation damages. It will want Cleopatra to pay the profit it would have made if the quality of the magazine had not fallen.

Remedy Limitations:

6. Avoidability. Cleopatra will argue that Memphis cannot recover for lost profits because it could have avoided them by advertising somewhere else. Cf. *Parker v. Twentieth Century Fox*.

7. Uncertainty. Cleopatra also will argue that Memphis cannot recover the lost profits because Memphis cannot prove them with reasonable certainty.

Memphis, however, might be able to create reasonable certainty by introducing evidence of past profits or expert testimony. Cf. Fera v. Village Plaza.

8. Unforeseeability. Cleopatra also will argue that Memphis cannot recover the lost profits because they were unforeseeable. See Hadley v. Baxendale. But Memphis will contend that they were foreseeable because the sole purpose of advertising is to generate profits.

Memphis Fashions v. Cleopatra Press

Claim:

9. Unjust Enrichment. Memphis Fashion will claim that, if there was no contract, Cleopatra was unjustly enriched by the payment of \$5,970.40 per page for 19 pages.

Defenses:

10. No Injustice. Cleopatra will argue that no unjust enrichment occurred because 5,970.40 per page is a reasonable price. Memphis Fashions will argue that it does not make sense that 19 pages cost more than 24 pages.

Remedy:

11. Restitution. Memphis will seek restitution of the amount of overpayment, which is perhaps the difference between \$113,437.60 and \$94,076.

Other

12. Other.
 - Discussion of reservation of rights
 - Assumption that the parties first made an oral agreement, then modified it.
 - Cleopatra may have lost circulation because of fewer advertisers.

Common Problems

- Confusion over who will sue whom. Cleopatra has been paid in full and therefore has little reason to sue Memphis.
- This is not a contract for the sale of goods.

PROBLEM II.

(35 minutes)

Cheops v. Tut

Claim:

1. Breach of Contract. Cheops will claim that Tut had an implied duty to use reasonable efforts to solicit business for Cheops because it was the

executive agent for Cheops in the region. See *Wood v. Lucy*. Cheops will argue that Tut breached this duty and also an implied duty of good faith when it (1) steered customers to other transporters, and (2) sold its telephone number to Phoenix, Inc. to get around its promise of dealing exclusively with Cheops. See Rest. § 205.

Defenses:

2. No Breach. Tut will argue that it did not breach the original contract because the implied duty of reasonable efforts did not require it to deal exclusively with Cheops. It did not breach the subsequent promise because it did deal exclusively with Cheops. Cheops, however, will argue that Tut was still is not acting in good faith.
3. No Consideration for Modification. Tut will argue that its subsequent promise of exclusive dealing lacks consideration promise because it did not bargain for anything in exchange. See *Feinberg v. Pfeiffer*.

Cheops will argue there is consideration because it continued to deal with Tut. See *Central Adjustment v. Ingram*. Most courts, however, do not accept this understanding of consideration.

Remedy:

4. Expectation Damages. Cheops will want to recover the profits that it lost because Tut sold the telephone number.

Cheops v. Phoenix

Claim:

5. Unjust Enrichment. Cheops will argue that Phoenix is being unjustly enriched by using its name to attract business.

Defense:

6. No Injustice. Phoenix may argue that there is no injustice because it paid for Tut's telephone number, and Tut had a right to advertise in Cheops's name.

Remedy:

7. Restitution. Cheops will seek the value of the telephone number.
8. Injunction. Cheops also will seek to enjoin Phoenix from using the telephone number in the future.

Menes Moving v. Cheops, Phoenix, and Nefertiti

Claims:

9. Unjust Enrichment (Cheops and Phoenix). Menes Moving will seek to recover from Cheops its share Nefertiti's payment on grounds that it did the work, not Cheops. The payment arguably also benefit Phoenix.
10. Breach of Contract. If Menes cannot recover the money from Cheops, it will sue Nefertiti for payment because the contract required her to pay. (She then can recover from Cheops or Phoenix on grounds of unjust

enrichment.)

Defenses:

11. No injustice. Cheops will argue that Menes should not recover Nefertiti's payment because it has a remedy against Nefertiti. See Callano v. Oak Park. Menes, however, might not have known about the contract. Nefertiti will argue that Cheops and Nefertiti are equitably estopped from asserting that she sent the money to the wrong place because Phoenix and Menses confused her.

Remedy:

12. Restitution. Menes and Phoenix together will want the contract price for moving her goods.

Other

13. Other.

- Discussion of indefinite period of agency
- Phoenix's commission

Common Problems

- Discussion of how Tut breached the contract needs to be more complete.
- Lack of discussion of Cheop's claim against Phoenix

PROBLEM III.

(40 minutes)

Ahkenaton v. Ramses

Claim:

1. Breach of Contract. Ahkenaton will claim that Ramses breached his promise to sell him the property for \$550,000.

Defenses:

2. No Offer. Ramses will argue that he did not offer to sell the property when he said that he needed \$550,000. See Owen v. Tunison. Ahkenaton, however, will say that his letter should be construed as an offer because it asked for acceptance.
3. Revocation Prior to Acceptance. Ramses will argued that he indirectly communicated his rejection to Akhenaton before Ahkenaton accepted. See Dickenson v. Dodds.

Akhenaton, however, will argue that his acceptance became effective when he dispatched it under the mailbox rule. Ramses, however, will argue that dispatch did not occur until the postal worker picked up the mail.

Remedy:

4. Expectation Damages. Although Ahkenaton might want specific performance, he will have to ask for expectation damages because Ramses already has conveyed the property.

Expectation damages will equal the loss in value minus cost avoided. The property arguably was worth \$600,000 because Horus agreed to pay that much, but Ahkenaton saved \$550,000 by not paying for it.

Isis v. Ramses

Claim:

5. Breach of Contract. Isis will claim that Ramses breached his promise to pay her 6% of any sale.

Defenses:

6. No Promise. Ramses may argue that the promise implicitly was limited to sales that she arranged, and the property was sold to Horus. He also will argue that the contract should be interpreted against Isis because she, as the real estate agent, probably drafted it. She did arrange a sale to Ahkenaton.

Remedy:

7. Expectation Damages. Isis will want expectation damages, or 6% of the \$600,000 sale price. (The court should subtract the \$1000 she already has retained, unless she pays it back to Ahkenaton.)

Ramses v. Horus

Claim:

8. Breach of Contract. Ramses will claim that Horus breached his promise to pay \$600,000 for the property because he paid only \$550,000.

Defenses:

9. No Consideration (Pre-Existing Duty Rule). Horus will argue that his promise to pay \$600,000 lacks consideration because Horus had a pre-existing option to buy the property for \$550,000. See *Arzani v. State*.

Ramses, however, may argue that he and Horus rescinded the original option and formed a new one. If that is true, then there is consideration. See *Schwartzreich v. Bauman-Basch*.

10. Statute of Frauds. Horus promised to pay the additional \$50,000 over the telephone. Also, the option contract may not have been in writing as required by Statute of Frauds.

Remedy:

11. Expectation Damages. Ramses would seek expectation damages of \$50,000.

Other

12. \$1000 earnest money
13. Other.

- Discussion whether "R" satisfies the statute of frauds.
- Horus has a claim to a year's interest on \$500,000 plus the value of the property for that time, because he had to pay early.

Common Problems

- Overlooking Ahkenaton's problem in getting specific performance.
- Saying Horus will sue Ramses for the land. He already has it.
- Thinking Ahkenaton's promise has to be in writing.

PROBLEM IV.

(35 minutes)

Sphynx v. Amon Loan Co.

Claim:

1. Breach of Contract. Sphynx will argue that Amon breached its promise to lend it \$7 million.

Defenses:

2. Cancellation. Amon will argue that Sphynx canceled the first contract, and thus it is unenforceable. See *Schwartzreich v. Bauman-Basch*.

Response to Defense:

3. Duress: Sphynx will argue that the court should rescind the cancellation because it was induced by duress. In particular, Amon threatened to breach its existing contract in bad faith. See Rest. §§ 175, 176.

Amon, however, will argue that it did not breach the contract in bad faith. It needed to modify the contract because of the changed position of Ptomely Bank. It also did not know of the urgency.

Remedy:

4. Expectation Damages. Amon will seek expectation damages. These will equal the amount of additional interest that Amon will have to pay on the one million loan.

Remedy Limitations:

5. Unforeseeability. Amon will argue that it could not foresee Sphynx's desperate need to get the money because Sphynx did not tell Amon about the April 30th deadline.
6. Avoidability. Amon also will argue that Sphynx could have avoided some of the additional interest if Sphynx had shopped around for a lower rate.

Amon Loan Co. v. Ptomely Bank

Claim:

7. Breach of Contract [\$7 million loan]. Amon Loan Co. will claim that Ptomely Bank breached an implied promise to buy all of its loans when it did not purchase the \$7 million loan to Sphynx.
8. Breach of Contract [\$6 million loan] Amon will argue that Ptolemy Bank breached a promise to buy the \$6 million loan of the usual rate, or \$606 million.

Defenses:

9. No Promise. Ptolemy Bank will argue that it never promised to buy all of Amon's loans. Although Ptolemy Bank suggested reducing the amount of the loan to \$6 million, it did not promise that it would buy the loan. See Owens v. Tunison.

A court, however, may find these terms implied because of past practice. Or it may conclude that a definite agreement was not required. See Hoffman v. Red Owl Stores.

Remedy:

10. Expectation or Reliance Damages. Amon will want to recover from Ptomely Bank the 1% profit that it would have made on the loan (either \$70,000 or \$60,000) if Ptolemy had purchased it at the usual price.

Other

11. Other.

PROBLEM V.

(35 minutes)

Hathor v. Naval Architect

Claim:

1. Breach of Contract. Hathor will claim that the naval architect breached his promise to design one of the world's fastest sailing boats

Defenses:

2. No Assent to be Bound. The naval architect will argue that he merely hoped that the design would create one of the world's fast racing boats, and did not assent to be bound.
3. Indefiniteness. The naval architect also will contend that the phrase "one of the world's fastest sailing boats" is too indefinite to enforce. He did not state that the boat would be the fastest.

Remedy:

4. Expectation Damages. Hathor will seek the difference in value of plans that would create one of the world's fastest racing vessels, and the plans the architect designed.
5. Reliance or Restitution Damages. If Hathor cannot recover the expectation damages because she cannot prove them with reasonable certainty, she may seek reliance or restitution damages instead.

Remedy Limitations:

6. Uncertainty. The Naval Architect will assert that Hathor cannot prove her damages with reasonable certainty. No one can say for sure what "one of the world's fastest racing vessels would be worth."

Hathor v. Nile Boats

Claim:

7. Breach of Contract. Hathor will claim that Nile Boats breached promise to construct the boat according to the plans.

Defenses:

8. No Breach. Nile boats will dispute Hathor's assertion that it breached the contract. It will attribute the boat's problems to its design, and not the workmanship. Perhaps it also will argue that Seth's suggestion that the boat contains defects is unreliable because Seth lacks credibility.

Remedy:

9. Expectation Damages. Hathor will seek expectation damages. She may argue that her loss in value equals \$450,000 that it cost to remedy the defect.

Remedy Limitations:

10. Cost to Remedy. Nile Boats will argue that Hathor cannot recover the cost to remedy the defect because it is grossly disproportionate to the probable loss in value to her. See Rest. § 348(2); Jacob & Youngs v. Kent.

Hathor will reply that, although the repairs may not improve the market value, they subjectively are important to her because she wants a winning boat. See Peevyhouse v. Garland Coal (dissent).

Hathor v. Seth

Claim:

11. Breach of Contract. Hathor breached his promise to correct Nile Boats' mistakes.

Defense:

12. No Warranty. Seth will argue that Hathor signed an acknowledgement that the work came with no warranty.

Responses to the Defense:

13. No Consideration. Hathor will argue that the disclaimer of warranties and guaranties was not bargained for because Seth raised it only after the contract to repair had been made.
14. Unconscionability/Public Policy. Hathor also will argue that disclaiming all warranties is unconscionable and violates public policy. See Henningsen v. Bloomfield Motors. This argument, however, seem weak because Seth did not have a monopoly position and Hathor was a sophisticated consumer with other options.

Remedy:

15. Expectation Damages. Hathor will seek to recover expectation damages, which would be equal to the cost of repairs, or the diminution in market value (see above).

Other

16. Other.

Common Problems

- Hathor will argue that the naval architect has broken a promise, not made a misrepresentation.

Final Examination In
CONTRACTS I
(Course No. 202-14; 3 credits)

ANSWER GUIDE

PROBLEM I.

(40 points)

Anna v. Fyodor

Claim:

1. Breach of Contract. Anna will claim that Fyodor promised to make her feel "as good as new," and breached this promise because she still feels pain in her knee.

Defenses:

2. No Assent. Fyodor will argue that, as is typical for doctors, he did not assent to be bound to any particular result. Anna will contend, however, that did that with his promise. See *Sullivan v. O'Connor*.
3. Indefiniteness. Fyodor also will contend that the phrase "as good as new" is too indefinite to enforce. See Rest. § 33; *Varney v. Ditmars*. Anna, however, will contend that, at minimum, it means she would not feel pain in her knee.

Remedy:

4. Expectation Damages. Anna primarily will want damages equal to the difference between her current condition and the promised condition. See Rest. § 347(a).
5. Reliance or Restitution Damages. Alternatively, she want reliance damages, which would include her fee and payment for the pain and suffering. See Rest. § 349; *Sullivan v. O'Connor*. Or she simply may want restitution damages, which would be her fee. See Rest. § 373(1).

Remedy Limitations:

6. Avoidability. Fyodor will argue that she could have avoided some of the pain by having another operation, but she declined the opportunity. See Rest. § 350(1); *Parker v. Twentieth Century-Fox*. Anna will argue that it would be an unreasonable burden to have another operation.
7. Uncertainty. Anna cannot prove the difference between the promised knee and the actual knee, or her pain and suffering, with reasonable certainty. See Rest. § 351.

Fyodor v. Anna

Claim:

8. Breach of Contract. Fyodor will claim that Anna promised to arbitrate her claims against him, and broke that promise by suing him. (Alternatively, Anna might sue to rescind.)

Defenses:

9. Duress. Anna will argue that Fyodor induced her to sign by an improper threat. In particular, he threaten to break his promise to operate, unless she agreed to arbitrate. See Rest. §§ 175, 176(1)(d).

Fyodor will argue that his assistant merely told him that he "wanted" his signature. Moreover, Anna had a reasonable alternative; she could have refused to sign.

10. Adequate Notice. Anna will argue that she did not have adequate notice that she was signing papers containing contractual terms. Rest. § 211; Klar v. H.M. Parcel. She will have thought she was signing papers simply indicating that she had received disclosures, etc. Fyodor, however, will assert that "like writings" often contain promises, such as releases.
11. Strict Construction. Anna will argue that the arbitration clause does not apply because she is alleging breach of contract rather than negligence. See Galligan v. Arovitch.
12. Public Policy. Anna will argue that terms of the arbitration agreement violate public policy. The attorney's fee provision, for example, discourages lawsuits to uphold standards of conduct in surgery because it requires even a winner to pay the other side's fee. See Henningsen v. Bloomfield Motors. Fyodor will argue that the agreement only affects the two of them, and not the public. See O'Callaghan v. Waller & Beckwith.
13. Unconscionability. Anna will argue that the clause is unconscionable because it is grossly unfair to require her to arbitrate before another surgeon and to pay fees even if she wins. See Rest. § 208. Fyodor will say that it is reasonable for him to want a surgeon to hear the claim.

Remedy:

14. Specific Performance. Fyodor will seek specific performance of Anna's promise to arbitrate by asking the court to dismiss the case and enjoin Anna from suing in court.

Remedy Limitations:

15. Terms Unfair. Anna will argue the court should deny specific performance because the terms of the bargain are unfair in that the stack the deck in favor of Fyodor. See Rest. § 364; McKinnon v. Benedict.

Other

16. Other

QUESTION II.

(35 points)

Vasily v. Muscovy [FIRST CLAIM]

Claim:

1. Breach of Contract. Vasily will claim that Muscovy promised to award him two cars, and it did not deliver them.

Defenses:

2. No Assent. Muscovy will argue that it did not assent to be bound because the contest was not serious. See *Lucy v. Zehmer*. Vasily, however, will argue that a reasonable person would think the contest was serious. Catherine told him that he had won two cars. Other employees thought that she was serious. (The timing of the contract is also relevant.)

But Muscovy will argue that a reasonable person would not think that the company would give away 2 cars for an eight word theme. It also will contend that Vasily himself did not think the contract was serious because he laughed when Catherine told him that he had won.

3. No Offer. Muscovy may argue that an advertisement in a newspaper cannot constitute an offer. See *Craft v. Elder & Johnston*. But Vasily will argue the contest was limited to just one winner and spelled out all of the rules and thus could be an offer. See *Lefkowitz v. Great Minn. Surplus Store*.
4. Indefiniteness. Muscovy will argue that the newsletter did not make clear what the prize would be. It could have been any one of three prizes. Also, the cars could have been new or used. See Rest. § 33; *Varney v. Ditmars*.
5. Statute of Frauds. Muscovy will argue that the promise had to be in writing and signed because it would take more than a year to perform. Given that the convention was not until the next year. Although the promise was in writing, there is no indication that it was signed.

Vasily will argue that the newsletter is, in effect, signed because it is a publication of Muscovy. He also will argue that the Muscovy could have completed its performance in less than a year by awarding the prize early.

6. No Breach (Additional Prize). Muscovy will argue that it did not breach the contract because it awarded him an "additional prize," namely, the gift certificate. Vasily will argue, however, that Muscovy already identified the cars as the prize.
7. No Breach (Ineligibility). Muscovy will argue that Vasily is ineligible because the contest is explicitly (or at least implicitly) limited to "employees." See Rest. 201. Vasily will argue, however, that the court should read the contract against Muscovy and require a person to be an employee only when submitting a theme. See Rest. § 206; *Lefkowitz v. Great American Surplus Store*.
8. Waiver. Muscovy that Vasily implicitly waived his claim when he took the restaurant gift certificate. Cf. *Toys Inc. v. F.M. Burlington*. Vasily will argue that he had not intent to waive.

Remedy:

9. Expectation Damages. Vasily will want the value of two Mercedes automobiles, minus \$100.

Remedy Limitations:

- 10. Uncertainty. Muscovy will argue that the value of the two cars is uncertain because they could be new or used. See Rest. § 350.

Vasily v. Muscovy [SECOND CLAIM]

Claim:

- 11. Restitution. If the contract is not enforceable (and Vasily did not waive his rights), he may claim that Muscovy was unjustly enriched by being able to use his theme, and therefore has to make restitution.

Remedy:

- 12. Restitution Damages. Vasily will want the value of his theme to Muscovy over and above the \$100 gift certificate.

Remedy Limitations:

- 13. Uncertainty. Muscovy will argue that the value of the theme cannot be proved with reasonable certainty. Cf. Rest. § 352.

Other

- 14. Other

QUESTION III.

(35 points)

Elizabeth v. Nicholas

Claim:

- 1. Breach of Contract. Elizabeth will claim that Nicholas promised to pay her \$450,000 for her house, and did not do it.

Defense:

- 2. No Consideration (Illusory Promise). Nicholas will argue that there was no consideration for his promise. He will say that Elizabeth's return promise was illusory because she could declare the contract void merely because she felt insecure. Cf. Strong v. Sheffield. Elizabeth, however, will argue that she had an implied duty to determine whether she felt secure in good faith. See Mattei v. Hopper.

Remedy:

- 3. Expectation Damages. Elizabeth will seek damages calculated as follows:

loss in value	+	other loss	-	cost avoided	-	other loss avoided
what D promised	-	what D delivered		costs expected	-	costs incurred
house price	-	deposit	+	taxes & lawn and snow	-	value of house
(\$450,000 - \$10,000)	+	(\$3,500 + \$500)	-	(\$430,000 - \$0)	-	\$0 = \$14,000

Remedy Limitations:

4. Unforeseeability. Nicholas will argue that the other losses (i.e., taxes and lawn & snow expenses) were unforeseeable. See Hadley v. Baxendale. Elizabeth will argue that they arise in the ordinary course of events.
5. Valuation of House. Nicholas will ask the court to value the house at either \$480,000 (the appraised value) or \$450,000 (the contract prices). Elizabeth will argue that the actual price, \$430,000, is more realistic.
6. Penalty. Nicholas will argue that Elizabeth cannot keep the \$10,000 in addition to expectation damages because that would be a penalty. See Rest. § 356(1).

(Elizabeth probably can keep the money if expectation damages are less than \$10,000 as a reasonable liquidation. See Dave Gustafson v. State.)

Nicholas v. Elizabeth

Claim:

7. Restitution. If the contract is not enforceable, Nicholas will ask for restitution of his \$10,000 deposit on grounds of unjust enrichment.

Nicholas v. Mother

Claim:

8. Breach of Contract. Nicholas will claim that his mother promised to lend him \$80,000, and she did not do it.

Defenses:

9. No consideration. Nicholas's mother will argue that there was no consideration for her promise to lend him the money because she received nothing in exchange. See Kirksey v. Kirksey. Nicholas will respond that the consideration was his getting a place of his own, even if there was no benefit to her. See Hamer v. Sidway. He also will argue for enforcement on the basis of reliance. See Feinberg v. Pfeiffer.

Remedy:

10. Expectation Damages. Nicholas may ask for expectation damages. His loss in value is the value of an interest free loan. His other loss be the profit expected on the house (i.e., \$480,000 - \$450,000), his lack of use of the house, the damages that he had to pay Elizabeth. His other loss avoided would be his mortgage payments to the bank.
11. Reliance Damages: Nicholas alternatively may seek reliance damages from his mother. These would include any damages that he has to pay to Elizabeth (i.e., \$14,000 unless limited) and the \$200 fee that he has to pay the bank to cancel.

Remedy Limitations:

12. Justice. His mother will argue that justice requires limiting the damages to at most reliance damages. See Rest. § 90 (second sentence).

Other

13. Other

PROBLEM IV.

(35 points)

Ivan v. Danilovich

Claim:

1. Breach of Contract. Ivan will claim that Danilovich promised in the severance agreement to pay him \$400,000 a year for four years, but only kept the promise for three years.

Defenses:

2. No Breach. Danilovich will argue that it only had to pay him until he found "other comparable employment." Becoming the dean of a business school is comparable employment. Ivan will argue that a lower paying job with different duties is not comparable. Cf. Parker v. 20th Century Fox. [Note that Danilovich does not want argue that the severance agreement is too indefinite to enforce.]
3. Waiver. Danilovich will argue that Ivan waived his right to collect the \$400,000 because he settled for \$50,000. Ivan, however, will argue that his promise to accept \$50,000 is not enforceable. See Discussion Below; Toy's Inc. v. F.M. Burlington.

Remedy:

4. Expectation Damages. Ivan will seek damages calculated as follows:

$$\begin{array}{rccccccc}
 \text{loss in value} & & + & \text{other} & - & \text{cost avoided} & - & \text{other loss} \\
 & & & \text{loss} & & & & \text{avoided} \\
 \text{what D - what D} & & & & & \text{costs} & - & \text{costs} \\
 \text{promised} & \text{delivered} & & & & \text{expected} & \text{incurred} & \\
 4 \text{ yrs. pay} & - & 3 \text{ yrs. pay} & & & 4 \text{ yrs. job} & - & 3 \text{ yrs. job} & - & \text{salary} \\
 & & + \text{ check} & & & \text{searching} & & \text{searching} & & \text{as Dean} \\
 = & 4*400,000 & - & (3*400,000 + 50,000) & + & \text{unknown} & - & \$175,000 & = & \$175,000
 \end{array}$$

Remedy Limitations:

5. Avoidability. Ivan could have avoided some of the loss by looking harder for another job. See Rest. § 350; Parker v. 20th Century-Fox. [Note that failing to look diligently for a job also might have given rise to a defense of non-occurrence of constructive condition.]

Ivan v. Danilovich

Claim:

6. Rescission/Declaratory Judgment. Ivan will seek rescission his promise to settle his claim for \$50,000 or a declaratory judgment that it is not enforceable.

Grounds for Asserting the Promise is not Enforceable:

7. No Offer by Ivan and Acceptance by Danilovich. Ivan will argue that he did not make an offer to settle when he said that he "could not settle for less than \$50,000." See Owen v. Tunison. As a result, Danilovich's

letter and check could not be an acceptance.

8. No Offer by Danilovich and Acceptance by Ivan. Ivan will argue that, even if Danilovich's letter and check was an offer, he did not accept it. Danilovich, however, may argue that he implicitly accepted by cashing the check. Cf. *Allied Steel v. Ford Motor Co.*
9. No Consideration (Pre-existing Duty Rule). Ivan will argue that Danilovich had a pre-existing duty to pay him more money and that his promise to accept less money lacks consideration. See *Arzani v. People*. Danilovich may argue that it is a reasonable modification in light of unforeseen circumstances, see Rest. § 89; *Watkins & Sons v. Carrig*, but the facts tend to contradict this position.
10. Misrepresentation. Ivan will argue that Danilovich misrepresented its financial condition in saying that it was "critical" to conserve cash, and that this misrepresentation induced him to settle. Danilovich will say that its statement involves only opinion, and not facts. It is also not the kind of statement a person would rely upon.
11. Non-Disclosure / Confidential Relations. Ivan will argue that he was in a confidential relationship with Danilovich and Danilovich had a duty to disclose his true financial picture. Danilovich will assert that no such relationship existed. See *Swinton v. Whitinsville Savings Bank*.

Remedy:

12. Rescission/Declaratory Judgment. Ivan wants rescission or a declaration that his promise is not enforceable so that he still may assert his claim for breach of the severance agreement against Danilovich.

Other

13. Other

PROBLEM V.

(35 points)

Peter v. Romanov [First Promise]

Claim:

1. Breach of Contract. Peter will argue that Romanov broke its implicit promise not to use the idea that was "between us."

Defenses:

2. Indefiniteness. Romanov will argue that the promise is too indefinite to enforce. See Rest. § 33; *Varney v. Ditmars*.

Remedy:

3. Damages or Specific Performance. Peter may request expectation damages equal to what he could have made selling the idea in a different fashion or reliance damages for the amount spent in preparation or specific performance of the promise.

Remedy Limitations:

4. Uncertainty. Romanov will argue that Peter cannot prove damages with reasonable certainty. There was not other buyer for the idea.

Peter v. Romanov [Second Promise]

Claim:

5. Breach of Contract. Peter will claim that Romanov, through Alexis, promised to grant him access to the land and set up a visitor center, but did not do it.

Defenses:

6. Statute of Frauds. Romanov will argue that the promise fell within the statute of frauds because it could not have been completed in one year. Because it was not reduced to writing, it is not enforceable. Peter, however, will claim that the promise should be enforced because of his reliance on it. See Rest. § 139; Monarco v. Lo Greco. Not all states, however, recognize this exception.
7. No Assent. The lack of signature may indicate a lack of assent to be bound.

Remedy:

8. Expectation Damages: Peter will argue that he is entitled to expectation damages. He presumably would have made the same profit that the pipeline made, or roughly \$12,000 per year. He should get the present value of this amount for 30 years.
9. Reliance Damages: Peter, alternatively, will request reliance damages, which will include his expenses in getting ready to open the business after the meeting.

Remedy Limitations:

10. Uncertainty. Romanov will argue that the court should limit the remedy to reliance damages because of the uncertainty of how much profit Peter would have made. See Hoffman v. Red Owl Stores. This is especially true because his plan differed slightly.

Peter v. Romanov [Third Promise]

Claim:

11. Breach of Contract. Peter will argue that Romanov, through Alexis, expressly promised to reduce the contract to writing and implicitly promised to negotiate in good faith. She broke both promises.

Defenses:

12. No Consideration. Romanov that it received no consideration for this promise. Peter will argue that he relied on the assurances. Cf. Grossman v. Channel Stores; Hoffman v. Red Owl Stores.

Remedy & Remedy Limitations:

13. Same as above.

Peter v. Romanov [Restitution Claim]

Claim:

14. Restitution. Peter will seek restitution from Romanov on grounds that it was unjustly enriched by using his idea.

Remedy:

15. Restitution Damages. The damages will equal the value of the idea. This value, again, may difficult to prove with reasonable certainty.

Other

16. Other

Final Examination In
CONTRACTS I
(Course No. 202-13; 3 credits)

ANSWER GUIDE

PROBLEM I.

(40 points)

Poseidon v. Calliope

Claim:

1. Calliope promised to sell her 17 acres and then refused to deliver.

Defenses:

2. Misrepresentation: Calliope may argue that Poseidon told her a half-truth when he said that he just wanted the property as an investment. *Kannavos v. Annino*

Poseidon will contend that his statement had no false implications. He thus will characterize his failure to state his specific purpose as a bare nondisclosure. *Swinton v. Whitinsville Savings Bank*.

3. Unilateral Mistake: Calliope may argue that she was induced by a unilateral mistake to enter the agreement. Poseidon, however, will say that she merely made a poor prediction. *Wood v. Boynton*
4. Cancellation/modification: Calliope may argue that Poseidon canceled or modified the contract when he agreed to rent the property. Poseidon will challenge the validity of that agreement (see below).

Remedy:

5. Poseidon will seek specific performance of the contract. Specific performance ordinarily is available for the sale of land. One question is whether the consideration was inadequate, as in *McKinnon v. Benedict*.

Dionysus v. Poseidon

Claim:

6. Dionysus will argue that Poseidon promised to pay him for the construction work and did not do it. Alternatively, he will say that the parties entered a contract to negotiate.

Defenses:

7. No Acceptance: Poseidon will argue that he never accepted the bid. The letter of intent said that he was not accepting until he got financing.

Dionysus, however, might contend that Poseidon accepted the bid by silence when he allowed Dionysus to do the work. See Rest. § 69(1). An issue would be whether the letter of intent was a rejection, in which case no further acceptance was possible.

8. No Counter-Offer: Poseidon also will argue that the letter of intent was not a counteroffer that Dionysus could accept. The letter merely indicated that he would appreciate seeing Dionysus do the work.

Dionysus will argue the letter of intent was an offer to enter the deal but allow cancellation if financing did not come through. He will say that he accepted the counteroffer by commencing the work.

Remedy:

9. Dionysus will seek expectation damages, which equal the cost of his work to date plus his expected profit on the deal.
Dionysus v. Poseidon and Calliope

Claim:

10. Restitution: If Dionysus cannot recover from Poseidon for breach of contract, he will seek restitution for the work that he did during the first week.

Defenses:

11. Volunteer: Poseidon and Calliope will argue that Dionysus was a volunteer. He did not expect compensation. Instead, he did the work merely to get a leg up on the final bid. (Dionysus was not an official intermeddler because he was invited to do the work.)

Calliope v. Poseidon

Claim:

12. Calliope will claim that Poseidon promised to pay the rent and did not pay it.

Defenses:

13. Duress: Poseidon will argue that the promise was induced by duress. Calliope threaten to break their original contract in bad faith merely to get more money.

Note: I don't think there is a pre-existing duty argument here because the duties of both sides have changed.

14. Lack of Definiteness: Poseidon also will argue that the contract is too vague to enforce because it calls for Calliope to receive a "fair share of the profits." See Varney v. Ditmars.

Other

15. Other

-- Calliope could seek restitution if the rent contract is void.

QUESTION II.

(40 points)

Please note: At the last minute, I changed the name of one of the parties from Athena to Apollo. Unfortunately, I forgot to change the pronouns. Accordingly, Apollo is referred to as "she" rather than "he."

Apollo v. Zeus (First Promise)

Claim:

1. Apollo will claim that Zeus promised to pay her tuition if she went to a local college, and Zeus did not keep the promise.

Defenses:

2. No consideration: Zeus will argue that his promise was a conditional promise to make a gift and thus lacked consideration. See *Kirksey v. Kirksey*. Apollo will contend that they made a bargain and that there was consideration. See *Hamer v. Sidway*.

Apollo also may argue that the promise should be enforced under a theory of promissory estoppel. She relied on the promise and decided to attend Delphi University. (But how would she have paid for the other schools?)

3. Not in Writing: Zeus also will argue that the promise is not enforceable because it cannot be performed within one year and was not in writing. Apollo, however, may assert that Zeus could have performed if he had paid the tuition for all four years in advance.

In a jurisdiction that accepts *Monarco v. Lo Greco*, she could overcome the statute of frauds with promissory estoppel. Not all jurisdictions, however, accept that theory.

4. No Assent: Zeus also may argue that he did not assent to be bound. See *Lucy v. Zehmer*. Parents often make promises to children that they do not expect to be enforceable.
5. No Acceptance: Zeus will argue that Apollo never accepted his offer. Apollo will contend that she accepted by performance. See *Hamer v. Sidway*.

Remedy:

6. Apollo will want Zeus to pay for all four years of college. To the extent she relies on promissory estoppel, however, Zeus may argue that he only has to pay reliance damages.

Delphi v. Zeus

Claim:

7. Delphi will argue that Zeus promised to pay the fall semester tuition during Apollo's junior year and did not do it.

Defenses:

8. Indefiniteness: Zeus may claim that he never really promised to pay. He merely said that he would try to pay. Delphi will argue that he committed himself at least attempt in good faith to pay.

9. Statute of Frauds: Is Zeus promising to pay the debt of another? If so, then the promise has to be in writing to be enforceable.

Apollo v. Zeus (Second Promise)

Claim:

10. Apollo will argue that Zeus promised to give her whatever money he could and did not do it. Note: This promise is important if the first promise is unenforceable.

Defenses:

11. Indefiniteness: Zeus will argue that the promise is too indefinite to enforce. See Varney v. Ditmars.
12. No consideration: Apollo never promised anything in return. If she actually took a part-time job, would she have accepted by performance?

Hera v. Apollo

Claim:

13. Hera will claim that she deserves restitution for paying \$4,000 of the tuition that Apollo owed. (She cannot not claim a breach of contract because Apollo never made any promise.)

Defenses:

14. Apollo may contend that her mother was an officious intermeddler. But that seems unlikely because Apollo probably wanted the money. Hera was not a volunteer because she expected compensation.

Other

15. Other

Delphi has a right to any unpaid back tuition from Apollo unless he was a minor.

QUESTION III.

(35 points)

Leto v. Persephone

Claim:

1. Persephone promised to run the advertisement and did not run it.

Defenses:

2. No Acceptance: Persephone may argue Leto made an offer in the advertisement request form, but Persephone never accepted it. Leto, however, will contend that Persephone accepted the offer when it cashed her check.

Liquidated Damages:

3. Persephone will argue that the advertisement request form expressly

limits damages to the contract price (\$240).

Liquidated Damages -- Response:

- 4. **Penalty:** Could Leto argue that liquidated damages are a penalty? They are not too large.
- 5. **Strict Construction:** Leto first will argue that the clause limits Persephone's liability only for "ERRORS IN ADVERTISEMENTS." This case does not involve an error in an advertisement; Persephone never ran the advertisement. Courts should construe strictly exculpation clauses. See Galligan v. Arovitch.
- 6. **Adequate Notice:** Leto might argue that the advertisement request form did not provide adequate notice. See Klar v. H & M Parcel Room. But surely she, as a lawyer, knew that she was entering a contract.
- 7. **Unconscionability:** Leto will argue that the clause is an unconscionable attempt at exculpation. As in Henningsen v. Bloomfield Motors, she had not other option but to take it. Persephone will argue that she is a lawyer and was sophisticated enough to protect herself. The limitation also does not shock the conscience.
- 8. **Public Policy:** Leto also will argue the clause violates public policy. A business that truly has a monopoly in its field should not have the power to exculpate itself from all liability.

Persephone will argue that this case does not present one of the traditional public policy arguments. See Bush v. Black Industries.

Unliquidated Damages

- 9. If the liquidated damages clause is not enforceable, Leto will want expectation damages. Expectation damages equal:

$$\begin{array}{rccccccc}
 \text{loss in value} & & + & \text{other loss} & - & \text{cost avoided} & & - & \text{loss} \\
 & & & & & & & & \text{avoided} \\
 \text{what D} & - & \text{what D} & & & \text{costs P} & - & \text{costs P} & \\
 \text{promised} & & \text{delivered} & & & \text{expected} & & \text{incurred} & \\
 \\
 (\text{market value} & - & 0) & & + & \text{lost} & & - & (240 & - & 240) & & - & 0 \\
 \text{of comparable} & & & & & \text{business} & & & & & & & & & \\
 \text{advertisement} & & & & & & & & & & & & & &
 \end{array}$$

- 10. The market value of comparable advertisement probably is about \$240, the same price that Leto paid. Leto, however, also lost income (after expenses) that the advertisement would have produced both this year and in future years.

Unliquidated Damages -- Response

- 11. **Uncertainty:** Persephone will argue that Leto's lost income cannot be used for "value of the advertisement" because the lost income is too uncertain to measure. See Rest. § 352. Leto cannot prove exactly how much business she lost because of the advertisement.

Leto will respond that she only has to prove the amount of lost income with reasonable certainty. She can show that she obtained about one-third of her business from the yellow pages or that she lost 40% from last year. That should be enough. Cf. Fera v. Village Plaza.

12. **Avoidability:** Persephone also will argue that Leto's lost income cannot be used for the "value of advertisement" because she could have obtained avoided some of that lost income by running substitute advertisements in the newspaper or on television. See Rest. § 350.

Leto will respond that the duty to avoid damages does not require her to take actions that would be undignified. The substitutes were not comparable. Cf. Parker v. Twentieth Century Fox.

13. **Unforeseeability:** Persephone also may contend that Leto's lost income cannot be used for the "value of the advertisement" because the lost income was not foreseeable. It did not know that Leto would lose one-third of her business if it did not run the advertisement. See Hadley v. Baxendale.

Leto, however, may argue that the whole point of advertising in the yellow pages is to attract new customers. As a result, the damages that she suffered are the kind that arise "in the ordinary course of events."

Other

14. Other

PROBLEM IV.

(35 points)

Hercules v. Atlas

Claims:

1. **Rescission:** Hercules will seek to rescind the settlement that he entered into with Atlas on grounds that he was a minor. See Kiefer v. Fred Howe Motors. We know that he is a minor because he is in elementary school.
2. **Breach of Contract:** In view of the rescission, Hercules will claim that Atlas implicitly promised that he would compete only against the best orthographers from other schools. Atlas broke that promise by allowing Pluto to compete.

Defenses:

3. **Equities:** Atlas may argue that the facts do not favor the equitable remedy of rescission, even for a minor. Although the court might accept this argument, it probably would excuse Hercules because of his age.
4. **No Promise:** Atlas may argue that it never made the promise that Hercules claims. It merely invited the best contestants. It did not make any assurances about who would compete against whom.
5. **No Assent:** Atlas also may argue that it merely was holding a fun contest and never intended to incur contractual liability, even if it made implicit promises. This argument may have some validity, but courts sometimes treat contests as contracts.
6. **Misrepresentation:** If Atlas contends that Hercules misrepresented his actual age, Hercules will contend that the misrepresentation was not material. Hercules was the best orthographer at his school regardless of his age.

Remedy:

7. Hercules will want the following damages:
 - (a) the of value trip to the nation's capital in damages; and
 - (b) an injunction ordering Atlas to name him the sole winner.

Remedy Limitations:

8. Uncertainty: Atlas may contend that, even if it broke its promise to allow only the best orthographer to compete, Hercules cannot show that he suffered any harm.

Even if Atlas had only allowed the best orthographer from each school to compete, Pluto may have been the best orthographer at his school. He thus could have beaten Hercules. Cf. Collatz v. Fox Wisconsin Amusement Corp; Rest. § 352. As a result, Atlas can receive only nominal damages.

Pluto v. Atlas

Claim:

9. Pluto will claim that Atlas implicitly promised that, if he won the contest, he would be declared the sole winner. It broke that promise when it declared Hercules a joint winner.

Defenses:

10. No Promise: Atlas will claim that it did not make the promise. Again, it will assert that it merely said that it was holding a contest.
11. No Breach: Atlas also will assert that Pluto was not a valid contestant because he was not determined to be the best orthographer at his school

Remedy:

12. Pluto will want an injunction ordering Atlas to declare him the sole winner. He will argue that damages would not be an adequate remedy and that an injunction is necessary because of the difficulty of proving damages.

Other

13. Other

Would Atlas want to get out of the settlement on grounds that Hercules did not have a good faith belief in the validity of his claim? See Fiege v. Boehm. The settlement seems favorable. Besides, they already have performed.

Would Ares have any claim? Ares did not beat Hercules. As a result, it should not matter that Pluto participated. Besides, Ares would have a lot of nerve to claim that Pluto should not be there when Ares did not win fair and square at his own school.

Aphrodite v. Executor

Hestia v. Executor

Posture of potential litigation:

1. Aphrodite will sue the executor claiming that she has a right to inherit one-third of Hephaestus' property under state law.
2. Hestia will sue the executor claiming that she should inherit all Hephaestus's property under his will because Aphrodite waived her statutory right of inheritance in the pre-nuptial agreement.

Aphrodite's argument that the prenuptial agreement was never valid:

3. Nondisclosure: Aphrodite also will argue that the prenuptial agreement is not enforceable because Hephaestus did not disclose his heart condition.

Although nondisclosure general does not invalid a contract, see Swinton, parties who stand in a confidential relation do have duty. Two people who are about to get married probably stand in such a relationship.

4. No consideration: Aphrodite also will argue that there was no consideration for her promise because she was not really getting much in return.

Under Hamer v. Sidway, however, the value of what is exchange does not matter. Also, part of the consideration may have been Hephaestus willingness to get married.

5. Unconscionability: Aphrodite also may argue that the antenuptial agreement was unconscionable. It would seem grossly unfair to leave her with nothing. On the other hand, courts enforce these agreements all the time.

Aphrodite's argument that the pre-nuptial agreement was rescinded:

6. Rescission: Aphrodite will argue that the prenuptial agreement is not enforceable because she and Hephaestus canceled it.

Hestia's Argument that Prenuptial Agreement was not rescinded:

7. Incapacity: Hestia will argue that Hephaestus lacked capacity to agree to the cancellation because of the stroke. See Ortelere v. Teachers' Retirement Board.

8. Aphrodite's Reply: Aphrodite will assert that Hephaestus had capacity for the following reasons:

(1) Neither physician said that Hephaestus could not understand the transaction. See Rest. § 15(1)(a).

(2) Hephaestus acted reasonably. It was appropriate to give her one-third of the estate because he was her wife. See Rest. § 15(1)(b).

(3) Hephaestus had counsel to help him with the agreement. See Cundick v. Broadbent.

9. No Assent: Hestia also may argue that the Hephaestus never agreed to the cancellation because he did not sign the document that the lawyer prepared.

10. Aphrodite's Reply: Aphrodite will argue that the facts say that he "wanted to assent" and therefore did assent. The agreement to cancel the prenuptial agreement is not one that the statute of frauds requires to be in writing.

Other

11. Other