Grading Guide for the Final Examination in

CONTRACTS

(Course No. 6202-13)

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

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

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

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

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

Claim:

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

Defenses:

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

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

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

5. **Non-occurrence of a constructive condition.** Boris may argue that, even if he did promise to pay Amanda, his performance was excused when Amanda materially breached the contract. Rest. § 237; Walker & Co. v. Harrison; Jacob & Youngs v. Kent; Plante v. Jacobs. He will argue that Amanda implicitly promised that she would use a writing style that was appropriate for biographies, see Dalton v. Educational Testing Service, and breached that implied promise by using a dull writing style. Amanda might respond in two ways. First, she might deny that she made an implied promise to use any particular writing style because there are no
circumstances that suggest that she made such a promise. Cf. Wood v. 
Lucy. Second, she may respond that her breach is not material because it 
concerns only two chapters and might be corrected through editing.

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

**Remedy:**

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

**BORIS v. CRISTINA**

**Claim:**

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

**Defenses:**

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

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

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

**AMANDA v. CRISTINA**

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

**OTHER**

13. Other

**PROBLEM II.**

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

**ELIDA v. DOUGLAS**

*Claim:*

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

*Defenses:*

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

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

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

DOUGLAS v. ELIDA

**Claims & Remedies:**

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

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

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

FAUSTO v. DOUGLAS

**Claim:**

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

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

**Defense:**

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

Reply:

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

Remedy:

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

OTHER

11. **Other**

**PROBLEM III.**

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

**GENEVIEVE v. HERNAN**

Claim:

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

Defenses:

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

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

**Remedy:**

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

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

**ISELLE v. HERNAN**

**Claim:**

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

**Defenses:**

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

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

**Remedy:**

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

OTHER

10. Other

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

PROBLEM IV.

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

JULIO v. KARINA

Claim:

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

Defenses:

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

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

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

Remedy:

5. Expectation damages. Julio will seek expectation damages equal to his loss in value (insurance coverage for his $100,000 loss) minus his costs.
avoided (Karina's $3000 commission) and minus other loss avoided (the premiums that Julio would have paid to the insurance company).

JULIO v. LOWELL

Claim:

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

Defenses:

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

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

Remedy:

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

JULIO v. LOWELL

Claim & Remedy:

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

Defenses:

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

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

OTHER

12. **Other**

**PROBLEM V.**

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

**NORBERT and THE BANK v. MARIE**

Claim:

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

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

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

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

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

**Remedy:**

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

NORBERT and THE BANK v. MARIE

**Claim & Remedy:**

5. **Restitution.** If Norbert or the Bank cannot recover for breach of contract because the court determines that they have committed a material breach, they alternatively may seek restitution under the theory in Britton v. Turner. They will argue that their recovery should
equal the contract price minus any damages that they caused Marie (an issue discussed above). Rest. § 374(1).

NORBERT v. ODALYS

Claim:

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

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

Defense:

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

Remedy:

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

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

OTHER

10. Other