



**CONTRACTS AND SALES**  
**PROFESSOR GEORGE S. GEIS**  
**UNIVERSITY OF VIRGINIA SCHOOL OF LAW**

**CHAPTER 1: INTRODUCTION**

**A. Introduction**

The MBE emphasizes certain topics over others and covers some ground that is rarely studied in first-year Contracts.

**Editor's Note 1:** Per the NCBE, the MBE now includes 28 Contracts questions among the 190 scored questions. (All other subjects have 27 scored questions.)

- a. **Has an enforceable contract been formed?**
- b. **Has the contract been performed (or, has the performance been excused)?**
- c. **What are the remedies for breach?**
  - Always come back to these three questions if you get lost or confused.

**1. What is a contract?**

- o A contract is just a \_\_\_\_\_. Look for an agreement plus a special legal basis for enforcing the promise (e.g., bargained-for consideration).

**Example 1:** *I promise to give you \$1,000 next week. You say "OK...I accept."*  
*Is this contract? \_\_\_\_\_*

- o The gateway issue: What universe are you in? The law of contracts and sales spans two parallel universes.
  - Universe One is the \_\_\_\_\_. We are in this universe whenever a contract deals with real estate or \_\_\_\_\_.

**Example 2:** *You hire me to mow your lawn. Is this contract governed by common law? \_\_\_\_\_*

- Universe Two is Article 2 of the UCC. We are in this universe whenever a contract deals with \_\_\_\_\_.

**Note 1:** The UCC governs all parties who enter a goods contract, not just merchants.

**Example 3:** You agree to buy five dozen pencils from Staples. Is this contract governed by common law? \_\_\_\_\_

**Note 2:** The law of contracts is almost exactly the same in both universes, with some key differences often arising on the MBE.

- o Mixed Contracts - What universe are you in if the contract has elements of both services and goods?

**Example 4:** You agree to purchase a hot-water heater from Boilermaker Inc. for \$1,000. As part of the deal, Boilermaker promises to install the hot water heater in your home. Is this contract governed by the UCC? \_\_\_\_\_

- **Rule #1:** The \_\_\_\_\_ rule. You cannot be in two universes at the same time, so mixed contracts must fall into one class or the other.
  - Exception: \_\_\_\_\_ contracts - If the agreement is divided into two mini-contracts

**Example 5:** You agree to purchase a hot-water heater from Boilermaker Inc. for \$950. As part of the deal, Boilermaker promises to install the hot-water heater in your home for an additional \$50. Is this latter installation part of the deal governed by the UCC? \_\_\_\_\_ - Common law now applies.

- **Rule #2:** The \_\_\_\_\_ rule. Does a good or a service play a bigger role?

**Example 6:** You commission the famous artist Andy Warhol to paint your portrait for \$1 million. Does the UCC apply? \_\_\_\_\_

**Example 7:** You commission my mother-in-law, Mickey, to paint your portrait for \$10. Does the UCC apply? \_\_\_\_\_

## CHAPTER 2: MAKING AN OFFER

### A. In General

Has an enforceable contract been formed?

Four big topics within this question:

- 1) Agreement (offer and acceptance)
- 2) Consideration (and related theories for when you have to keep your promises)
- 3) Defenses to formation (incapacity, duress, etc.)
- 4) Statute of Frauds
  - If it helps, "All Contracts Don't Stink"

## B. Agreement

A contract is typically created by agreement. This can be broken down into the offer and the acceptance:

- o Offer: "Will you go to the football game with me?"
- o Acceptance: "Sure"
- o Counteroffer: "How about we go skating instead?"

### 1. OFFER

- o An offer is a manifestation of a willingness to enter into an agreement (by the offeror) that creates a \_\_\_\_\_ (in the offeree).  
(Think of the offer as a caterpillar: cute and fuzzy, but fragile.)

#### a. Creating a Legal Offer

- Offer and acceptance are governed by the \_\_\_\_\_ which means that outward appearance of words and actions is what matters—not secret intentions.
- The key question is whether an offeror displays an objectively serious \_\_\_\_\_ to be bound.

**Example 8:** I offer to "sell you my Jeep Wrangler for \$5,000." But I have my fingers crossed behind my back, and in my mind I'm thinking: "Of course I don't mean it; no way I'll sell the Jeep to you." If you say "OK," do we have a contractual agreement? \_\_\_\_\_.

**Note 3:** Watch out for situations involving anger or humor—the offeror may not be displaying a serious intent to be bound under the objective test.

**Example 9:** You see me on the side of the road with the hood of my Jeep Wrangler open and wires pulled out everywhere. I kick the side of my Jeep and yell "I'd sell this stupid junker for \$5!" You yell back, "I ACCEPT." Do we have a contractual agreement? \_\_\_\_\_

- Expressions of opinion?

**Example 10:** We are talking causally in the law-school parking lot when I lean against my Jeep Wrangler and ask you, "How much do you think this old thing is worth?" You reply (generously), "I don't know, maybe about \$10,000." I say "OK, I accept." Do we have a contractual agreement? \_\_\_\_\_

- An offer must usually be directed to a specific offeree. In other words, you can't accept an offer unless it is directed at you.

**Example 11:** You hear that there are a lot of good deals to be had on Wall Street. So you walk down through the trading pit, saying "I accept...I accept...I accept." Do you have any contracts with the stock traders? \_\_\_\_\_

**Note 4:** There is a limited exception here for contest offers or reward offers that promise something to anyone who accomplishes a certain task.

**Example 12:** *I've lost my pet cat, Monster, and I take out a newspaper advertisement promising \$100 to anyone who finds my cat by this Friday. You see the ad, find Monster, and come by my house on Thursday to collect the reward. Do we have a contractual agreement? \_\_\_\_\_*

- How specific must your offer be? Here, we have two slightly different rules for our two different universes:
  - **Common law:** All \_\_\_\_\_ terms must be covered in the agreement. This typically means parties, subject, price, and quantity.
  - **UCC:** In this universe, the law is more willing to \_\_\_\_\_ and find a contract, even if the agreement leaves out some key terms. Generally, you need only identify **parties, subject, and quantity** under the UCC—BUT THE **PRICE DOES NOT NEED TO BE STATED!**

**Example 13:** *Beth offers to pay Seth \$50 every week to wash her car each Saturday for the next year. Is this deal covered by the common law? \_\_\_\_\_ Is it a valid offer? \_\_\_\_\_; it names the parties, the subject, the price, and the duration (quantity of washes).*

**Example 14:** *Beth offers to pay Seth a "fair price" every week to wash her car for the next year. Is this a valid offer? \_\_\_\_\_*

**Example 15:** *Bob offers to buy 500 windshield-wiper blades next week from Sue for \$5 each. Is this deal covered by the common law? \_\_\_\_\_ Is it a valid offer? \_\_\_\_\_*

**Example 16:** *Bob offers to buy 500 windshield-wiper blades next week from Sue for a fair price. Is this a valid offer? \_\_\_\_\_*

**Example 17:** *Bob offers to buy windshield-wiper blades next week from Sue for a fair price. Is this a valid offer? \_\_\_\_\_ because there is no quantity term.*

**Example 18:** *Bob offers to buy "all the windshield wiper blades that I need for the next 10 years" from Sue for a fair price. Is this a valid offer? \_\_\_\_\_, as a requirements contract.*

- **Requirements contract:** "I don't know how many I need over the next X years, but I promise to buy all of them from you."
- **Output contract:** "I don't know how many I will make over the next X years, but I promise to sell all of them to you."

- Both requirements and output contracts are specific enough under the UCC, even though they don't state an exact quantity term—they provide a formula for calculation.
- o A valid offer must give the power of the acceptance to the other side (i.e., the offeree can simply say "I accept" and know that he has concluded the deal).

**Exam Tip 1:** Here are two common fact patterns testing this concept:

\_\_\_\_\_ are preliminary communications that still reserve a final round of approval with the speaker. That is, they don't confer a power of acceptance to the other side. Invitations to deal are not offers.

\_\_\_\_\_ are usually understood as invitations to deal ("make me an offer for the advertised item; I'll probably accept"). There are some exceptions:

- Reward advertisements (see Example 12, above)
- Advertisements that are very specific and leave nothing open to negotiation, including how acceptance can occur (you may recall the Lefkowitz fur-stole case)

**Example 19:** I tell you that "you'd better decide fast if you want to buy my house, as I expect to have a ton of offers next week." You say "I accept." Is this a contract? \_\_\_\_\_

**Example 20:** I place an advertisement in the paper promising "to sell my 1994 Jeep Wrangler for \$5,000, first come, first served." You show up at my house waving a check and say "I accept." Is this a contract? \_\_\_\_\_

### CHAPTER 3: TERMINATING THE OFFER AND IRREVOCABLE OFFERS

#### A. TERMINATING THE OFFER (Squashing the Caterpillar)

Look for one of six recurring fact patterns on the MBE (but also beware of irrevocable offers):

**1. The offeror \_\_\_\_\_ the offer by express communication to the offeree.**

**Example 21:** I offer to sell you my house for \$100. A split-second later I yell "I revoke." Is there a squashed caterpillar? \_\_\_\_\_

**Example 22:** I offer to sell you my house for \$1 million. A day later, I decide that I don't want to move and mutter to myself in my office "Forget it. I revoke that offer." Is there a squashed caterpillar? No, the revocation must be \_\_\_\_\_ to the offeree.

2. The offeree learns that the offeror has taken an action that is absolutely inconsistent with a continuing ability to contract. This is called a \_\_\_\_\_ revocation.

**Example 23:** I offer to sell you my house for \$1 million. A day later, you are talking with Mickey and learn that she bought my house that morning for \$1.1 million. You run to my house waving a check and say "I accept." Is this a contract? \_\_\_\_\_

**Example 24:** I offer to sell you my house for \$1 million. A day later, you are talking with Mickey and learn that I offered to sell her my house that morning for \$1.1 million. You run to my house waving a check and say "I accept." Is this a contract? \_\_\_\_\_

**Example 25:** I offer to sell you my signed contracts textbook for \$100. A day later, you are talking with Mickey and learn that she bought my signed contracts textbook for \$100. You run to my house waving a check and say "I accept." Is this a contract? \_\_\_\_\_, because there are lots of books available to sell.

3. The offeree \_\_\_\_\_ the offer.

**Example 26:** I offer to sell you my Jeep for \$5,000. A split second later, you yell, "NO... I mean YES!" Is there a squashed caterpillar? Yes.

4. The offeree makes a \_\_\_\_\_

**Example 27:** I offer to sell you my Jeep for \$5,000. A split second later, you say "I offer to buy it for \$4,500." I remain silent. Ten seconds later, you say "OK, OK... I'll buy it for \$5,000." Is there a contract? \_\_\_\_\_ the counteroffer squashes the caterpillar.

**Note 5:** Be careful to distinguish a counteroffer from a mere counter-inquiry or indecision.

**Example 28:** I offer to sell you my Jeep for \$5,000. A split second later, you say "Maybe not; I better check my bank balance." I remain silent. Ten seconds later, you say "OK, OK... I'll buy it for \$5,000." Is there a contract? Yes.

5. The offeror \_\_\_\_\_ (As described later, death of one party after the contract has been made does not usually terminate the contract; we're talking here about offers).

6. A reasonable amount of time passes.

**Example 29:** I offer to sell you 1,000 barrels of oil for \$100 each. You remain silent, and I never revoke. Five years later, when the price of oil has jumped to \$500, you call me up and accept. Is there a contract? \_\_\_\_\_

**Note 6:** Remember that even if an offer is squashed, the offeror can always throw out a new offer with the exact same terms as before ("revival").

## B. IRREVOCABLE OFFERS (Caterpillar's "Power Shield")

The offeror is normally free to revoke at any time prior to acceptance.

**Example 30:** *I offer to sell you my house for \$1 million, and I promise not to revoke this offer for one week. Five minutes later, I say "Never mind...I revoke the offer." Can you still accept? No.*

An "irrevocable offer" can arise in four ways.

### 1. Option.

**Example 31:** *I offer to sell you my house for \$1 million. You also pay me \$100 in exchange for a promise that I will not revoke this offer for one week. Five minutes later, I say "Never mind...I revoke the offer." Can you still accept? \_\_\_\_\_ What if the \$100 will go toward the \$1 million purchase price if you exercise the option? \_\_\_\_\_*

### 2. Firm Offer

- o A merchant in the UCC universe can make a firm offer to buy or sell goods (i.e., a binding, free option).
  - A merchant is someone who regularly deals in the type of good at issue. In other words,  
\_\_\_\_\_

**Editor's Note 2:** For purposes of this rule, a merchant includes not only a person who regularly deals in the type of goods involved in the transaction, but also any business person when the transaction is of a commercial nature.

- A firm offer must be written, contain an explicit promise not to revoke, and be signed by the \_\_\_\_\_.
- How long does it last? Either as long as stated in the offer or for a reasonable time period not to exceed \_\_\_\_\_ days.

**Example 32:** *I offer to sell you a contracts textbook for \$100 and I promise via a signed writing not to revoke this offer for one week. Five minutes later, I say "Never mind...I revoke the offer." Can you still accept? \_\_\_\_\_, because Professor Geis is not a merchant.*

**Example 33:** *Your law-school bookstore offers to sell you a contracts textbook for \$100 and it promises via a signed writing not to revoke this offer for one week. Five minutes later, the bookstore says "Never mind...I revoke the offer." Can you still accept? \_\_\_\_\_*

**Example 34:** Your law-school bookstore offers to sell you a contracts textbook for \$100. Five minutes later, it says "Never mind...I revoke the offer." Can you still accept? \_\_\_\_\_

**Example 35:** Your law-school bookstore offers to sell you a contracts textbook for \$100 and it promises via a signed writing not to revoke this offer for one week. Ten days later, you stop by the bookstore to accept the offer. Can you still accept? \_\_\_\_\_, as long as a reasonable amount of time has not squashed the caterpillar (see Example 29).

**Editor's Note 3:** Although the bookstore may revoke the offer, it has not done so. The test for whether you may accept remains whether 10 days is an unreasonable amount of time.

### 3. Offeree has started performance.

- o A unilateral offer to contract cannot be revoked by the offeror if the offeree has started performance.
  - What is a unilateral contract? This arises from a promise that requests acceptance by an \_\_\_\_\_ of the promisee (versus a return promise of the promisee, which is called a "bilateral contract"). (Example 12 above).

**Example 36:** "I promise to pay you \$1,000 if you promise to paint my house." Unilateral or bilateral? \_\_\_\_\_

**Example 37:** "I promise to pay you \$1,000 if you paint my house." Unilateral or bilateral? \_\_\_\_\_

- Because a unilateral contract can be accepted only by performance, the law gives the promisee the right to finish.

**Example 38:** I promise \$10,000 to the winner of a swim race to Alcatraz Island. The swimmers dive off the dock and are going strong toward the island. When they're about halfway, I stand up on Fisherman's Wharf with my bullhorn and yell "I REVOKE!" Can the winner of the race insist on the prize? \_\_\_\_\_ this is a unilateral contract with part performance.

**Note 7:** The offeree need not complete the performance and can stop at any time.

**Example 39:** You are swimming in the Alcatraz race, but you get tired and swim to a boat. Can I sue you for breach of contract? No; there's no agreement.

### 4. Detrimental Reliance

- o An offer cannot be revoked if the offeree reasonably and detrimentally relies on the offer in a foreseeable manner.



- Look especially for a general contractor/subcontractor context.
- This is a special variant of the reliance theory of contractual liability (sometimes called "promissory estoppel"); more on this later.

**Example 40:** A builder who is bidding on a law-school building project receives an offer from a subcontractor to supply all of the carpet for \$20,000. Armed with this knowledge, the builder offers to renovate the building for \$100,000. Before the law school accepts the bid, the subcontractor calls to revoke its carpet offer. Can the general contractor builder still accept the carpet offer from the subcontractor? \_\_\_\_\_

## CHAPTER 4: ACCEPTANCE, INCLUDING THE MAILBOX RULE

### A. ACCEPTANCE

An acceptance is a manifestation of a willingness to enter into the agreement by the offeree.

Acceptance is governed by the \_\_\_\_\_ test.

The starting place here is a famous phrase: "The offeror is master of the offer." This means that the offeree must accept the offer according to the rules of the offer.

**Example 41:** I offer to sell you my Jeep for \$50 and state that in order to accept this offer, you must spring into a handstand, walk across the room to me, and sign this piece of paper. You look at me funny, just stand there, and say "I accept." Is there a contract? \_\_\_\_\_

- o Unilateral versus bilateral offers. As master of the offer, the offeror gets to decide which type of offer to make, and the offeree must play by those rules.

**Example 42:** "I promise to pay you \$1,000 if, and only when, you paint my house." You say "I accept." Is there a contract? \_\_\_\_\_ you haven't done what I said you must do to accept.

**Example 43:** Bob sends a letter to Sue, reading "please ship me 500 windshield-wiper blades next week for \$5 each." Sue mails back a letter saying "I accept." Unilateral or bilateral offer? Unclear without more information. Is there a contract? \_\_\_\_\_, under the modern approach.

**Example 44:** Bob sends a letter to Sue, reading "please ship me 500 windshield-wiper blades by next week for \$5 each." Sue ships 500 wiper blades the next day. Is there a contract? \_\_\_\_\_

**Note 8:** **\*\*TRICK\*\***What if the seller tries to accept by shipping the wrong goods? The UCC treats this as **acceptance plus breach**.

**Example 45:** Bob sends a letter to Sue, reading "please ship me 500 Bosch windshield-wiper blades by next week for \$5 each." Sue ships 500 Sloshed wiper blades the next day. Is there a contract? \_\_\_\_\_ but also a breach.

More specific rules about acceptance

- 1) The offer must be \_\_\_\_\_ to the person trying to accept it; you can't accept an offer directed elsewhere. [See Example 11 above.]
- 2) Even with an open-to-all offer—like the "Monster" cat reward offer—you must know about that offer in order to accept it.

**Example 46:** *I've lost my pet cat, Monster, and I take out a newspaper advertisement promising \$100 to anyone who finds my cat by this Friday. You never see the ad, but you find Monster roaming near my house and return the cat to me. Later, you learn about the reward offer and come by to collect. Do we have a contractual agreement? \_\_\_\_\_*

- 3) Just like with revocations, you must generally communicate your acceptance to the other party in order for it to become effective.

**Example 47:** *You offer to buy my contracts textbook for \$50. I say "I'll think about it." That night, while I'm alone brushing my teeth, I say to myself "that's a good offer... I should really accept that offer... in fact, I do accept that offer right now... I accept!" The next morning you call me up and revoke the offer. Is there a contract? \_\_\_\_\_*

- This requirement of communication can sometimes raise tricky timing issues. This is the subject of the \_\_\_\_\_ rule.
- 4) **MAILBOX RULE** - Recall the general rationale behind the mailbox rule: to determine when an acceptance has been legally communicated when there is some delay between sending and receiving.
    - The rule: An acceptance sent by mail is valid when the letter is \_\_\_\_\_
    - Does not apply:
      - If the offeree sends something else first (e.g., rejection, counteroffer).
      - To other types of communication (e.g., revocations, rejections).
      - To \_\_\_\_\_ contracts.
      - It is unclear whether this applies to other media (fax, e-mail, etc.).

**Example 48:** *I send you an offer. You mail back your acceptance. I call you before I receive your letter and revoke. Is there a contract? \_\_\_\_\_*

**Example 49:** *I send you an offer. You mail back your acceptance. The letter gets lost and never shows up. Is there a contract? \_\_\_\_\_.*

**Example 50:** *I send you an offer. You mail back your acceptance. You change your mind and call me up before I receive your letter to reject the offer. Is there a contract? \_\_\_\_\_ unless I detrimentally relied on the rejection.*

**Editor's Note 4:** In Example 51 below, Professor Geis inadvertently says "offer" instead of "acceptance."

**Example 51:** *I send you an offer. You mail back a rejection. You change your mind and mail back an acceptance a few hours later. Both letters arrive at my house on the same day. Is there a contract? It depends on*

---

5) Acceptance without communication (by silence) - There are some exceptions to the requirement that you must communicate an acceptance to the offeror. Look for one of the following:

- Unilateral \_\_\_\_\_ offers or contests (e.g., the Carbolic Smoke Ball case)
- Unilateral offers in which the parties are geographically close (such that the offeror will see that performance has occurred)
- A \_\_\_\_\_ of silence serving as acceptance (such that the offeree should reasonably notify the offeror if she does not accept)
- The offeror says that acceptance must come via silence, and the offeree intends to accept the offer by silence

**Example 52:** *I've lost my pet cat, Monster, and I take out a newspaper advertisement promising \$100 to anyone who finds my cat by this Friday. You see the ad, find Monster, and come by my house on Thursday to collect the reward. Can you get the money even though you never communicated your acceptance to me? \_\_\_\_\_*

**Example 53:** *Mickey buys her weekly keg of beer by calling up Pabst Blue Ribbon on Monday and leaving a message requesting delivery on Friday. One Monday, she leaves her message as usual, but Pabst does not deliver the keg that Friday. Distraught, Mickey asks if she has a contract for this keg. Does she? \_\_\_\_\_*

**Example 54:** *I offer to sell you my Jeep for \$500,000, saying "you may accept this offer by remaining silent for five seconds." You stare at me but don't say a word. After five seconds pass, do we have a butterfly? \_\_\_\_\_ unless you intend to accept.*

6) Implied-in-fact contracts - You can communicate an acceptance without writing or speaking. This communication by gestures or actions is called an "implied-in-fact" contract.

**Example 55:** *I walk into Cheapcuts, a popular haircut franchise where the service offerings and prices are posted above the cash register. The energetic receptionist offers to put my name in, and I sit down to wait. A haircutter comes forward to call my name; I follow and she cuts my hair. When I walk*

toward the exit, the receptionist tells me that I owe them \$15. Must I pay— even though I never said a single word?

---

## CHAPTER 5: COUNTEROFFERS AND UCC § 2-207

### A. COUNTEROFFER

The **common law** universe uses the \_\_\_\_\_ rule. This means that the terms in the acceptance must match the terms of the offer exactly—or it is not an acceptance, but a counteroffer.

Treat conditional acceptance as just another form of counteroffer. (Look for words like "if," "only if," "on the condition that," "but," etc.)

*Example 56:* I offer to mow your lawn on Saturday for \$50. You say, "OK, if you come over on Sunday." Do we have a contract? \_\_\_\_\_

### B. UCC § 2-207

The **UCC** is more forgiving for acceptances that don't match the terms of the offer exactly. It replaces the mirror image rule with § 2-207.

The main intuition of § 2-207 is that a purported acceptance that does not match the terms of the offer exactly can still count as a legal acceptance in many circumstances. But just because there's been an acceptance, do not assume that all terms in the purported acceptance will govern the contract.

**Note 9:** It does not matter whether the parties are merchants for this part of § 2-207.

*Example 57:* I run a business on the side: Geis's Chainsaws. You send me a purchase order requesting a chainsaw for \$400. On the back of this form is an indemnification provision saying "seller agrees to indemnify buyer in the event of a lawsuit." I send back a confirming memo that is exactly the same as the purchase order, except for a provision on the back saying "buyer agrees to indemnify seller in the event of a lawsuit." The most likely outcome - we don't ever notice the difference, because nobody ever gets hurt. But it is possible that a dispute arises and one of us tries to back out of the deal. The goal of UCC § 2-207 is to determine whether there is a contract and, if so, which indemnity term, if any, counts.

Text of **§ 2-207(1)**: "A definite and seasonable expression of acceptance [or a written confirmation] which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional upon assent to the additional or different terms."

**Example 58:** You send a purchase order requesting acceptance by this Friday. I send back my confirming memo two weeks later. Is there a contract? \_\_\_\_\_ because the purported acceptance is not timely.

**Example 59:** You send a purchase order. I send back a timely confirming memo saying "Thanks, but I no longer sell chainsaws; however, I have a hand saw which you can have on the same terms." Is there a contract? \_\_\_\_\_, because this is not a definite acceptance of the original offer.

**Example 60:** You send a purchase order. I send back a timely confirming memo saying "OK, on the condition that you agree to indemnify me against a lawsuit for harm arising from the chainsaw." Do we have a contract? \_\_\_\_\_

**Example 61:** Same facts as Example 60, but my acceptance letter has a bunch of terms on the back, all of which match yours, except for a clause that says "Buyer agrees to indemnify seller against a lawsuit for harm arising from the chainsaw." Do we have a contract? \_\_\_\_\_, under § 2-207(1). Unlike #60, in #61 the change was not a major part of the agreement; it was just one term that was changed.

The new term in the purported acceptance may control under **§ 2-207(2)**, but only if all of the following are true:

- o Both parties are merchants;
- o The new term does not materially alter the deal;
- o The initial offer did not expressly limit acceptance to its terms; and
- o The offeror does not object within a reasonable time to the new term.

It is very difficult for the new terms in the acceptance to govern the contract.

**Example 62:** Same facts as Example 61. Is my indemnity term part of the contract? \_\_\_\_\_

**Example 63:** Does the answer change if the buyer is Lowes? \_\_\_\_\_ if the indemnification is \_\_\_\_\_

If there is not a real contract but the parties still act as if there is an agreement (for example, by exchanging goods for money), only the terms that both writings \_\_\_\_\_ become part of the contract, with other terms supplied by the UCC acting as default rules.

**UCC § 2-207** also governs the situation in which two parties have a contract (often a verbal agreement), and one party sends over a **confirming memo** with additional terms that go further than the earlier agreement. Do these terms come in?

§ 2-207(1): [A definite and seasonable expression of acceptance or] a written confirmation which is sent within a reasonable time operates as an acceptance [even though it states terms additional

to or different from those offered or agreed upon, unless acceptance is expressly made conditional upon assent to the additional or different terms.]

**Note 10:** If you see this fact pattern (early agreement + written confirmation with new terms), work through the same steps as above for § 2-207(2). But recognize that the new terms will very rarely come in.

## CHAPTER 6: CONSIDERATION, INCLUDING MODIFICATION AND PREEXISTING DUTY RULE

### A. CONSIDERATION (And Related Theories) - The "C" in "All Contracts Don't Stink."

#### 1. General Nature of Bargained-For Consideration

- o Consideration in the law means a deal in which the parties exchange promises involving a legal \_\_\_\_\_

**Exam Tip 2:** The bar examiners like to test situations in which bargained-for consideration is missing. You can quickly determine whether there is a problem here by asking the following questions:

Who is making the \_\_\_\_\_ that needs to be supported by law? (That person is the promisor; the other party is the promisee.)

Is there a \_\_\_\_\_ to the promisor or a \_\_\_\_\_ to the promisee? (You need just one, not both.)

Was this \_\_\_\_\_? (In other words, did the parties think that they were making a deal when they exchanged promises?)

**Example 64:** *I promise to pay you \$1,000 if you don't watch the next season of American Idol. You do not watch the show, but I refuse to pay you the money. Who is the promisor? Professor Geis. Who is the promisee? You. Did I benefit from the exchange of promises? Not in a legal sense. Did you incur a legal detriment, even though not watching the show is good for you? \_\_\_\_\_ So is there bargained-for consideration? \_\_\_\_\_*

**Note 11:** Key—Not doing something that you are legally entitled to do is a legal detriment.

- o Gift promises and conditional gifts do **not** count as bargained-for consideration.

**Example 65:** *Every year for Christmas, Mickey gives me a tacky tie, and I give her an ugly sweater. Can she sue me this year if I refuse to give her a present? \_\_\_\_\_ we are exchanging gifts, not bargaining.*

**Example 66:** *I promise to give you my Jeep if you come to my house to pick it up. Is there bargained-for consideration? \_\_\_\_\_ I am not bargaining for you to come.*

- Example 66 is a conditional gift (I would never sue you if you don't come over).

## 2. Tricks Regarding Consideration

- o **Adequacy of consideration** (nominal consideration): A pretense of consideration is insufficient; there must be some adequacy of consideration.

*Example 67:* I promise to sell you my Jeep for \$1. Is there bargained-for consideration? \_\_\_\_\_, one dollar is inadequate.

**Editor's Note 5:** Note, however, that a difference in economic value between the items exchanged is not grounds for finding that a contract did not exist due to inadequate consideration. As long as the exchanged item has subjective value to the person receiving it, consideration will be adequate.

- o An **illusory promise**: A promisor must clearly commit to the deal or there is no consideration.

*Example 68:* You promise to buy my Jeep for \$5,000 on December 1, "if you feel like it." Is there bargained-for consideration? \_\_\_\_\_

- There must be a way for the promisor to breach.
- Satisfaction contracts are not illusory. They are real contracts with consideration.

*Example 69:* I promise to pay Mickey \$500 if she paints a portrait of my family that meets my satisfaction. She says OK. Is there bargained-for consideration? \_\_\_\_\_

- Although output and requirements contracts (see Example 18 above) are not illusory promises, there is a way for a party to breach (by requiring the product and purchasing from others or by making the product and selling to others).

- o **Past consideration** is not consideration.

*Example 70:* You are trying to win a race to Alcatraz, when the sharks start to circle. I swing my boat over to pick you up. Grateful, you promise to pay me \$500 for the rescue. Is there bargained-for consideration? No.

- o **Promising not to sue** (settlement of a legal claim) will act as consideration as long as there is an \_\_\_\_\_ in the validity of the claim and a reasonable basis for that belief.

## B. Contract Modification and the Preexisting Duty Rule

Common law has historically followed the preexisting duty rule, which means that a promise to do something that you are already legally obligated to do (by prior contract or otherwise) is not consideration.

*Example 71:* You rent an apartment from Slumlord for one year; the rent is \$2,000 per month. Later that year, you start running short on cash, and you both agree to modify the rent to \$1,500 per month. Can Slumlord sue you at

the end of that month for the extra \$500? \_\_\_\_\_, at common law.  
(There is no bargained-for consideration for the modification contract.)

- o Exceptions include a change in performance, a third party promising to pay, or unforeseen difficulties that would excuse performance.

**Example 72:** Same facts as Example 71, except you agree to re-rent the apartment for another year when the rent is lowered to \$1,500 per month. Can Slumlord sue you at the end of that month for the extra \$500? No.

**Example 73:** Same facts as Example 71, except Slumlord's sister (Slumlady) agrees to cover \$500 of your monthly rent if you stay in the apartment. Is there bargained-for consideration? Yes.

- o Is promising partial payment for release from a debt obligation binding? The key is to ask whether the debt is currently due and \_\_\_\_\_. If so, the modification is not binding.

**Example 74:** Mickey owes me \$50,000, due today. I promise to release her from this debt if she can pay me at least \$1,000. If she does, can I sue her for the other \$49,000? \_\_\_\_\_, because the modification is not valid.

**Example 75:** Same facts as Example 74, except that the debt is not due until next year. If Mickey accepts the deal and pays me the \$1,000 today, can I sue her next year for the other \$49,000? \_\_\_\_\_ because the debt is not currently due.

Modification under the UCC - The UCC universe does not follow the preexisting duty rule. Rather, you should simply ask whether a modification is made in \_\_\_\_\_. If so, it is binding even \_\_\_\_\_ new consideration.

**Example 76:** Mickey contracts with Pabst Blue Ribbon to buy her weekly keg of beer for \$75. Later in the week, Pabst calls back to say that there is a worker shortage that week, and it can't get her the beer unless she pays \$100 (so Pabst can outsource delivery to FedEx). Mickey says, "OK, charge what you must; I need my beer." Is the price modification binding? \_\_\_\_\_

**Example 77:** Same facts as Example 76, but Pabst knows that Mickey will do anything for her beer. On Friday morning, Pabst calls to say, "you better pay us \$1,000 or we won't deliver your keg this afternoon." Mickey says, "OK, charge what you must." Is the price modification binding? \_\_\_\_\_



## CHAPTER 7: CONSIDERATION SUBSTITUTES

### A. Other Theories of Promissory Liability (Consideration Substitutes)

#### 1. Promissory Estoppel (or Reliance)

- o Reliance can arise when one party makes a promise, and the other party relies on that promise to take some action.
- o Three key elements for a claim under reliance:
  - A promise is made that would be \_\_\_\_\_ to induce reliance;
  - The promisee does indeed take detrimental action in reliance on the promise; and
  - \_\_\_\_\_ can be avoided only by enforcement of the promise.

**Example 78:** *Grandpa Moneybags promises to pay his granddaughter Katie \$100,000 next month so that she doesn't have to work anymore. Katie quits her job. Is this bargained-for consideration? No. Does Grandpa nevertheless have to keep his promise? Maybe yes, under a reliance theory.*

**Note 12:** Charities do not need to prove detrimental reliance when pursuing a reliance theory to collect on a charitable-gift promise.

- Remember also that reliance was discussed earlier with respect to irrevocable offers in the general contractor/subcontractor context, as a special type of caterpillar "power shield."

#### 2. Quasi-Contract

- o Quasi-contract is sometimes called a "contract implied-in-law." Think of this as a situation in which you would have made a contract if you could have, but you couldn't. Or, look for a situation in which one party conferred a benefit on another party, and it would be fair to pay for that benefit.
- o Quasi-contract elements:
  - The plaintiff confers a \_\_\_\_\_ on the defendant;
  - The plaintiff reasonably expected to get paid; and
  - It would be unfair to let the defendant keep the benefit without paying (look for an opportunity to decline or a good reason why there was no opportunity to decline).

**Example 79:** *I am teaching away for this bar review course, when I suddenly grab my chest and keel over with a heart attack. A student rushes out to hire a doctor, who saves my life. Later, that student asks me to pay her back for the doctor's fee. Must I? \_\_\_\_\_.*

**Example 80:** *I hear about this cool thing called quasi-contract and rush over to paint your house while you are taking the bar exam. When you come home, I stick out my hand and demand a reasonable payment for the paint job. Will I recover? \_\_\_\_\_*

**Note 13:** Quasi-contract damages are often limited, as justice requires, to the fair value of the benefit conferred.

- o More generally, whenever you see a situation that does not satisfy the normal requirements for a contract but still strikes you as unfair, ask whether quasi-contract might apply.

### 3. Moral Obligation Plus Subsequent Promise (the "Half Theory")

- o A few jurisdictions have some case law suggesting that a moral obligation plus a subsequent promise to pay can be binding. Normally, this would be past consideration and thus nonbinding.

**Example 81:** *Recall the facts of Example 70. You are trying to win a race to Alcatraz, when the sharks start to circle. I swing my boat over to pick you up. Grateful, you promise to pay me \$500 for the rescue. Is there bargained-for consideration? \_\_\_\_\_ Might I argue moral obligation plus subsequent promise? \_\_\_\_\_*

### 4. The Seal

- o Does a seal on a document act as a consideration substitute in most jurisdictions? \_\_\_\_\_

## CHAPTER 8: DEFENSES PART 1: MISUNDERSTANDING, INCAPACITY, AND MISTAKE

### A. DEFENSES TO CONTRACT FORMATION -The "D" in "All Contracts Don't Stink."

Seven Defenses:

- 1) Misunderstanding
- 2) Incapacity
- 3) Mistake
- 4) Fraud/Misrepresentation/Nondisclosure
- 5) Duress
- 6) Illegality
- 7) Unconscionability

#### 1. Misunderstanding

- o Look for situations where each party attaches different meanings to the same words. To make out a defense here, you must show that

- The parties use a \_\_\_\_\_ that is open to two or more reasonable interpretations (so the objective test cannot apply);
- Each side attaches a different meaning to the term; and
- Neither party knows, or should know, of the confusion.

**Example 82:** *I verbally contract to sell you a bike for "twelve fifty." You think I'm trying to unload the bike by selling it for \$12.50. I think you recognize that this is a rare edition bike and you are willing to pay \$1,250. Do we have a contract? \_\_\_\_\_.*

**Example 83:** *Same facts as Example 82, except I know that you would never pay \$1,250 for the bike and must think the price is \$12.50. Is there a contract? \_\_\_\_\_. For how much? \_\_\_\_\_*

## 2. Incapacity

- o Who lacks the capacity to make a contract?
  - Minors (under the age of 18)
  - The mentally ill—two standards:
    - The person cannot understand the nature and consequences of his actions; or
    - The person cannot act in a \_\_\_\_\_ in relation to the transaction (if the other side knows this)
  - Very intoxicated persons (if the other side knows this)
- o The standard changes according to the type of incapacity.
  - Minors = blanket protection
  - Intoxicated persons = depends on what the other side knows or should know at the time
  - Mentally ill = intermediate level of protection
- o What happens if you make a contract with a person who lacks capacity?
  - The contract is \_\_\_\_\_ meaning that the incapacitated party can disaffirm;
  - For necessities, the party without capacity must still pay \_\_\_\_\_ (not necessarily the contract price);
    - What's a necessity? Something you really need to live, like food, clothing, or shelter.
  - A party without capacity can ratify the deal by keeping the benefits of the contract after capacity is obtained.

**Example 84:** *Amelia is aged 16 but looks much older. She buys a used airplane for \$5,000. The wings fall off as she pulls away from the dealer's lot. Can Amelia get her money back? Yes.*

**Example 85:** Same facts as Example 84, except the plane flies OK. Amelia turns 18 and continues to use the plane. Can she get her money back now? No.

**Example 86:** Same facts as Example 84, except Amelia is now 32 and takes LSD prior to buying the plane. She has no idea what she is doing, but witnesses say she seemed perfectly lucid while negotiating and buying the plane. Can Amelia get her money back? No.

### 3. Mistake

- o A mistake is a belief that is not in accord with a \_\_\_\_\_ fact.

**Example 87:** Mickey contracts with her stockbroker to buy a share of Google stock for \$500. When the price drops to \$400 the following month, can she get out of the deal by saying, "I made a mistake; I thought the price was going to go up?" \_\_\_\_\_

- o **Mutual mistake** (affecting both parties) lets the adversely affected party rescind if:
  - There is a mistake of fact, existing at the time that the deal is made;
  - The mistake relates to a \_\_\_\_\_ assumption of the contract and has a material impact on the deal; and
  - The impacted party did not \_\_\_\_\_ of mistake.

**Example 88:** We are walking along a trail, when I lean down to pick up a shiny rock. "Wow," I say, "look at that diamond. I'll sell it to you for \$10,000." You agree and pay me the money but are sad to learn later that the rock is plain quartz. Can you get out of the contract? \_\_\_\_\_, for mutual mistake.

**Example 89:** Same facts as Example 88, except I say "Wow look at that shiny rock; I wonder what it is. Well, whatever it is, I'll sell it to you for \$10,000." Can you get out of the contract? \_\_\_\_\_ this is a "compromise of conscious ignorance."

- o \_\_\_\_\_ mistake (one party) lets the adversely affected party rescind if:
  - She can prove all of the elements of mutual mistake; **plus**
    - The mistake would make the contract unconscionable; or
    - The other side knew of, had reason to know of, or caused the mistake.

**Example 90:** Mickey decides to move to an annual purchasing model for her beer kegs and solicits 25 brewers for offers. Twenty-four of the brewers quote her prices in the \$100,000 to \$120,000 range. But one brewer makes a mistake about the quantity of kegs she lists and quotes a price of \$10,000 for the year's supply. Can Mickey snap up the last deal? \_\_\_\_\_

**Note 14:** Only the adversely affected party can claim the defense.

## CHAPTER 9: DEFENSES PART 2: FRAUD, DURESS, ILLEGALITY, AND UNCONSCIONABILITY

### A. Defenses to Contract Formation, Continued

#### 4. Fraud, Misrepresentation, and Nondisclosure

- o A **misrepresentation** is a statement at the time of contracting that is not true. It can be intentional (fraudulent) or accidental.
- o To assert this defense, the party must show:
  - A misrepresentation of a \_\_\_\_\_ (not opinion);
  - That is \_\_\_\_\_ or fraudulent (intentional); and
  - That is made under circumstances in which it is justifiable to \_\_\_\_\_ on the representation.

**Example 91:** Before buying my Jeep Wrangler for \$3,000, you ask me how the car runs. I say "it's a great car." In actuality, it only runs on four out of six cylinders, and the radiator leaks. Can you get out of the contract?  
\_\_\_\_\_ if this is an opinion.

**Example 92:** Same facts as Example 91, except you ask me if the car runs OK, and I say "yes," knowing that it has all the mentioned problems. Can you get out of the contract? \_\_\_\_\_ due to intentional fraud.

**Example 93:** Same facts as Example 92, except I don't know about these problems. Can you get out of the contract? \_\_\_\_\_ due to material misrepresentation.

**Example 94:** Same facts as Example 93, except the only thing wrong with the car is that the cigarette lighter doesn't work. Can you get out of the contract?  
\_\_\_\_\_

- o **Fraud in the Execution** - Fraud in the execution is when you trick someone into signing something that she doesn't even know is a contract.

**Example 95:** You're walking down the street when you run into Dave Matthews. You ask for his autograph and then laugh when he hands back the paper. If you show that he just signed a contract promising to play music at your birthday party for just a \$100 fee, is Dave bound? No, this is fraud in the execution.

- o **Nondisclosure** - The other party doesn't learn the truth about something, but now you just remain quiet. Normally, you need not tell the other side about all material facts related to the deal. But watch out for a special (fiduciary) relationship or active  
\_\_\_\_\_

**Example 96:** *I'm selling my house, but I have a bad termite problem. I hide the ripples in the floor with carpets and put plants on the damaged stairways. You buy the house but soon learn of the termite infestation. Can you get out of the contract for nondisclosure? \_\_\_\_\_*

## 5. Duress

- o Duress is an improper threat that deprives a party from making a meaningful choice to contract.
- o \_\_\_\_\_ duress arises when one party makes threats to induce another party to contract (or modify a contract).

**Example 97:** *Pabst threatens to breach a contract with Mickey to sell her beer unless Mickey agrees to extend the contract for another year at double the price. Mickey has exhausted her credit with every other brewer and feels that she has no choice but to accede to this threat. Is Mickey bound for the next year? \_\_\_\_\_*

- o Undue influence arises when a party puts very intense sales pressure on another party—who often seems weak minded or susceptible to high-pressure sales tactics.

## 6. Illegality

- o Illegal contracts are unenforceable. But, a contract entered in furtherance of an illegal act (that is not itself illegal) will still be enforced.

**Example 98:** *Mobster Tony Soprano agrees to pay Paulie \$10,000 to knock off Artie. Is this legally binding as a contract? \_\_\_\_\_ because it is for an illegal action. If Paulie doesn't knock off Artie, then Tony cannot bring Paulie into court and sue him for breach.*

**Example 99:** *Same facts as Example 98. Paulie hires a taxi to drive him over to Artie's restaurant. Can Paulie claim an illegality defense to avoid paying the cab driver? \_\_\_\_\_*

- o Typically, the law will just leave the parties where they stand, but there is a modern trend toward allowing less-guilty parties to recover restitution (i.e., get their money back).

**Example 100:** *Same facts as Example 99, except Tony pays Paulie the \$10,000 up front. If Paulie refuses to perform, can Tony get the money back? \_\_\_\_\_ The losses will lie where they may.*

- o Contracts against public policy will not be enforced. These are contracting situations that are not formally illegal but present some other policy concern (e.g., a broad exculpatory agreement).

## 7. Unconscionability

- o This is the ultimate contract defense. Everything seems fine, but a court simply looks at the deal and says, "No, this shocks my conscience. It's unconscionable."
- o Recall the two varieties of unconscionability:
  - \_\_\_\_\_ unconscionability: A defect in the bargaining process itself, such as a hidden term (surprise) or an absence of meaningful choice (no other contracting option);
  - \_\_\_\_\_ unconscionability: A rip-off in some term of the contract.
- o Some jurisdictions require both varieties to be present before a deal is stuck down; others may act if only one variety is present.

## CHAPTER 10: STATUTE OF FRAUDS PART 1

### A. Statute of Frauds - The "S" in "All Contracts Don't Stink."

The Statute of Frauds is a barrier that some contracts must meet in order to become "real" (legally binding).

The basic goal of the Statute of Frauds is to prevent false assertions about a contract that was never really created.

***Example 101:** I walk up to you one day and say "I'm so glad that you agreed to sell me your house for just \$50,000." You stare at me puzzled and reply, "Who are you? We've never met." I laugh and say, "See you in court." Will I win the lawsuit? \_\_\_\_\_; the Statute of Frauds will bar my claim.*

You should always ask two questions here:

- o Gateway question: Does the Statute of Frauds apply to this transaction?
- o If so, has the Statute of Frauds been satisfied?
  - Contracts in Statute of Frauds world require a higher and special form of proof— typically a writing signed by the defendant or some performance on the purported deal.

#### 1. Is the contract in the Statute of Frauds world?

- o Recall that the Statute of Frauds applies to only a few types of contracts:
  - Marriage: A contract made in consideration of marriage (like a prenup).
  - Suretyship: A contract promising to guarantee the debt of another.
  - One Year: A contract that by its terms cannot be performed within one year from its making.
  - UCC: Applies to goods contracts for a price of \$500 or more
  - Real property: A contract for the sale of an interest in real property.

- o You should think about Lemonheads candy and its mascot: Mr. SOUR (or M. SOUR):

**Example 102:** Mickey buys beer on credit from Pabst, promising to pay \$499 at the end of the month for her five kegs. Pabst sues her at the month for failure to pay. Are we in Statute of Frauds world? \_\_\_\_\_

**Example 103:** Same facts as Example 102, except Pabst now sues me, claiming that I had offered to pay Mickey's bill if she could not. Are we in Statute of Frauds world? \_\_\_\_\_, suretyship.

- o **The Main Purpose Exception** - If the main purpose in agreeing to pay the debt of another is for the surety's own economic advantage, then we are not in Statute of Frauds world.

**Example 104:** Same facts as Example 103, except Pabst sells beer to Mickey that she brings over to my house for weekly parties. Pabst sues me, claiming that I had offered to pay Mickey's bill if she could not. Are we in Statute of Frauds world? \_\_\_\_\_, because of the main purpose exception.

- o The one-year rule is interpreted very narrowly; the question is whether there is \_\_\_\_\_ that the contract could be performed within one year.

**Example 105:** I verbally contract with the mayor of Charlottesville to build an exact replica of the Egyptian pyramids at the edge of town for \$50 billion. Are we in Statute of Frauds world? \_\_\_\_\_ It may be difficult, but it is not impossible to complete the contract within one year.

**Example 106:** I verbally contract with the mayor of Charlottesville to manage all city elections through 2020 for \$50 per election. Are we in Statute of Frauds world? \_\_\_\_\_

**Example 107:** I contract on April 1 to hire a 1L student as my RA for three months during her 2L summer. Are we in Statute of Frauds world? \_\_\_\_\_ The length of the employment is only three months, but it won't even start until over one year from now.

**Example 108:** William Shatner hires me to teach him contract law for the rest of his life. Are we in Statute of Frauds world? \_\_\_\_\_ It is possible that Shatner could die within one year.

**Note 15:** Note that all contracts involving real property are not in Statute of Frauds world; only those transferring an interest in the property. Also, leases of one year or less are usually not in Statute of Frauds world.

**Example 109:** Shatner hires Spock to build a house on Shatner's Enterprise Acre estate. Is this contract in Statute of Frauds world? \_\_\_\_\_ It involves land but does not transfer an interest in land.



**Example 110:** Shatner agrees to sell Enterprise Acre to Spock for \$5 million. Is this contract in Statute of Frauds world? \_\_\_\_\_

**Example 111:** Mickey verbally contracts with Pabst to buy exactly \$500 in beer. Are we in Statute of Frauds world? \_\_\_\_\_, under the UCC part of the SOF.

## CHAPTER 11: STATUTE OF FRAUDS PART 2

**Editor's Note 6:** Professor Geis inadvertently says "M.SALTY" instead of "M.SOUR" as the mnemonic device to remember whether the Statute of Frauds applies to a contract.

### A. Has the Statute of Frauds been satisfied?

There are two main ways to satisfy the Statute of Frauds—by \_\_\_\_\_ and by \_\_\_\_\_. The exact requirements differ between our parallel universes.

#### 1. Services Contracts

- o Full performance of a services contract by either side satisfies the Statute of Frauds.

**Example 112:** Shatner verbally agrees to hire Spock to build a house on Enterprise Acre estate. In exchange, Shatner will provide "charm lessons" to Spock for the next three years. Is this contract in Statute of Frauds world? \_\_\_\_\_ Spock builds the house, but Shatner refuses to provide the lessons, asserting a Statute of Frauds defense. Is Shatner right? \_\_\_\_\_

- o Part performance of a services contract does not satisfy the Statute of Frauds.

#### 2. A writing signed by the party against whom the contract is asserted will satisfy the Statute of Frauds.

- o Do you need both signatures on the writing? \_\_\_\_\_
- o Does the writing have to be a formal contract? \_\_\_\_\_
- o But it must cover the fundamental facts by:
  - Indicating that a contract has been made;
  - Identifying the parties; and
  - Containing the essential elements of the deal.

#### 3. Real Estate - Real estate deals are like other service deals in that a signed writing will satisfy the Statute of Frauds.

- o But, unlike other service deals, part performance of a real estate contract can satisfy the Statute of Frauds if any two of the following three elements are met:
  - Possession
  - Payment

- Improvements \_\_\_\_\_

**Example 113:** Spock claims that Shatner agreed to sell Enterprise Acre for \$5 million. There is no signed writing, but Spock now possesses the land and has erected a nice house on the lake. Is this contract in Statute of Frauds world? Yes. Is the Statute of Frauds satisfied? Yes.

#### 4. Goods

- o A signed writing will satisfy the Statute of Frauds, but the requirements differ a little under the UCC:
  - There is no need to mention the price;
  - The writing must mention the \_\_\_\_\_ sold.
- o The contract is only enforceable under the Statute of Frauds for the quantity mentioned.

**Example 114:** Mickey verbally contracts with Pabst to buy 100 kegs of beer for \$75 each. Later, Pabst sends her a signed confirmation order stating that the parties agree to contract for 50 kegs of beer (no price is listed). Even later, Pabst asserts a Statute of Frauds defense and refuses to sell Mickey any beer. Can Mickey satisfy the Statute of Frauds? \_\_\_\_\_ but only for 50 kegs.

- o **Part performance** on a goods contract satisfies the Statute of Frauds, but only for the quantity delivered or accepted.

**Editor's Note 7:** The professor misspoke. Part performance on a goods contract satisfies the Statute of Frauds, but only for the quantity delivered AND accepted.

**Example 115:** Same facts as Example 114, except there is no confirming memo. Mickey changes her mind and decides to order some kegs of Fat Tire beer. Later, Pabst delivers 25 kegs to Mickey, and she eagerly stores the kegs in her basement. Can Pabst satisfy the Statute of Frauds? Yes, but only for the 25 kegs delivered. Is Mickey contractually obligated to buy the other 75 kegs from Pabst? \_\_\_\_\_, the Statute of Frauds will bar that claim.

- o **Custom-made (or specially manufactured) goods** are exempted from the Statute of Frauds. Thus, a maker can satisfy the Statute of Frauds as soon as it makes a \_\_\_\_\_ toward the manufacturing of the goods.

**Example 116:** I contract verbally with Brooks Brothers to buy 100 white dress shirts with "GSG" monogrammed on the pocket for \$10,000. Brooks Brothers sends me the shirts, but I change my mind and send the shirts back. Can I assert a Statute of Frauds defense if Brooks Brothers sues for the \$10,000? No, the custom-goods exception applies.

- o A **judicial admission**, such as a statement in a pleading or during testimony, satisfies the Statute of Frauds under the UCC.
- o The **failure to object** to a confirming memo within 10 days will satisfy the Statute of Frauds—but only if both parties are \_\_\_\_\_

**Example 117:** Mickey verbally contracts with Pabst Blue Ribbon to buy 100 kegs of beer for \$7,500. Later, Pabst sends her a signed confirmation memo with all of the material terms. Mickey has changed her mind, crumples up the memo, and throws it in the corner. Ten days later, does Pabst satisfy the Statute of Frauds? \_\_\_\_\_ Mickey is not a merchant.

**Example 118:** Same facts as Example 117, except the buyer is now Whole Foods. Ten days after the memo arrives at Whole Foods, does Pabst satisfy the Statute of Frauds? \_\_\_\_\_, even though there is no signed writing by Whole Foods.

## 5. Miscellaneous Statute of Frauds problems

- o **Agency law:** Do you need a signed writing to authorize an agent to form a contract that is in Statute of Frauds world? \_\_\_\_\_ This is known as the "\_\_\_\_\_ rule."
- o **Modification:** Suppose you have a deal that is in Statute of Frauds world, and the Statute of Frauds requirements are met. Now the parties want to modify that deal. Must the modification also satisfy the Statute of Frauds requirements?

- 
- Ask whether the deal with the alleged modification would be in Statute of Frauds world.

**Editor's Note 8:** The professor misspoke when he said "within" instead of saying "with."

- If so, the Statute of Frauds requirements must be met;
- If not, there is no Statute of Frauds requirement, even though the initial deal was in Statute of Frauds world!

**Example 119:** Mickey contracts with Pabst to buy five kegs of beer for \$500. Later, Pabst sends her a signed confirmation memo with all material terms. Mickey alleges that they later modified the deal to three kegs only for \$300. Does she need to supply written proof of this alleged modification? \_\_\_\_\_ because the modification is not within the SOF world.

## CHAPTER 12: PERFORMANCE AND THE PAROL-EVIDENCE RULE

### A. Second Main Question in Contract Law: Has the contract been performed?

Four big topics within this question:

- 1) Parol-evidence rule
  - 2) Warranties
  - 3) Conditions
  - 4) Excuse of performance obligations (impracticability, frustration of purpose, etc.)
- o "Pizza With Crawling Escargot" -

### B. The Parol-Evidence Rule (PER) - "P" in "Pizza With Crawling Escargot."

Step One: Determine what the agreement entails. If you see a written contract that the court finds is the final agreement and *earlier* oral or written statements about the same deal, think PER.

- o Does the PER apply to later written or oral statements about the deal? \_\_\_\_\_, that's a modification.
- o Does the PER apply to earlier written documents? \_\_\_\_\_.

Gateway Question: Have the parties created an integrated writing?

- o \_\_\_\_\_ integration means that the contract expresses all terms of the agreement.
- o \_\_\_\_\_ integration means that there is a writing and final writing, but some terms are not included.

How do you distinguish an agreement that is not integrated from one that is completely or partially integrated?

- o Look for a \_\_\_\_\_ clause (evidence of complete integration)

**Example 120:** *Disney signs a contract with Hugh Grant to make a movie for \$2 million. It contains the following language right above the signature line: "This is the entire agreement between the parties. No representations or promises have been made save for those set out in this memorandum." Hugh later argues that Disney had verbally promised to provide a free house in Beverly Hills while he was filming, and they did not. Can he introduce this evidence?*

\_\_\_\_\_

**Example 121:** *Same facts as Example 120, except Hugh argues that during the meeting but after the written contract was signed, they verbally agreed that \$2 million was not enough and that he would get \$3 million. Disney later sent a check for \$2 million. Can Hugh introduce evidence that Disney promised to pay Hugh \$3 million? \_\_\_\_\_*

- o Courts may also ask whether, under the circumstances, an extrinsic term of the agreement would "naturally be omitted" from the writing. If so, it may not violate the parol-evidence rule and can be introduced as evidence if it does not contradict the writing.
- o The UCC universe is more forgiving, presuming that a writing is, at most, only a partial integration—unless the parties would have \_\_\_\_\_ included a disputed term in the writing.

**Example 122:** Same facts as Example 120, except Hugh argues that Disney verbally offered him, prior to signing, a sequel part for \$5 million. (Although this is a service contract, for the purpose of illustrating the UCC partial integration rule), can he introduce this evidence? Tough call.

Finally, there are some situations in which the parol-evidence rule does not apply to bar earlier evidence.

- o The parol-evidence rule does not bar evidence relevant to a defense against contract formation (duress, mistake, fraud, etc.)
- o Even if a writing is totally integrated, a party can introduce evidence of a \_\_\_\_\_ deal.

**Example 123:** Same facts as Example 120, except Hugh now argues that Disney verbally offered, prior to signing, to sell him a season pass to Disneyland for \$1,000. Can he introduce this evidence? \_\_\_\_\_

- o Even if a writing is totally integrated, a party might be able to introduce evidence of a \_\_\_\_\_ that is designed to interpret an ambiguous term in the final agreement.

**Example 124:** Same facts as Example 120, except the parties disagree over what "movie" means in the contract. Disney believes that Hugh will make "Mrs. Doubtfire 2." Hugh claims that they had verbally agreed that he would make "Driving Miss Daisy 2." Can Hugh introduce this evidence? \_\_\_\_\_, as long as the term "movie" is sufficiently ambiguous.

Recap: Some people confuse the parol-evidence rule with the Statute of Frauds.

- o If the question does not have a signed writing, think \_\_\_\_\_
- o If the question does have a signed writing, along with an earlier discussion of the deal, think \_\_\_\_\_

## CHAPTER 13: WARRANTIES AND EXPRESS CONDITIONS

### A. Warranties - "W" in "Pizza With Crawling Escargot."

A warranty is a promise about a term of the contract that explicitly shifts risk to the party making the promise.

*Example 125:* I agree to sell you my Jeep for \$5,000, but we don't discuss any other term. If the wheel falls off as you drive away, can you get out of the deal? It's uncertain. The buyer would need to argue mistake, duty to disclose, etc. What if I include a warranty that the Jeep will run fine for the next 1,000 miles? \_\_\_\_\_ you can get out of the deal.

Note that you can also \_\_\_\_\_ all warranties. For example, I might sell the Jeep on an "as is" basis.

Three types of warranty issues that arise in the UCC universe:

#### 1. Express Warranties.

- o A promise that affirms or describes the goods and that itself is part of the basis of the bargain is an express warranty unless it is merely the seller's opinion.
- o The use of a sample or model good creates an express warranty that the goods sold will be like the sample.

*Example 126:* You walk into an AutoZone store to buy some hubcaps. The clerk shows you some floor samples that are bright gold and says these are our best model. You buy that model of hubcaps but find that they are an ugly yellow color when you pull them out of the box. AutoZone has breached an \_\_\_\_\_ warranty.

#### 2. Implied Warranty of Merchantability.

- o This warranty is triggered only when the seller is a merchant dealing in the goods at issue.
- o The merchant makes an implied warranty (unless disclaimed) that the goods are fit for \_\_\_\_\_.

*Example 127:* You walk into an AutoZone store to buy some polish for your hubcaps. The clerk waves you over to aisle 12 where you pick up a can of hubcap polish. When you spray it on your hubcaps, they turn an ugly yellow color. AutoZone has breached an implied warranty of \_\_\_\_\_.

*Example 128:* You walk into an AutoZone store and the clerk tells you that their delivery van is for sale. You buy it, but it breaks down the next day. Has AutoZone breached the implied warranty of merchantability? \_\_\_\_\_ this is a one-off good; AutoZone is not a merchant in vans.

- o Can a merchant disclaim this warranty? \_\_\_\_\_ if very clearly done. Look for VERY CONSPICUOUS language that mentions the warranty of merchantability or words like "as is."

### 3. Implied Warranty of Fitness for a Particular Purpose.

- o This warranty is triggered when a buyer relies on a seller's expertise to select a special type of good that will be used for a special purpose.
- o The seller makes an implied warranty (unless disclaimed) that the goods will satisfy this special purpose.

*Example 129: Same facts as Example 127, except you can't decide between three different types of hubcap polish. You ask the clerk which one is right for your aluminum-alloy hubcaps, and he picks up a can and says, "THIS is the brand you want." When you spray it on your hubcaps, they turn an ugly yellow color. AutoZone has breached an implied warranty of*

---

- o Can a nonmerchant extend this warranty by implication? \_\_\_\_\_ as long as the buyer relies on any seller's expertise.
- o Can this warranty be disclaimed? \_\_\_\_\_ just like the warranty of merchantability.

**Editor's Note 9:** While the implied warranty of fitness for a particular purpose may be disclaimed by the use of CONSPICUOUS language such as "as is," which is also the case for the implied warranty of merchantability, the implied warranty of fitness for a particular purpose, unlike the implied warranty of merchantability, cannot be disclaimed orally; its disclaimer must be in writing

## B. CONDITIONS - The "C" in "Pizza With Crawling Escargot."

A condition is another way to shift risk by stating that one party's contractual obligation will kick in only if some future event takes place.

*Example 130: Your rich and eccentric Aunt promises you \$5,000 if you pass the bar exam—on the express condition that you study with Barbreeze. You take Themis and easily pass the exam. Must your aunt pay you the \$5,000?*

---

Like warranties, conditions can be express or implied. By far, the most important implied condition is something called the "constructive condition of exchange."

### 1. Express Conditions

- o Express conditions are created by language in the contract. Look for magic words like "only if," "provided that," "on the condition that," "only in the event that," etc.
- o Express conditions must be \_\_\_\_\_—unless the condition is somehow excused.

*Example 131: Mark contracts to work for The Egg House for 10 weeks building a new henhouse for the chickens. The parties agree that Mark will get \$10,000*

for building the house, along with a bonus of \$5,000 awarded on the condition that he shows up every day for work. Mark finishes the henhouse, but he doesn't come to work for the last two days in week 10 because he is really sick. Can Mark collect the \$5,000 bonus? \_\_\_\_\_

- o How are these conditions met? It depends on the nature of the performance.
  - The preferred approach is to use an objective standard of satisfaction, meaning that if most reasonable people would be satisfied, then the condition is met;
  - Contracts involving aesthetic taste, such as art or tutoring services, will measure whether any satisfaction conditions are met with a \_\_\_\_\_ standard. The party can still breach if they claim dissatisfaction in bad faith.

**Example 132:** *I promise to pay Mickey \$5,000 if she paints a portrait of my family, if the painting meets with my satisfaction. She says OK. After she is finished, the portrait is revealed, and all of the art critics rave over the masterpiece. But I hate it. Must I pay Mickey the \$5,000? \_\_\_\_\_*

- o The party receiving the protection of the condition may waive the condition by words or \_\_\_\_\_

**Example 133:** *You agree to buy my Jeep for \$5,000 on the express condition that you can get a car loan for this amount at an interest rate of 10% or less. You can only get a loan for 12%, but you still want to buy the Jeep. If you waive the financing condition, must I sell you the Jeep? Yes. Can I waive the financing condition? \_\_\_\_\_*

- o A condition will also be waived if the other party \_\_\_\_\_ or hinders the occurrence of the condition. This will be judged by a good-faith standard.

**Example 134:** *Same facts as Example 133, but you decide that you don't want the Jeep after all. You refuse to provide any documentation to the bank considering your loan and tell the loan officer that you're a lazy deadbeat. Is the financing condition waived? \_\_\_\_\_*

## CHAPTER 14: IMPLIED CONDITIONS, CCE, AND UCC PERFORMANCE RULES

### A. IMPLIED CONDITIONS AND THE CONSTRUCTIVE CONDITION OF EXCHANGE

- o The **Constructive Condition of Exchange** ("CCE") says that one party's performance is conditioned on the other side's performance.

**Example 135:** *You agree to buy my Jeep for \$5,000 next Friday. That day we meet, but I refuse to sign over the pink slip. Do you have to pay me the \$5,000? \_\_\_\_\_*



## 1. Common-Law Universe

- o The CCE need not be satisfied perfectly. The doctrine of substantial performance states that a party will satisfy the CCE if there is not a \_\_\_\_\_

***Example 136:** Shaquille O'Neal hires me to build him a house. I build the doorways all at standard height (6'6") instead of the 8' listed in the contract. Shaquille is mad because he must duck to get from room to room. Has there been substantial performance? \_\_\_\_\_, this is a material breach, a "big deal."*

- o Substantial performance works to satisfy the CCE only if the failure is not \_\_\_\_\_

***Example 137:** I hire you to build the Geis Towers, a 150-story building in Charlottesville, Virginia, for \$100 billion. When you finish, I conduct the final walkthrough and notice that the lobby walls are made of baby blue marble from North Carolina, not dark blue marble from Virginia, as called for in the contract specs. Can I avoid paying you the \$100 billion? \_\_\_\_\_. Assuming the breach was innocent, the CCE has been satisfied.*

***Example 138:** Same facts as Example 137, but our contract includes the following condition: "Geis's payment obligation under this contract is expressly conditioned on the use of Virginia marble in the lobby." Must I pay the \$100 billion? \_\_\_\_\_. This is an express condition, not a constructive condition.*

- o If payment needs to be made (because there is only a minor problem) can the nonbreaching party recover **damages** for the deficiency? \_\_\_\_\_ - typically measured as the cost to complete the performance.

- But, sometimes damages will be limited to the diminution in market value.

- o Can a breaching party who fails to satisfy the CCE due to a **material** breach get paid anything? \_\_\_\_\_ - maybe quasi-contract.

- o Can a breaching party who fails to satisfy an **express** condition get paid in quasi-contract? Usually not.

- o **Divisibility** - If a contract is clearly divisible, then it will be broken down into mini-contracts for the purposes of determining if there has been substantial performance.

***Example 139:** Mickey contracts with Best Buy to install a kegorator in each of the 20 rooms in her house for \$2,000. If Best Buy only installs five kegorators before it abandons the job, is this substantial performance? \_\_\_\_\_ - contract is not divisible - Mickey is paying for the full job.*

**Example 140:** Same facts as Example 139, except Mickey agrees to pay Best Buy \$100 for *each* of the 20 kegorators. If Best Buy installs only five kegorators before it abandons the job, can it collect anything on the contract? \_\_\_\_\_ if divisible: can collect  $5 \times \$100 = \$500$ . (When evaluating substantial performance on a divisible contract, Best Buy can recover on the mini contracts on which it has fully performed.)

**Exam Tip 3:** Be aware of "divisibility" in a contract because it can support an argument by one party that it has substantially performed "something."

## 2. UCC Universe: Performance

- o The UCC requires \_\_\_\_\_

**Exam Tip 4:** Don't discuss substantial performance or material breach if the contract involves goods.

- Exception: The parties **can** contractually change the default rules to include discussion of substantial performance instead of perfect tender.
  - Exception: **Installment contracts** do not have to satisfy "perfect tender."
- o Perfect tender has two main obligations:
  - Perfect \_\_\_\_\_
  - Perfect \_\_\_\_\_

**Example 141:** Mickey contracts for 500 pints of Fireball whiskey for \$5,000. Fireball sends Mickey only 495 pints. Is this perfect tender? \_\_\_\_\_ Mickey can reject all of the whiskey.

**Note 16:** Rejection of the goods is not the same as rejection of an offer.

- o **Revocation of acceptance** - The buyer may also **revoke an acceptance** of the goods (occurs when the goods seem OK and are accepted at delivery, but a defect is discovered within a reasonable time).
  - For example, Fireball delivers all 500 pints of the whiskey in the example above, and Mickey stores the bottles in her cellar. A month later, she cracks a bottle to find that it is cola (not whiskey). She can revoke her acceptance and send the bottles back.
- o If the seller **fails to tender perfect goods** and time is left on the contract **or** the seller had reasonable grounds to believe that the buyer would accept a replacement, then the buyer must give the seller a chance to \_\_\_\_\_
- o The default method of delivery under the UCC is **one** delivery of the goods, but the UCC allows for installment contracts (agreement for delivery in separate lots). There, the buyer can reject a specific delivery that isn't perfect only when there is a \_\_\_\_\_ in the installment that cannot be cured.

**Example 142:** Same facts as Example 141, except Mickey contracts for 1 pint of Fireball whiskey to be delivered each day at 5:00 p.m. for 500 days. Delivery #345 comes at 5:15 p.m. Can Mickey reject that delivery? \_\_\_\_\_ (Even though it was not perfect tender, the UCC allows Fireball some leeway because this is an installment contract.)

o **Common methods of tender/delivery for goods contracts:**

- Tender at Seller's place of business. If the goods are tendered at the seller's place of business, then the seller just needs to give the goods to the buyer.
- \_\_\_\_\_ contract. [F.O.B. Seller's place of business] If the contract is a shipment contract, then the seller must take three actions to satisfy perfect delivery requirement:
  - i) Get the goods to a \_\_\_\_\_
  - ii) Make arrangements for \_\_\_\_\_; and
  - iii) \_\_\_\_\_ the buyer.
- \_\_\_\_\_ contract [F.O.B. Buyer's place of business], then the seller must get the goods to the **buyer's** business and notify the buyer.

**Example 143:** I contract with Brooks Brothers (located in New York) to buy "100 white dress shirts for \$10,000 F.O.B. Charlottesville." Has Brooks satisfied its delivery obligation when it gives the shirts to FedEx and sends me an e-mail saying that they are coming? \_\_\_\_\_ because "F.O.B. Charlottesville" (where the buyer lives) makes this a destination contract.

- o **Risk of Loss Problem** - You can recognize a risk of loss problem when there is a **goods** contract followed by **damage** or destruction of the goods **before** the buyer receives them. Who will bear the loss? Seller? Buyer?
- i) Check whether the parties have already dealt with the risk problem in the contract. If so, their agreement will control.
  - ii) If not, ask whether either party has **breached** (typically another part of the contract). If so, that breaching party bears the risk of loss. Is this true even if the breach is totally unrelated to the delivery damage? \_\_\_\_\_ If there has been a breach, the breaching party is liable for the risk of loss.
  - iii) If there is no breach, and the goods are being shipped, then ask what type of delivery contract it was:
    - o If it was a **shipment** contract, then the risk of loss during delivery rests with the \_\_\_\_\_
    - o If it was a **destination** contract, then the risk of loss during delivery rests with the \_\_\_\_\_

- iv) In all other cases, ask whether the seller is a **merchant**.
  - o If so, the risk of loss stays with the seller until the buyer \_\_\_\_\_ the goods.
  - o If not, the risk of loss moves to the buyer when the seller \_\_\_\_\_ the goods.

**Example 144:** I contract with Brooks Brothers to buy "100 white dress shirts for \$10,000." Brooks calls to tell me that the shirts are ready, and I can pick them up at the store when I like. That night, the store burns down, and my shirts are destroyed. Do I have to pay for them? \_\_\_\_\_. (In this risk of loss problem, you can tick off application of all but the last step in analysis. Seller is a merchant. Therefore the risk of loss stays with the seller.)

**Example 145:** Professor Geis contracts with the law-school bookstore to sell 10 used copies of his book for \$10 each. He tells the bookstore manager that he has left the books outside his office, so she can get them whenever. That night, a pack of law-review editors steals and burns all of the books. Does the bookstore have to pay for them? \_\_\_\_\_. Bookstore must pay Professor Geis. (Again, you can tick off all but the last step in analysis. Because Professor Geis is not a merchant, the risk of loss moves to the buyer and the bookstore has to pay for the books.)

**Exam Tip 5:** If you get a risk of loss problem (a **goods** contract followed by **damage** or destruction of the goods **before** the buyer receives them) go through the four part analysis until you get an answer.

## CHAPTER 15: EXCUSES

### A. Excuses - "E" in "Pizza With Crawling Escargot."

There is a clear contract but something has nevertheless happened to prevent one side from having to perform on the contract.

#### 1. Impossibility and impracticability

- o Look for these common fact patterns:
  - Performance becomes illegal after the contract is formed;
  - The subject matter of the contract is destroyed;
  - A services contract with a "special person," and the performing party dies or is incapacitated;
  - BUT, something that just makes performance more expensive than expected will not normally excuse. Look for something that hinders the **ability** to perform, not just the **cost** to perform.

**Example 146:** Mickey contracts with a local tavern, The Whisky Jar, to bartend for one year in exchange for free drinks. If "Prohibition II" is passed, outlawing alcohol consumption in Virginia, must Mickey perform this contract? \_\_\_\_\_

**Example 147:** You contract to reroof my house for \$10,000, but before you can perform, my house burns down. I insist that our contract requires you to rebuild my house and then reroof it. Am I right? \_\_\_\_\_

**Example 148:** You contract to dig a wine cellar for me for \$10,000. After you start performing, you hit some big rocks and realize that it will cost you twice as much to finish the job, resulting in a loss on the contract. Are you excused from performing? \_\_\_\_\_

- To recap, look for an unforeseeable event in which the non-occurrence of the event was a basic assumption of the contract, and the party seeking discharge was not at fault.

## 2. Death after a contract.

- o Dying does not normally excuse liability on a contract that has been made. The estate will normally be on the hook for any contractual obligations.

**Example 149:** Old Man Jones finds out that he only has a few more months to live. So he goes out and borrows \$1 million from a bank and invests the money in jewelry. When he dies, is his debt contract with the bank excused? \_\_\_\_\_.

- o Ask whether there is something special about the person performing on the contract, such that it makes no sense to continue if they die.

**Example 150:** You hire the Rolling Stones to play your birthday party next month for \$1 million. If, sadly, Mick Jagger dies before the big date, can the rest of the band show up and play for the \$1 million? \_\_\_\_\_ your contractual obligation is excused. Likewise, you can hardly make the full band perform.

## 3. Frustration of purpose

- o Performance can still occur, but something has happened to undermine the entire reason for the creation of the contract. Note that this is very rare, and the event must be extreme and not previously allocated to one of the parties.

**Example 151:** You are excited for the season opener of your favorite football team's game, especially after paying \$2,000 for season tickets. You sit down 20 rows up on the 50-yard line, when right before kickoff, a tall man in an Abe Lincoln hat sits down in front of you. He refuses to remove the hat, and you can't see the game. Can you get out of your contract for the football tickets?  
\_\_\_\_\_

**Example 152:** You rent an apartment in Chicago at \$5,000 for one day because it has a prime view of Wrigley Field, and the Cubs are scheduled to play in the

*World Series that afternoon. The game is unexpectedly canceled one day before because of an earthquake. Is performance excused due to impossibility? \_\_\_\_\_ What about being excused for frustration of purpose? \_\_\_\_\_*

#### 4. Performance is excused because the initial contract has been modified or canceled.

- o Can both parties agree to just walk away from a contract? \_\_\_\_\_ as long as there is some performance remaining from each side. Otherwise, there is no consideration for this modification.

***Example 153:** I contract to sell you my Jeep for \$5,000. We meet to swap the money for the pink slip, but both of us want to back out. Can we just say forget it? \_\_\_\_\_*

***Example 154:** I contract to paint your house for \$5,000. After I finish the job, we agree to rescind the deal. Is this valid? \_\_\_\_\_*

#### 5. Accord and satisfaction.

- o The parties to an earlier contract agree that performance will be satisfied instead by the completion of a different performance.
  - The new performance is called the \_\_\_\_\_
  - The excusing of the initial performance obligation is called the \_\_\_\_\_

***Example 155:** Mickey contracts with Pabst to buy five kegs of beer for \$500. Later, she agrees that if Pabst delivers 100 cases of beer, then it does not need to deliver the kegs. If Pabst delivers the cases of beer, can Mickey still sue for the kegs? \_\_\_\_\_.*

- o What happens if the accord is not performed? In that case, the other side can sue on either the original obligation or the new promise.

***Example 156:** Same facts as Example 155. If Pabst delivers nothing, then Mickey can sue for the five kegs or the 100 cases.*

#### 6. Novation

- o This arises when BOTH parties agree that a substitute person will take over the contractual obligations.
  - Can one side decide to create a novation by asking someone else to do the work? \_\_\_\_\_ this is called a "delegation," and will be discussed later.
  - If there is a valid novation, then the original promisor will be excused from performance.

***Example 157:** Mickey contracts with Pabst to buy five kegs of beer for \$500. Later, both parties agree that Blatz will take over the deal. If Blatz fails to*

deliver any beer, can Mickey sue Pabst? \_\_\_\_\_, the novation has excused Pabst.

## CHAPTER 16: ANTICIPATORY REPUDIATION; REMEDIES: BASIC CONCEPTS

### A. Third main question in contract law: What are the remedies for breach?

#### 1. ANTICIPATORY REPUDIATION

- o Anticipatory repudiation is closely related to the CCE, but it deals with a slightly different question: What are your remedy options when the other side says he's not going to perform on the contract (repudiates) before the performance is due? Do you still have to go along with your part of the deal and see if he really does breach?

*Example 158: I hire you to build the Geis Towers, a 150-story building in Charlottesville, Virginia, for \$100 billion by December 31. On July 31, when you're about half-way finished with the project, I let it slip that I'm broke and never going to pay you the money. Do you have to keep working on the tower? \_\_\_\_\_, as long as my repudiation is clear and unequivocal.*

- o If you see a situation like this, remember that the nonbreaching party has two options:
  - Treat the repudiation as a breach and sue immediately for damages.
    - But, if you have completed the entire performance and are only waiting for payment, **you cannot sue early.**
  - Ignore the repudiation, demand performance, and see what happens.

*Example 159: Same facts as Example 158. If you decide to sue me for money damages, must you wait until December 31, or can you sue on July 31? You can sue on July 31.*

*Example 160: Same facts as Example 159, except you completed the Geis Towers ahead of schedule on June 30. If you decide to sue me for money damages, must you wait until December 31, or can you sue on July 31? You must wait until December 31.*

- o A party can **retract its repudiation** as long as the other side has not commenced a lawsuit for breach or acted in \_\_\_\_\_ on the repudiation (by materially changing its position).
- o **UCC universe:** Reasonable grounds for insecurity about the other side's performance allows you to demand \_\_\_\_\_ of **performance.**
  - If the questionable party fails to respond within a reasonable time, then you can treat this as repudiation.

**Example 161:** I agree on January 1 to buy 100 white shirts from Crooks Brothers for \$1,000. Half of the money is due on February 1; the balance and the shirts are due March 1. In the middle of January, I see a news exposé about financial trouble at Crooks Brothers, and it fails to return my phone calls. I send a letter demanding adequate assurance of performance on January 15. If it says, "don't worry, we're almost done with the shirts," must I make the \$500 February 1 payment? \_\_\_\_\_. What if it doesn't respond? \_\_\_\_\_

## 2. MONEY DAMAGES

- o Money damages are the typical remedy in contract law.
  - Expectation Damages
    - This is the normal way to calculate damages. The goal here is to put a party in the same \_\_\_\_\_ that it would be in if the contract had been performed as promised.
    - Measure expectation damages by comparing the **value of the performance** without the breach to the value of the performance with the breach.

**Example 162:** I hire you to build the Geis Towers, a 150-story building in Charlottesville, Virginia, for \$100 billion. You never start the project and tell me that you are breaching the contract. What are my expectation damages if I hire a replacement builder for \$110 billion? \_\_\_\_\_

**Example 163:** Same facts as Example 162, but the replacement builder costs only \$80 billion. What are my expectation damages? \_\_\_\_\_; I've benefitted from your breach. Do I have to pay you? \_\_\_\_\_

- **UCC universe:** Work through this basic formula to determine any question about expectation damages.

**Example 164:** Buyer breach. Mickey contracts with Pabst to buy a keg of beer for \$100. Mickey repudiates the contract, and Pabst sells the keg to a liquor store for \$80. What are Pabst's expectation damages? \_\_\_\_\_

**Example 165:** Buyer refusal to pay. Mickey contracts with Pabst to buy a keg of beer for \$100. Mickey gets the keg but breaches the contract by refusing to pay. The current price for a keg of Pabst has risen to \$110. What are Pabst's expectation damages? \_\_\_\_\_

**Example 166:** Seller breach. Mickey contracts with Pabst to buy a keg of beer for \$100. Pabst fails to deliver the keg, and Mickey has to buy her keg from Blatz for \$120. What are Mickey's expectation damages? \_\_\_\_\_ When Pabst refuses to deliver, can Mickey buy a keg of Utopia for \$25,000 and sue Pabst for \$24,900? \_\_\_\_\_ cover must be similar.



**Example 167:** Seller breach. Mickey contracts with Pabst to buy a keg of beer for \$100 (paid up front). When Pabst delivers the keg, it is only half full, but Mickey is desperate to get her keg and keeps the keg. It can be shown that a half keg of Pabst costs \$60 at the corner liquor store. What are Mickey's expectation damages? \_\_\_\_\_

**Example 168:** Same facts as Example 167. Can Mickey send the keg back instead? \_\_\_\_\_ under the perfect-tender rule.

## CHAPTER 17: EXPECTATION DAMAGES

### A. LIMITS ON EXPECTATION DAMAGES

There are three major limits on the calculation of expectation damages.

#### 1. Expectation damages must be proven with \_\_\_\_\_.

**Example 169:** Tronald Dump decides to run for president and agrees to pay CNN \$5 million for ten 30-second advertising slots. CNN forgets to run the ads. Dump argues that but for this breach, he would have been elected president, and he sues for the four-year salary of the president. Can he get this as expectation damages? \_\_\_\_\_ there is too much uncertainty.

- o Other common fact patterns here include brand new or unproven business ventures, which have trouble proving lost profits from a consistent sales track record.

#### 2. Unforeseeable consequential damages are not recoverable unless the breaching party had some reason to know about the possibility of these unforeseeable consequential damages (the Hadley rule).

- o What are consequential damages? You should distinguish two types of damages:
  - **General damages:** The type of losses that almost anyone would suffer from a breach. These include incidental damages, such as the cost of storing rejected goods, or finding a new buyer, or finding a replacement vendor.
  - **Consequential damages:** Losses that are unique or special to this plaintiff.

**Example 170:** I hire FedEx to deliver Super Bowl tickets to a buyer on eBay for \$20. FedEx refuses to honor the contract, and I have to pay UPS \$50 for rapid delivery to get the tickets there in time. I also use up \$5 in gas driving to UPS. What are my expectation damages against FedEx?  $\$50 - \$20 + \$5$  incidental damages = \$35.

**Example 171:** Same facts as Example 170, except I cannot get another carrier to deliver the tickets in time, and as a result, the buyer doesn't pay me the \$2,000 ticket price. Because I bought the tickets for \$200, can I sue FedEx for my lost profits of \$1,800? \_\_\_\_\_, this is an unforeseeable consequential damage.

**Example 172:** Same facts as Example 170, except I also provide FedEx with the exact details of my transaction. Can I now recover my lost profits? \_\_\_\_\_ unless there are other disclaimers.

**3. The doctrine of mitigation states that a breached-against party must take reasonable steps to reduce damages from breach.**

**Example 173:** I agree to pay you \$10,000 to fix my roof, which has major holes (I tell you this). You breach the contract. Can I sit in my bed and ring up the cash register every time it rains? \_\_\_\_\_, I have to hire someone else to do the job.

- o If you refuse to mitigate, the law will calculate damages as if you did mitigate. The defendant bears the burden of proving a mitigation failure.

**Example 174:** Same facts as Example 173, but I don't hire a new roofer for several months. My oriental carpets (worth \$25,000) are ruined from rain and snow. Eventually, I hire another roofer to do the job for \$12,000 and sue you for  $\$25,000 + \$2,000 = \$27,000$ . Should I receive this amount? \_\_\_\_\_ What is my recovery if you can show that there was another roofer able to do the job for \$9,000 at the time that you told me of the breach? \_\_\_\_\_

- o Note that mitigation efforts must be reasonably similar to the original contract.

**Example 175:** Shirley MacLaine contracts with MGM to make a movie entitled "Bloomer Girl" for \$10 million. MGM decides not to make the movie, but it offers her a replacement part for \$10 million in a country-western, "Big Country Big Man." If MacLaine refuses to take the part, can MGM argue that she has failed to mitigate, such that expectation damages are zero? \_\_\_\_\_; this is not reasonably similar mitigation.

**B. Special Problems that Might Appear on the MBE:**

**1. Lost volume profits (LVP).**

- o If the paying party breaches, then normally the selling party needs to mitigate by reselling the goods or services to another person. But if the seller is a retailer who sells this type of product all the time, the seller can try to argue for LVP.

**Example 176:** Outrigger contracts to sell Mickey a speedboat for \$15,000 (which cost Outrigger \$10,000 to buy from the manufacturer). The following week, Mickey repudiates the sale. The very next day, Tronald Dump walks in to buy the same boat for \$15,000. Mickey argues that Outrigger's damages are zero because it fully mitigated her breach with the sale to Dump. Is she right? \_\_\_\_\_ if Outrigger can show that it had plenty of boats to sell and few buyers. If Outrigger does get LVP, how should these be calculated?

---

## 2. Incomplete performance

- o If the paying party breaches in a partially completed building contract, can the builder continue to work on the job? \_\_\_\_\_ this runs counter to mitigation—it would be "running up the damages." Accordingly, we need to adjust the recovery price in this special context to take account of the fact that the builder did not need to finish the job. Use this formula:
  - *Expectation Damages = Contract Price – Amount already Paid – Amount that Would Be Needed to Finish the Job*

**Example 177:** *I hire you to build the Geis Towers, a 150-story building in Charlottesville, Virginia, for \$100 billion, with \$10 billion due every month. You start the project, and I pay you for the first three months. After that, I tell you that I'm repudiating the contract and won't pay another dime. You had expected to build the tower for \$85 billion (netting a \$15 billion profit), but you have spent only \$45 billion thus far. Can you recover the \$70 billion balance on the contract price? \_\_\_\_\_; you didn't do all of the work. What should you get?  $\text{Expectation damages} = \$100 \text{ billion} - \$30 \text{ billion} - \$40 \text{ billion} = \$30 \text{ billion}$ ; you can also calculate as  $\$45 \text{ billion spent} + \$15 \text{ billion profits} = \$60 \text{ billion} - \$30 \text{ billion already paid} = \$30 \text{ billion}$ .*

## 3. Economic waste and diminution in market value damages.

- o The normal measure of expectation damages is the cost to complete the job.

**Example 178:** *I hire you to build the Geis Towers, a 150-story building in Charlottesville, Virginia, for \$100 billion, with \$10 billion due each month. You start the project, and I pay you for the first three months, and then you repudiate the contract. I have to pay someone else \$80 billion to finish the job. How much can I recover from you under expectation damages? The cost to complete the job:  $\$110 \text{ billion} - \$100 \text{ billion} = \$10 \text{ billion}$ .*

- o But, sometimes using cost-to-complete damages will dramatically overcompensate the plaintiff.

**Example 179:** *I hire you to build the Geis Towers, a 150-story building in Charlottesville, Virginia, for \$100 billion. When you finish, I'm conducting the final walk-through and notice that the lobby walls are made of marble from North Carolina, not marble from Virginia (as called for in the contract specs). I sue you for breach and demand \$20 billion (to tear it down) plus \$100 billion (to rebuild it with the right marble). Should I get the \$120 billion in cost-to-complete damages? \_\_\_\_\_*

- o Diminution in market value ("DMV")—How much lower is the market value of what you got versus what you wanted? Note that the breaching party must normally have acted in an innocent and unintentional manner for DMV damages.

**Example 180:** Same facts as Example 179. If you can show that your use of North Carolina marble was unintentional, what damages must you pay for the breach? DMV, probably zero, or maybe a slight amount if I can show that Virginia marble would increase the market value of the Geis Towers.

## CHAPTER 18: OTHER MONEY DAMAGES AND SPECIFIC PERFORMANCE

### A. Reliance Damages

The second way to calculate money damages is reliance damages. The goal is to put a party in the same economic position that it would be in if the contract had never been created.

RELIANCE DAMAGES = GROUNDHOG DAY DAMAGES

Always ask, what loss has the plaintiff incurred that would never have taken place but for the breached contract?

**Example 181:** Recall the facts of Example 169, in which Tronald Dump decides to run for president and agrees to pay CNN \$5 million for ten 30-second advertising slots. CNN forgets to run the ads. Dump cannot recover the four-year salary of the president. Can he get anything under reliance damages? \_\_\_\_\_, the cost of making all the ads.

A party cannot recover both expectation and reliance damages; typically, the plaintiff must elect one or the other.

### B. Restitution Damages

The third way to calculate money damages is restitution. Here, we have a third frame of reference: our goal is to give the plaintiff an amount equal to the economic benefit that the plaintiff has conferred on the defendant.

This can sometimes equal reliance damages, but it need not.

**Example 182:** Owen Wilson pays \$50,000 to Dr. Plastic, a famous surgeon who promises to "make Wilson's nose perfect." Wilson also incurs \$20,000 in hospital costs related to this procedure. Dr. Plastic botches the job, and Wilson sues for restitution damages. What does Dr. Plastic owe Wilson? \$\_\_\_\_\_ the benefit that Owen Wilson conferred upon Dr. Plastic.

**Example 183:** Same facts as Example 182, but Wilson sues for reliance damages. What does Dr. Plastic owe Wilson?  $\$50,000 + \$20,000 = \$70,000$ .

**Example 184:** Same facts as Example 182, but Wilson sues for expectation damages. How would these be calculated?

---

---

### C. Liquidated Damages

Determine whether a contract provides for liquidated damages. These are set out in the contract as an explicitly negotiated amount due upon breach.

Courts are wary about awarding punitive liquidated damages and will do so only if:

- o The amount of liquidated damages was reasonable at the time of contracting; and
- o Actual damages from breach would be uncertain in amount and difficult to prove.

***Example 185:** Same facts as Example 182, but Wilson and Dr. Plastic agreed that the doctor would pay Wilson \$500,000 if the operation was a failure. Will these liquidated damages be enforced? \_\_\_\_\_.*

*What if the liquidated damages were \$50 million?*

\_\_\_\_\_ *This is likely to be viewed as a penalty that will not be enforced.*

#### D. Punitive Damages

Punitive damages are almost never allowed in contract law. Don't worry about these unless you see a breach that also seems like a tort (e.g., fraud or some other very extreme situation).

#### E. Specific Performance/Injunction

Equitable relief, such as specific performance and related injunctions, is the exception—not the norm—in contract law. This remedy is awarded only when monetary damages are considered inadequate for some reason.

Specific performance is presumptively available for \_\_\_\_\_ transactions.

***Example 186:** Hugh Grant contracts to buy a Napa Valley winery for \$25 million. If the seller breaches, can Grant get specific performance? \_\_\_\_\_. What if the seller has already transferred the land to another bona fide purchaser? \_\_\_\_\_*

Specific performance is presumptively not available for contracts of personal service. Rarely, a court might grant an injunction prohibiting a breaching party from performing services for a competitor for a reasonable period of time/place (the Lumley doctrine).

***Example 187:** Hugh Grant contracts to make a movie with Disney for \$3 million. If Grant breaches, can Disney get specific performance, forcing Grant to act in the movie? \_\_\_\_\_*

***Example 188:** Same facts as Example 187. Can Disney get an injunction prohibiting Grant from acting in another Hollywood movie for the next three months? \_\_\_\_\_ under the Lumley doctrine.*

Specific performance is available only for **unique goods** like art or custom-made items.

***Example 189:** You purchased the original Saturday Night Fever dance floor in an auction, but the seller refuses to perform on the contract. Can you get specific performance? \_\_\_\_\_*

A **right of reclamation** is an equitable right of an unpaid seller to reclaim goods when the buyer is insolvent. To assert this remedy, the following facts must be present:

- o The buyer is \_\_\_\_\_ at the time of receipt of the goods;

**Editor's Note 10:** Professor. Geis misspoke when he said "purchase."

- o The seller must demand the return of goods within 10 days of receipt (or within a reasonable time if the buyer misrepresented his solvency to the seller); and
- o The buyer still has the goods.

**Example 190:** Mickey is broke, but she contracts for 500 pints of Fireball whiskey for \$5,000. Fireball sends all 500 pints but learns of Mickey's financial situation and asks for the whiskey back five days later. Must Mickey return the whiskey?

\_\_\_\_\_

## CHAPTER 19: THIRD-PARTY BENEFICIARIES

Three main concepts:

- 1) Third-party beneficiary contracts
- 2) Assignment
- 3) Delegation

### B. THIRD-PARTY BENEFICIARY CONTRACTS

Identify the parties:

- o The **promisor** is the person making the promise that the outsider is trying to sue to enforce.
- o The **promisee** is a contractual counterparty to that promise; this person could presumably enforce the promise but is not doing so.
- o The **third-party beneficiary** is the outsider suing the promisor.

**Example 191:** Abe agrees to pay Beth \$50 if Beth mows Cam's lawn. Beth never shows up, and Cam files a lawsuit against Beth. Who is the promisor?

\_\_\_\_\_ Who is the promisee? \_\_\_\_\_ Who is the third-party beneficiary? \_\_\_\_\_

The critical issue in a third-party beneficiary contract is whether the third party is an intended or an incidental beneficiary.

- o \_\_\_\_\_ beneficiaries have the right to sue.
- o \_\_\_\_\_ beneficiaries do not.

To determine whether a given third party is an intended or an incidental beneficiary, ask whether the initial counterparties (promisor and promisee) intended to convey enforcement rights to the third party in the event of breach.

**Example 192:** Same facts as Example 191. Is Cam an intended beneficiary?

\_\_\_\_\_. Can the promisee, Abe, sue Beth? \_\_\_\_\_

**Example 193:** Same facts as Example 191. Don lives across the street from Cam, and he has to buy \$15 in weed killer when weeds blow over from Cam's yard into Don's yard because Beth didn't mow the lawn. Can Don sue Beth for breach? \_\_\_\_ Don is an incidental beneficiary.

**Example 194:** Same facts as Example 191. Earl runs a gas station that Beth uses to gas up her lawn mower. Earl would have earned \$5 in profits if Beth had performed on her contract with Abe. Can Earl sue Beth for breach? \_\_\_\_ Earl is an incidental beneficiary.

A \_\_\_\_\_ beneficiary arises when the promisee strikes a deal with the promisor in order to repay some earlier debt to the third party. This is a common fact pattern on the bar exam.

**Example 195:** Cam loaned Abe \$500 last month. In satisfaction of this debt, Abe agrees to pay Beth \$500 if Beth mows Cam's lawn 10 times. Beth never shows up, and Cam files a lawsuit against Beth. Can Cam sue Beth because he is a creditor beneficiary.

A donee beneficiary arises when there is no preexisting obligation, but the promisee clearly intends to confer a gift of enforcement on a third party.

**Example 196:** Abe buys a policy from Bottomless Life Insurance. Under this contract, Abe will pay \$500 per year to Bottomless, and Bottomless will pay \$500,000 to Cam when Abe dies. Can Cam sue Bottomless if it fails to pay the claim? \_\_\_\_\_ because he is a donee beneficiary.

Can the initial counterparties revoke or modify away the third-party's right to enforce the contract? Depends on whether the third party knows about the promise and has changed her position in reasonable reliance on the promise. If so, the third party may be able to make out a claim under promissory estoppel. See Example 78.

A third party will not lose enforcement rights if any of the following facts is true, as these facts cause the right to vest:

- o The beneficiary \_\_\_\_\_ on the rights (similar to promissory estoppel);
- o The beneficiary \_\_\_\_\_ to the contract/the rights; or
- o The beneficiary \_\_\_\_\_ to enforce the contract.

The promisor can assert any contract defense against the third party that he would be entitled to assert against the promisee.

**Example 197:** Abe points a gun at Beth's head and promises to "sell" Beth a contract law casebook if Beth pays \$225,000 to Cam. Beth says "OK" but

doesn't pay the money to Cam. Would Beth have a contract defense against Abe? \_\_\_\_\_ duress. Can she assert this defense to avoid having to pay Cam?  
\_\_\_\_\_

## CHAPTER 20: ASSIGNMENT AND DELEGATION; FINAL REVIEW

### A. ASSIGNMENT

An assignment is the transfer of rights under a contract. A delegation is the transfer of duties under a contract.

You can distinguish assignment from a third-party beneficiary contract because you will typically see two steps:

- o The formation of a contract and
- o The transfer of the benefits of the contract from an original counterparty to some third party.

Almost all contractual benefits can be assigned, in whole or in part, unless a contract explicitly prohibits or invalidates assignments.

**Example 198:** I offer to pay you \$1,000 to paint my house. Can you assign the offer to Mickey? \_\_\_\_\_; an offer must be directed at a specific person by the offeror.

**Example 199:** I offer to pay you \$1,000 to paint my house. You accept. Can you assign the \$1,000 payment to Mickey such that she can sue me for failure to pay? \_\_\_\_\_

**Example 200:** Same facts as Example 199. Can Mickey sue me for the money if you don't paint the house? \_\_\_\_\_ All defenses transfer to the assignee.

**Example 201:** I agree to pay Mickey \$1,000 if you paint my house. Mickey is an intended third-party beneficiary.

If the contract states that rights are not assignable, you need to decide whether the contract prohibits assignments or invalidates assignments.

- o If the contract just prohibits assignments, then the assigning party has breached the deal when he makes the assignment, but the third party can still recover from the guarantor (i.e., the power to assign persists, even if the right to assign was not present initially).

**Example 202:** I agree to pay you \$1,000 to paint my house, but the contract states that the rights under this contract are not assignable. You nevertheless assign the \$1,000 payment to Mickey. Have you breached? \_\_\_\_\_. Can Mickey sue me if I don't pay her the money? \_\_\_\_\_



- o If the contract invalidates assignments, then the third party cannot recover (because there is no power or right to assign).

**Example 203:** *I agree to pay you \$1,000 to paint my house, but the contract states that all purported assignments of rights under this contract are void. You nevertheless assign the \$1,000 payment to Mickey. Can Mickey sue me if I don't pay her the money\_\_\_\_\_*

What happens if someone assigns the same rights twice? The answer depends on whether the assignee has paid consideration for the rights:

- o If the rights are **assigned without consideration**, then the last assignment controls.
- o If the rights are **assigned for consideration**, then the first assignment for consideration will typically hold.
  - **Limited exception:** A later assignment will take priority if the second assignee does not know of the initial assignment and is first to obtain payment or a judgment.

**Example 204:** *I agree to pay you \$1,000 to paint my house. You assign the payment rights to Mickey. You then wise up and assign the payment rights to your best friend. Can Mickey sue me if I don't pay her the money? \_\_\_\_\_  
Can your best friend sue? \_\_\_\_\_*

**Example 205:** *Same facts as Example 204, except Mickey trades you 100 bottles of Fireball whiskey for the assignment of payment rights. You then assign the rights to your best friend. Can Mickey sue me if I don't pay her the money? \_\_\_\_\_  
Can your best friend sue? \_\_\_\_\_*

## B. DELEGATION

A delegation of duties occurs when a party to a contract "outsources" her duties under a contract to another party. This is generally acceptable, as long as the contract does not prohibit delegation and as long as the other party does not have some special interest in having a specific individual perform.

**Example 206:** *I agree to pay you \$1,000 to paint my house. You delegate your painting obligation to your best friend. Is that OK? \_\_\_\_\_ You are the delegating party; your friend is the delegate; I am the obligee.*

**Example 207:** *If your friend does a lousy job, are you still on the hook for breach? \_\_\_\_\_. Contrast this outcome with novation, described above in Example 157.*

**Example 208:** *Same facts as Example 206. Your friend does a great job, and I refuse to pay. Can your friend recover from me? \_\_\_\_\_; all you have done is transfer the duties, not the benefits. What if you delegated the duties and assigned the rights to your friend? \_\_\_\_\_ the friend can recover from me.*

A delegatee is generally not liable for breach unless she receives \_\_\_\_\_ from the delegating party.

**Example 209:** *I agree to pay you \$1,000 to paint my house. You delegate your painting obligation to your best friend and promise to pay her \$800 to do the job. She does a lousy job. We know already that I can sue you. Can I sue your friend? \_\_\_\_\_ the friend has been paid consideration to do the job. Contrast this with Example 207, in which I cannot sue your friend.*

**Example 210:** *I commission the famous artist Andy Warhol to paint my family portrait for \$1 million. He delegates this duty to Mickey for \$50. Is this OK? \_\_\_\_\_ under the special-person exception.*

**Note 17:** Often, the bar examiners will just use "assignment" when they are referring to both an assignment and a delegation. Just take the context of the question into account.

## FINAL REVIEW

WHICH UNIVERSE: COMMON LAW OR UCC ARTICLE 2?

THE BIG THREE QUESTIONS IN CONTRACT LAW:

Has an enforceable contract been formed? ("All Contracts Don't Stink")

Has the contract been performed? ("Pizza With Crawling Escargot")

What are the remedies for breach? (anticipatory repudiation, money damages, maybe specific performance)

o Plus, the after-party third-party beneficiaries (assignment, delegation)

HOT TOPICS FROM PAST EXAMS:

Rejecting an offer

Revoking an offer

Statute of Frauds

Parol evidence rule

Warranties

Rejecting goods

Money damages

Third-party beneficiary

Assignment

Delegation versus novation

**[END OF HANDOUT]**