

CONTRACTS
13, 14, 15 January 1998

Overview of Lecture

1. **Applicable Law**
2. **Formation of Contracts**
3. **Terms of Contract**
4. **Performance**
5. **Excuse of Non-performance**
6. **Breach Remedies**
7. **Third Party Problems**

All Funky Turkeys Pass Easy Bar Tests

Basic Vocabulary

- **Contract**: A *legally enforceable* Agreement (not all agreements are contracts)
 - **Express Contract**: Verbal (what people Say & Write) spelling out of a legally enforceable agreement (contract)
 - **Implied Contract**: Based on Conduct (Actions & Inactions). Rule of Law is the same for both express & implied contracts
- **Quasi-Contract**: An *Equitable Remedy*. Not governed by Rule of Law (contracts) but rather by the Maxims of Equity. When the contract rules cause an MBE fact pattern outcome to seem unfair, think Quasi-contract
 1. ***Elements of Quasi-contract***:
 - P has **conferred a benefit** on D, and
 - P **reasonably expected to be paid**, AND
 - D **realized unjust enrichment** if P not compensated
 2. ***Measure of Recovery*** – Contract Price is NOT the measure of recovery. Rather, the Contract Price is the CEILING if P is in default or contract recovery is barred by the statute of frauds
- **Bi-lateral Contract** – a Contract that results from an offer that is **open** as to how it can be accepted
- **Unilateral Contract** – a Contract that results from an offer that **requires performance** (full performance) to accept
 - The offer controls whether it is a Unilateral or a Bilateral contract (not what the offeree has to do to accept)
 - Key is whether the *offer requires performance*
 - Rule: it will be a **bilateral contract unless**:
 1. **Reward or prize** (*for example*: \$500 for whomever finds lost dog)
 2. **Offer EXPRESSLY requires performance**Everything else will be BILATERAL

§ 1: APPLICABLE LAW

1. Common Law

- Majority: note, MBE won't test minority. MA, usually in the Majority, but 8 Exceptions
- If not *Sale of Goods*, use the Common Law Rules

2. Article 2 of the UCC

- Article 2 applies to the *sale of goods*
- Factors Determining whether Article 2 Applies, ergo, are:
 1. Type of Transaction – **Sale**
 2. Subject Matter of Transaction – **Goods**
 - *For Example*: Zoe and Paul hire a couple to care for their child. Does Article 2 apply? *NO*: This is a *service contract*, not a sale of goods. Therefore, common law and not article 2 applies.
 - *For Example*: Mark Furhman buys Whiteacre. Is this contract covered by Article 2? *NO*, *Real Estate* contracts are governed by Common Law
 - *For Example*: Willard Scott sells his top hat to Richard Conviser. Does Article 2 cover the transaction? *YES*: This is a *Sale of Goods* (Article 2 applies regardless of the dollar amount and regardless of the complexity of the transaction... Article 2 applies to All Sale of Goods Contracts)
 - *For Example*: Bill buys a Saxophone. The \$1,000 purchase price includes five lessons. Does Article 2 Apply?
 1. All or Nothing. Article 2 applies to the whole transaction or none of it
 2. Which is more important? Goods or Services. If the goods are the biggest, most important part of the deal (where services are ancillary to the deal), then Article 2 applies. For MIXED deals, look to which (goods or services) is more important.

3. Article 2A of the UCC

- Article 2A applies to *leases of goods*
- In most controversies involving the lessor and lessee, Article 2A is similar to Article 2.
- But, in controversies involving default by the lessee or priority contests between the lessor and 3rd parties, Article 2A is similar to Article 9

§ 3: FORMATION OF CONTRACTS

1. Overview of Formation

- Remember, a contract is more than a mere agreement. A contract is a legally enforceable agreement. First, must find an agreement. Then, figure out if it is legally enforceable.

2. Offers

A. *General Test: Manifestation of Commitment*

- An offer is a *manifestation of an intention to contract*. The basic test is *whether a reasonable person* in the position of the offeree would believe that his/her assent creates a contract.
- This is NOT subjective intent, but look to Manifestation (words, conduct)
- Thus, words, conduct, surrounding acts are all relevant in finding a manifestation of intention to contract
- The ACTUAL INTENT is IRRELEVANT. Key is the MANIFESTATION of Intent.

B. *Specific Problems to Watch For*

1. *Terms*

- *Offer is NOT required to contain all material terms*
 - For Example: in an employment contract, may leave open the *duration of employment*
- *Missing PRICE Term (Total SILENCE as to Price)*
 - Real Estate Contracts: under common law, PRICE + DESCRIPTION required
 - *For example*: S 'offers' to sell Blackacre to B. Nothing is said about price. Is this an OFFER? NO. For Real Estate, the common law requires PRICE and a LAND DESCRIPTION to make a valid offer.
 - Sale of Goods: No Price Requirement
 - *For Example*: S 'offers' to sell her car to B. Nothing is said as to price. Offer? YES. Article 2 (Sale of Goods) does not require a stated price to be a valid offer. In Article 2, a communication can be an offer with No price term if the Parties so intent
- *Vague or Ambiguous MATERIAL terms*
 - For example: S offers to sell her car to B for a *FAIR PRICE*. Offer? No, Ambiguous Material Terms are NOT offers

2. *Requirements & Output Contracts*

- Defined: A contract for the sale of goods can state the Quantity of Goods to Be delivered under the contract in terms of the **buyer's requirements** or the **seller's output**
- Valid: These contracts are valid. *For Example*: B agrees to buy polyester from S for 5 years. There is Not a specific quantity term in the agreement; rather, it provides that B shall purchase **all of its polyester** from S (This is an *Exclusive Arrangement*). Requirement Contracts are perfectly permissible (so long as no other Vague Material Terms)
- Not Unreasonably Disproportionate Limitation: Buyer can increase his requirements. But these must be compared with prior demands. *For Example*: B buys 1,000 pounds of polyester in each of the 1st three years of the agreement. B

then orders 6,000 pounds in the 4th year. What result? Increases are permitted, but unreasonably disproportionate demands are NOT permissible. On bar, will be either clearly OK (a modest increase) or clearly disproportionate.

3. *Advertisements*

- General Rule; An advertisement is NOT AN OFFER (just an invitation for offers). Advertisements are broadly read & interpreted. If sign says ‘shirts \$10, that is just an invitation to offer; when you walk up with \$10, you are making an offer.
- Exception (limited); An advertisement can be an offer if it is specific as to quantity and indicates who can accept. *For Example*: the Great Minneapolis Surplus Store publishes the following advertisement: (1 Black Lapin Stone, worth \$139.50....\$1. First Come First Served.” This advertisement is an offer because of its **specificity**.

3. Termination of Offers (four methods)

- An offer cannot be accepted if it has terminated. An offer that has been terminated is ‘dead’.

A. *Offer Termination Method 1: Lapse of Time*

- *For Example*: During break, Epstein writes in notes that he will sell me his 1973 Cadillac for \$400. The writing fails to indicate how long the offer will be kept open. Can I accept the offer 5 years from now?
- *NO*: Even if nothing is said about the duration that the offer is to be kept open, the offer is subject to a reasonable time limitation.
- MBE strategy. Look at what the question tells you about when the offer is received and when it is responded to. That raises a termination issue. General rule, if the gap is greater than one month, probably it is a Dead Offer.

B. *Offer Termination Method 2: Words or Conduct of the Offeror (Revocation)*

- Focus on later words or conduct of the person who made the offer. Remember, this is a 2 player game: requires words or conduct of the offeror + AWARENESS of the OFFEREE
- How: 3 Ways for Offeror to Revoke
 - a. *Statement by OFFEROR to OFFEREE indicating an Unwillingness to Contract, OR*
 - b. *Conduct of Offeror that OFFEREE IS AWARE of*
 - *For Example*: On January 10, Epstein offers to sell Sharon Stone his 1973 Cadillac for \$400. The next day, while standing in the shower, Epstein exclaims, “I have changed my mind. I do not want to sell my Cadillac to Sharon Stone.” Can Ms. Stone still accept the January 10th offer? YES, Because she is UNAWARE of the conduct by the offeror indicating his intention to revoke the offer.
 - *For Example*: On January 10, Epstein offers to sell Sharon Stone his Cadillac for \$400. The next day, Epstein sells his Cadillac to Conviser. Can Ms. Stone still accept the January 10 offer? YES, she is still UNAWARE of the Offeror’s conduct. **Remember, an offer creates a power of acceptance. Offeree has the power of acceptance until it is**

revoked. Revocation requires 2 things: 1. Words/Conduct of Offeror & 2. AWARENESS by Offeree

- For Example: Same facts as above, except the Sharon Stone sees Conviser driving the Cadillac on January 11 and learns from him that he bought it. Can she still accept the offer? NO, because she is AWARE that the offer has been revoked.
- c. *If PUBLIC offer, by SAME or Comparable Publication (Arises in REWARD)*
 - For Example: On January 5, Epstein places an ad in the Atlanta Paper stating, "\$500 Reward to whomever finds his lost dog." How can Epstein Revoke? What if he places an ad in the same paper canceling the offer? What if he places an ad in the NY Times canceling the offer? Where a reward is generally disseminated, the offeror can Revoke it by a **same or comparable publication**. (Here, the NY Times would not be a Comparable publication)
- When does Revocation of an Offer Become Effective?
 - Revocation of an offer Sent through the **mail** is not effective **until received**
 - Remember, the *Mail Box Rule Applies ONLY to ACCEPTANCES, not the Revocation of Offers*
 - *For Example: S offers to sell her car to B. On Tuesday, S mails B a letter revoking the offer. The letter arrives on Thursday. When is the Revocation Effective? Thursday*
 - An offer cannot be revoked **after it has been accepted**
- Types of Offers that Cannot be Revoked (4 Situations where offers can't be revoked)
 1. An offer can't be revoked if the offeror has (a) promised to keep an offer **open** AND (b) the promise is **supported by consideration** (= an option)
 - *For Example: S offers to sell B her car for \$400. B pays S \$10 for her promise to keep the offer open for a week. Can S still revoke the offer? NO, This is an example of an option (a promise to keep the offer open which is supported by consideration)*
 - *For Example: S offers to sell her car to B for \$400. S promises to keep the offer open for a week. Can S still revoke? YES, here there is no consideration to support this promise. This is merely an unenforceable agreement.*
 2. An offer can't be revoked for up to **3 months** if (a) it is a contract for the **sale of goods**, (b) **signed, written promise to keep the offer open**, and (c) **party to be charged is a merchant**. (Merchant is GENERALLY a person in business.)
 - *For Example: S, a used car dealer (merchant), offers to sell B a 1973 Cadillac for \$400 (Sale of Goods). The offer is in writing, signed by S, and expressly promises it will be kept open for a week. Can S still revoke? NO, this illustrates the above rule, offer must be kept open for 3 months.*
 - *For Example: What if S's promise is oral? If oral, S may Revoke. This rule applies only to Written promises, signed by party-merchant to be charged.*

- *For Example:* What if S promises by a Signed writing to keep the offer open for 6 months? Rule is good for only up to 3 months, by the Code.
 - *For example: what if S's promise by signed writing to keep the offer open does not state a time period?* Rule: it will be an irrevocable offer for a time fixed by the court, of up to 3 months
 - *Review:* S Used Cars makes an offer by signed writing to B to sell a 1973 Cadillac for \$400. May S revoke? YES (because failed to promise to keep the offer open). The Rule is NOT triggered unless there is a signed, written promise to keep the offer open.
 - *For Example:* S offers to sell B her house for \$100,000, and the written offer promises that it can be accepted for the next 4 months. This Rule does NOT apply. This is not an Article 2 Transaction. Common Law: requires, in order to keep an offer open, (a) a **promise to do so** and (b) **consideration**
3. An offer can't be revoked if there has been **detrimental reliance** by the offeree that is **reasonably foreseeable**
- *For Example:* A is a general contractor who is bidding on a contract to build a new hotel, using various subcontractors. B, a subcontractor, bids to do the painting work for \$100,000. A uses B's bid in making its bid and is awarded the hotel construction contract. Can B still revoke its bid? NO, this illustrates the rule. It is the *reasonably foreseeable detrimental reliance that makes the offer irrevocable*
4. The start of performance pursuant to an offer to enter into a **unilateral contract** makes that offer irrevocable for a **reasonable time to complete performance**
- Unilateral: *for example:* O offers P \$1,000 to paint O's house. O's offer states that it can be accepted only by performance (a unilateral offer). P starts painting. Can O still revoke? NO, if start performing pursuant to a unilateral offer, the offer is irrevocable for a reasonable time to complete performance.
 - Performance, not mere Preparation: *for example:* Can O revoke if all that P has done is order the paint? YES, the rule requires both an offer to enter into a unilateral contract, PLUS the start of performance.
 - NOTE: the MBE loves the preparation exception. Facts they give you tend to be mere preparation. For MA, still may have *detrimental reliance*, though, to keep the offer open if fail due to mere preparation.

C. Offer Termination Method 3: Words or Conduct of the Offeree (Rejection)

- Focus on the Offeree (not the Offeror)
- In General:
 - Rejection by **offeree** terminates any right to accept the offer
 - Rejection sent through the **mail** is effective **when received**
 - Rejection can be Direct or Indirect
- Counter Offer as Indirect Rejection
 - A counter offer TERMINATES the offer. Bargaining, though, does not terminate the offer

- *For Example:* S offers Blackacre to B for \$10,000. B responds, “I will only pay \$9,000.” (a counter-offer) S refuses to sell for \$9,000. Can B later accept S’s offer? NO, to counter-offer is to reject the offer. Once REJECTED, Offeree cannot accept an earlier offer. Offers Can’t be born again. Counter offers kill the deal.
- *What if B’s response is, “Will you take \$9,000?” Can be later accept S’s offer?* YES; mere bargaining is not a Counter-offer, and thus, not a Rejection. Bargaining keeps the offer alive. May later accept the original, still living offer.
- Conditional Acceptance as Indirect Rejection
 - *For Example:* When a Memphis Law Firm calls to offer you a position as an associate, and your response is that you accept on the condition that you do not get assigned to the tax team. Has a contract been formed? NO: that conditional acceptance was a rejection of the offer, not a valid acceptance, and hence no contract. If not, can you call back an accept? NO: A conditional acceptance is a rejection, kills the offer, and cannot later accept the original offer
 - *For Example:* B sends S a purchase offer for polyester. The purchase order makes no mention of arbitration of disputes. S sends an acknowledgement form that provides for arbitration of disputes and states, “acceptance is expressly conditioned on these terms.” Is there a contract? NO: That is a Rejection. This Conditional Acceptance kills the deal, and the original offer. Contract talks need to start anew.
- Additional Terms as Indirect Rejection under the common law: Mirror Image Rule
 - *For Example:* L sends T a signed REAL ESTATE lease that is silent about arbitration of disputes. T adds a paragraph providing for arbitration of disputes and signs. Is there a contract? NO, *The offeree, in accepting, cannot add anything. Acceptance PLUS additional terms is a Rejection under the Common Law. Under the common law, Acceptance MUST MIRROR the offer*
- Additional Terms Still Acceptance under UCC Article 2: seasonable expression of acceptance
 - Contract? *For Example:* B sends S a signed purchase order for polyester that is silent about arbitration of disputes. S responds by sending back a signed acknowledgement form providing for arbitration of disputes. Is there a contract? YES: for the sale of goods, if the acceptances adds a few things, that is still an acceptances (leads to the battle of the forms)
 - Terms? *Additional Terms will become part of the contract if (1) BOTH parties are MERCHANTS, (2) the offer is NOT expressly limited in its terms, (3) the offeror does NOT OBJECT within a REASONABLE TIME, and (4) The additional term is NOT a MATERIAL CHANGE. Otherwise, the additional term is merely a proposal that is to be separately accepted or rejected.*
 - *For Example:* S, a used car dealer, faxes an offer to sell a 1973 Cadillac to A, another used car dealer, for \$400. A’s fax acceptance adds “Saturday Delivery”. Is there a contract? With Saturday Delivery? YES, there is a contract (OK to add stuff, between merchants). Whether Saturday Delivery depends on 2 things, whether S objected and whether the change is MATERIAL

- *For Example:* What if S responds that Saturday delivery is NOT convenient? Is there still a contract? With Saturday Delivery? YES, there is a contract. But Saturday delivery is not part of contract. If Saturday delivery were really important, B should have made Saturday delivery a condition of acceptance (in his offer), which S could reject, thereby killing the offer.
- *For Example:* Epstein offers to sell his 1973 Cadillac to Conviser for \$400. Conviser responds: "I accept. Deliver it on Saturday." Is there a contract? With Saturday delivery. YES, there is a contract. With Saturday delivery? Depends on merchant status. If not both merchants, as here, the additional term is not part of the contract, but rather, a mere proposal.
- *Review:* Epstein offers to sell his Cadillac to Conviser for \$400. Conviser responds, "I accept if the car is delivered by Saturday." Is there a contract? NO contract, this is a rejection (since it is a conditional acceptance)
- *Way to Test:* IN a Sale of Goods OFFER and Term Added (an no response by Offeror). YES there is a contract. But what about the new terms? If 1 or more parties are NOT merchants, the additional term is just a mere proposal and not part of the contract. If the parties are both merchants, the new term is part of the contract unless the change is a Material one.

D. Offer Termination Method 4: Death of a Party prior to Acceptance

- General Rule: Death or Incapacity of Either Party Terminates the Offer.
 - *For Example:* On 2/2, A sends B a written offer. A dies on 2/4. B, not knowing of A's death, mails an acceptance on 2/6. Is the acceptance effective? NO, at *Instant of Death*, all offers terminate with him. Offerees knowledge of Offerors death is irrelevant
- Exceptions: (1) Option, (2) Part performance of offer to enter into unilateral contract

4. Acceptance of an Offer

A. Who Can Accept?

- Generally, an Offer can be accepted by (1) a person who knows about the offer and (2) is the person to whom the offer was made.
- *For Example:* Epstein posts a reward for whomever finds his lost dog. I find and return his dog, not knowing of the reward. What result? NO Acceptance, no contract, I can't accept the reward (Acceptance requires knowledge of the offer)
- *For Example:* Epstein offers to sell me his 1973 Cadillac for \$400. Conviser learns of the offer. Can he accept? NO acceptance. The offer is NOT made to Conviser. Offers are PERSON-SPECIFIC.

B. Methods of Accepting an Offer (5 fact patterns)

1. If the offeree **starts to perform**, she will have accepted an offer to enter into a **bilateral contract**, but NOT an offer to enter into a **unilateral contract**
 - *Bilateral Offer* is open as method of acceptance, so start of performance is acceptance
 - *For Example:* O offers P \$1,000 to paint his house. The offer is silent as to method of acceptance. P starts painting the house. Has P accepted O's offer?

YES, if the offer is BILATERAL, open to method of acceptance, can accept by starting performance

- *Unilateral Offers* require PERFORMANCE for acceptance, so the start of performance is not acceptance; completion of performance is required.
 - *For Example*; O offers P \$1,000 to paint his house. O's offer states that it can be accepted ONLY by performance, not by promising to perform. P starts painting O's house. Has P accepted O's offer? NO, if it is a Unilateral offer and specifies that acceptance only by performance, then must PERFORM fully. Merely starting doesn't create a contract. This issue turns on the language of the offer. Can P walk away? YES, it is not yet an enforceable obligation. Merely starting to perform doesn't create a contract. Must understand the distinction between **acceptance and revoking** an offer. When Performance STARTS, OFFEROR CAN'T REVOKE, but no full acceptance and total contract until full performance.
- 2. If the offeree **promises to perform...**
 - If the facts show that an Offer has been made and the offeree **promises to perform**, a possible issue is whether the offer can be accepted by promises to perform. Most offers can be accepted by promises to perform, very few offers can be accepted ONLY by performance.
 - *For Example*: B telefaxes an order for polyester to S, requesting immediate shipment. Can S accept this offer by sending a telefax promising to ship the polyester? YES, most offers can be accepted by promises to perform (Remember, a Unilateral contract requires an Express method of performance (full) for acceptance)
 - *For Example*: O offers P \$1,000 to paint his house. The offer states that it can be accepted only by performance. P promises to perform. Has a contract been formed? NO, this is a unilateral contract requiring performance for acceptance. A mere promise to perform won't create a valid acceptance.
- 3. If the Offeree sends its acceptance through the **mails...Mail Box Rule**
 - If an offeree is "invited" to accept by mail, acceptance is effective **when posted**. For example, if the offer arrives by mail, a mailed acceptance will be effective when posted. This general Rule and 4 exceptions are listed below.
 - **General Rule**: The time of acceptance focuses on when the acceptance is **Sent** rather than when received, so long as a reasonable method.
 - *For Example*: Conviser receives a letter from Ronco offering to sell him both a Veg-e-matic and a Pocket Fisherman for \$30. On January 10, Conviser mails his letter of acceptance. On January 11, Conviser receives a letter from Ronco revoking its offer. What Result? Timing of Revocation sent through the mail is effective ONLY when Received. But, with the mail box rule, **Acceptance is effective when posted**. Here, Acceptance on the 10th, Revocation on the 11th. Ergo, there is an effective acceptance before revocation.
 - *Does the Mail Box Rule Apply even if Conviser's letter never arrives?* YES, as long as sent, acceptance is effective (if it is before the revocation is received). This may be hard to prove, though.

- Exceptions
 - *Offer Otherwise Provides*
 - If offer says, 'no acceptance until received', then that will control, above the mail box rule.
 - *Rejection, then Acceptance*
 - For Example: Conviser receives a letter from Phish inviting him to join their group. On August 8, Conviser mails a letter to the group rejecting their offer. On August 9, he changes his mind and mails a letter of acceptance. What result? What if he telefaxes his acceptance? ORDER is important (here, 1st rejection, 2nd acceptance). NO MAILBOX RULE if Rejection is Mailed 1st. Rejection is not otherwise effective until received. But if acceptance gets there first, there will be a contract. Thus, if he faxes an acceptance and it gets there before the rejection, then it will be a valid acceptance.
 - *Acceptance, then Rejection*
 - For Example: Same facts as above, except that Conviser mails a letter of acceptance 1st. The letter of acceptance is mailed on August 8. On August 9, he changes his mind and telegraphs the rejection. What results? In General, Mailbox Rule & acceptance if send acceptance 1st. However, if REJECTION Arrives 1st, there is no acceptance and no contract.
 - *Option Deadlines*
 - For Example: Epstein offers to sell Conviser his 1973 Cadillac for \$4,000. Conviser pay \$300 in exchange for Epstein's promise to hold the offer open until January 9 (*creates an irrevocable offer*). On January 9, Conviser mails his letter of acceptance. Epstein sells the Cadillac to Sharon Stone on January 10. On January 11, Epstein receives Conviser's letter. What result? ACCEPTANCE MUST BE RECEIVED BY OPTION DEADLINE. The Mailbox Rule does not apply to option deadlines.

4. If the **seller of goods sends the wrong goods**

- General Rule: Acceptance & Breach
 - *For Example*: B orders a case of Vaseline petroleum jelly from S. S ships a case of Welch's grape jelly. Did S accept the offer? Did S breach? YES, there is acceptance of the offer. When send the wrong goods, that is a breach. Communication was the offer. Sending the stuff, though wrong, was an acceptance. Sending the wrong stuff was a breach.
- Exception – Accommodation: Counter-offer & No Breach
 - *For Example*: Buyer, a merchant, faxes to Seller, a merchant, a message that states, in relevant part: "Urgently need 200 Blue Widgets to be delivered at your catalogue price by May 15." On May 13, Buyer received from Seller a shipment of 200 Red Widgets, accompanied by a typewritten note from Seller, stating: "Our supply of blue widgets is exhausted and we cannot restock before your delivery date. We have shipped 200 red widgets instead and hope you can use them." [*Sending the Wrong Goods + an Explanation is an*

Accommodation. Seller doesn't accept the offer, but rather creates a counter-offer. (counter-offers reject the original offer, ergo there is no breach).]

- *Upon Receiving the Shipment of Red Widgets Buyer may:* (MBE)
 - (A) *Accept the Shipment and Pay list price or reject the shipment and sue seller for total breach*
 - WRONG – no contract, no breach
 - (B) *Accept the shipment and pay list price or reject the shipment and sue for breach, but buyer must give seller a chance to cure*
 - WRONG – no contract, no breach
 - (C) *Accept the shipment and pay list price or reject and sue for total breach, providing that buyer covers promptly*
 - WRONG – no contract, no breach
 - (D) *Accept the shipment and pay list price or reject the shipment with no other remedy.*
 - RIGHT

5. If the offeree is *silent*

- General Rule: Silence is NOT acceptance
- Exception: If offeree agrees to it, Silence may be acceptance
 - *For Example:* Epstein offers to sell his 1973 Cadillac to Conviser for \$400. Conviser replies: “if you don't hear from me before Friday, I accept.” Here, since Offeree suggested silence as acceptance, then he accepts by silence. The whole Key is the offeree.

5. Formation: 2nd View

- Again, remember that a Contract is More than a Mere Agreement (needs to be a legally enforceable agreement to be a contract)

6. Consideration or a Consideration Substitute

- Consideration Defined:
 - Bargained for Legal Detriment (MBE Majority)
 - MA: Bargained for Legal Detriment or Benefit
 - Look at each promise separately. Must be bargained for. Person making the promise seeks something. Words are not enough, goes to context.
 - Bargained for: determines whether contract or gift
 - Identify promisor (defendant) and ask what did he bargain for? Identify the promisee (plaintiff) and ask what detriment did she incur?
 - The doctrine of consideration is of limited practical significance. In most transactions, especially commercial agreements, there will be no issue as to consideration. Article 2 has further reduced the significance of consideration.
- Forms of Consideration
 1. *Performance (doing something not legally obligated to do)*
 2. *Forbearance (not doing something legally entitled to do)*
 3. *Promise to Perform*
 4. *Promise to Forbear*

- Possible Issues
 1. *“Bargained For” v Conditioned Gift*
 - For Example: Epstein wants me to have his Cadillac so he tells me that “If you come to my house, I will give you my 1973 Cadillac” – Words alone don’t show whether contract or gift. Depends on context. This is a conditional gift
 - For Example: Epstein wants me to come to his house. Having tried the usual lines about etchings, wine & music with no success, he tells me that “If you come to my house, I will give you my 1973 Cadillac”. Same words, but it is bargained for. If person is seeking something in return, it is bargained for consideration (not a conditional gift).
 2. *“Legal Detriment”*
 - For Example: If you stop listening to Barry Manilow records, I’ll pay you \$100. (What is the promise? Is there consideration—bargained for legal detriment—supporting the promise?) The legal detriment is the forbearance from listening to Barry Manilow records, something a person has a legal entitlement to do.
 3. *“Past Consideration”*
 - General Rule: Past consideration is NOT consideration
 - *For Example*: Apu saves Lisa’s life. Homer is so grateful that he promises to pay Apu \$3,000. Homer later changes his mind. Is his promise legally enforceable? NO. Past consideration is not good consideration. Doing something in the past is not bargained for legal detriment. Stuff that happens before the promise is NOT good consideration for the promise.
 - Exception: *Expressly REQUESTED and EXPECTATION of payment*
 - *For Example*; What if Homer had asked Apu to save Lisa’s life? (without mentioning the amount). OK to just request Apu to save Lisa (that is an Express Request), and as long as Apu had the expectation of payment, then that past act would be good consideration.
 4. *Adequacy of Consideration*
 - For Example: I sign a contract to purchase Epstein’s 1973 Cadillac for \$10. Is this agreement legally enforceable? YES, both under common law and Article 2. Don’t look at the amount or adequacy of consideration. A mere peppercorn is good enough.
 5. *“Pre-existing Contractual or Statutory Duty Rule (Common Law different from Article 2)”*
 - Common Law
 - *General Rule*: Performance of pre-existing contractual or legal duty is NOT consideration
 - For Example: Willie Nelson contracts to play at a local Holiday Inn for \$15,000. Notwithstanding the contract, Willie refuses to play unless he is paid \$20,000, not \$15,000. The Inn owner promises to pay Willie \$20,000 for performing. Willie performs. The Inn owner pays Willie \$15,000. Is the promise to pay the additional \$5,000 legally enforceable? NO. There was no legal

detriment for the additional \$5,000. He was doing something he was already obligated to do.

- *Exception: Unforeseen Difficulty So Severe as to Excuse Performance*
 - For Example: The air conditioning, lights, and sound system at the Holiday Inn are inoperative. The Inn owner agrees to pay Willie an additional \$5,000 if he will play. Is the promise to pay the additional \$5,000 legally enforceable? YES, the unforeseen difficulty exception
 - *Exception: 3rd Party*
 - For Example: Same facts except Conviser, not the Inn owner, promises to pay the additional \$5,000. Will be legally enforceable.
 - MA: General Common Law Pre-existing duty is not consideration. But in MA, consideration is bargained for legal detriment OR benefit. MA courts think there is a benefit to PERFORMANCE, so promise to pay more is legally enforceable.
 - Article 2 UCC
 - *For Example*: S contracts to sell polyester to B for \$1,000. S subsequently tells B that it cannot deliver the polyester for less than \$1,300. B promises to pay the additional \$300. S delivers. Must B pay the additional \$300? YES
 - *No Pre-existing Legal Duty under Article 2*
 - *Do not need Consideration to Modify a sale of goods contract*
 - *Good Faith Test*
 - Whether B has to pay turns on whether act in good faith.
6. *Part Payment as Consideration for Promise to Forgive Balance of Debt*
- **Key** is whether the debt is **due** and **undisputed**
 - *For Example*: D owes C \$3,000. The debt is **due** and **undisputed**. C agrees to take \$2,000 in full satisfaction of the debt. D pays \$2,000. Can C now sue for the remaining \$1,000? YES. Part payment of a debt that is due and undisputed is NOT consideration for the RELEASE (since there is no legal benefit or detriment in paying what you already owe). So, even though there was an agreement, that agreement is not legally enforceable.
 - *For Example*: Same facts except the \$3,000 debt was due on January 15 and D pays the \$2,000 on January 11. Paying early is a DETRIMENT, and good consideration. Ergo, *Early payment or Payment in Dispute are valid consideration and there will be a valid release.*
7. *Illusory Promises*
- General Rule: An illusory promise (a promise in which the promisor has NOT committed herself in any matter) is Not consideration (there is no detriment)
 - *For Example*: Conviser agrees to purchase the 1973 Cadillac from Epstein on December 7, unless Conviser changes his mind. NO real commitment, an illusory promise. No consideration, no legally enforceable agreement.

- Exceptions: Watch for the illusion of illusoriness
 - *Restrictions on Right to Cancel Are Not Illusory*
 - For Example: Conviser agrees to purchase Epstein's 1973 Cadillac on December 7 unless Conviser gives notice by December 1 that he has changed his mind. This is NOT illusory. It is a limitation on freedom of action, but not illusory. Can be good consideration
 - *Conditional Promises are Not Illusory*
 - For Example; Conviser promises to purchase the 1973 Cadillac from Epstein on December 7 if he gets a tax refund before then. Not illusory, the conditional promise is good consideration
 - For Example: Conviser agrees to purchase Epstein's 1973 Cadillac if he is satisfied with how the car performs during a test drive. This is NOT illusory, it is good consideration in the form of a conditional promise.
- Written Promise to Pay Debt Barred by Technical Defense such as Statute of Limitations as Consideration Substitution (for the new agreement, not the underlying one)
 - Consideration Substitute Analogy: In sports, use starters until they don't work well. Then go with the substitutes. Only if can't find good consideration do you even begin looking to consideration substitutes.
 - *For Example:* D owes C \$1,000. Legal action to collect this debt is barred by the statute of limitations. D writes C, "I know I owe you \$1,000. I will pay you \$600." What are C's rights? C can enforce the new promise. Require (1) a later **writing**, (2) only the new promise is legally enforceable, not the underlying debt.
 - MA: A check to pay a debt discharged in bankruptcy is enforceable if defense is bankruptcy discharge (don't require a separate agreement, just the check)
- Majority: Seal is NOT a Consideration Substitute
 - MA, though, Seals serve as a substitute for consideration
- Promissory Estoppel (Detrimental Reliance) is the MOST important consideration substitute (2d Restatement on Contracts § 90)
 - *Elements:* (1) Promise, (2) Reliance that is Reasonable, Detrimental, & Foreseeable, (3) Enforcement is necessary to avoid Injustice
 - *Consideration v Promissory Estoppel*
 - *For Example:* M promises D that M will not foreclose on D's mortgage. D then paints her house. Is D's painting the house consideration for M's promise? NO. consideration must be bargained for. This is not bargained for, M gets nothing out of the deal. Though, this may be promissory estoppel.
 - *MBE: For Example: While negligently driving his father's uninsured automobile, 25 year old Arthur crashed into an automobile driven by Betty. Both Arthur & Betty were injured. Charles, Arthur's father, erroneously believing that he was liable because he owned the automobile, said to Betty, "I will see to it that you are reimbursed for any losses you incur as a result of the accident." Charles also called Physician and told him to take care of Betty and that he, Charles, would pay the bill. Arthur, having no assets, died as a result of his injuries. Dodge, one of Arthur's creditors, wrote Charles stating that Arthur owed a clothing bill of \$200 and that it was going to file a claim against Arthur's estate. Charles*

replied, "If you don't file a claim against Arthur's estate, I will pay you what he owed." In an action by Betty against Charles for wages lost while she was incapacitated as a result of the accident, which of the following would be Charles' best defense?

- (a) *Lack of Consideration* – Right. No bargained for legal detriment. Accident happened before the promise. Past consideration is not good consideration
- (b) *Mistake of fact as to basic assumption* – Wrong (trick)
- (c) *Statute of Frauds* - Wrong
- (d) *Indefiniteness of Charles' promise* – Wrong: never a good MBE answer, too fact intensive

If Dodge did not file an action against Arthur's estate, would Dodge succeed in an action against Charles for the \$200?

- (a) *Yes, because Dodge had detrimentally relied on Charles' promise* – Wrong. This is OK, but it is Not the best answer. Promissory Estoppel is a consideration substitute, look for consideration 1st before accept a consideration substitute as the right answer
- (b) *Yes, because Charles' promise was supported by a bargained for exchange* – Right. Good consideration.
- (c) *No, because Dodge's claim against Arthur's estate was worthless* - Wrong
- (d) *No, because Charles at most had only a moral obligation to pay Arthur's debts* – Wrong

Assume that Charles, honestly believing that he owed Dodge nothing, refused to pay anything to Dodge, who honestly believed that Charles owed him \$200. If Dodge then accepts \$150 from Charles in final settlement of the claim, will Dodge succeed in an action against Charles for the remaining \$50? (This is a disputed debt. Important for part payment for release as consideration substitute)

- (a) *Yes, because Arthur's debt of \$200 was liquidated and undisputed* - WRONG
- (b) *Yes, because Dodge honestly believed that he had a legal right against Charles for the full \$200.* - WRONG
- (c) *No, because Charles honestly believed that Dodge did not have a legal right against him for the \$200.* – CORRECT. Can't collect any more because undisputed debt and part payment for release
- (d) *No, because Charles was not contractually obligated to pay Dodge \$200 in the first place.* - WRONG

7. Defenses: Capacity to Contract

- Who lacks Capacity to Contract?

1. *Infant* – Magic Age is < **18**. Whether or not the other knows is irrelevant
2. *Mental Incompetents* – Keyword is **ability**. Whether the other knows is irrelevant
3. *Intoxicated Persons if other party has REASON to KNOW* – Key, if the other has reason to know of the Intoxication
 - *For Example*: While drunk, Conviser trades his BRI ownership interest for ½ interest in a new World Roller Derby Franchise, the Tapei Personalities. The other contracting party does NOT have reason to know that Conviser is incapacitated. Can Conviser disaffirm? NO – key is whether the other party has reason to know of the incapacity due to intoxication.

- Consequences of Incapacity

1. *Right to Disaffirm*

- For Example: In 1997, Conviser sells a Harley to Chelsea for \$7,500. Could Chelsea disaffirm? Could Conviser disaffirm? Chelsea is 17. Her agreements are not legally enforceable. Infants may disaffirm (other non-infant party, though, may not disaffirm)
- Could Chelsea disaffirm even if Conviser did not know that Chelsea was less than 18? Doesn't matter if he doesn't know about infancy.

2. *Implied Affirmation*

- What if Chelsea does not disaffirm and continues to use the Harley after she becomes 18? If **infant** continues to **keep benefits** of the contract after a reasonable time, it is like making a new agreement & legally enforceable. Can gain or regain capacity; if continue benefit, like making a new agreement

3. *Liability for NECESSITIES*

- **Necessary**: Food, clothing, shelter, things to make a living
- Even a person without capacity is legally obligated to pay for necessities
- Legal obligation is under **quasi-contract** and not contract law (look to *value of the benefit and not the contractual terms*)

8. Defenses: Statute of Frauds

A. Issues

- Is the contract within the statute of frauds?
- If so, is the statute of frauds satisfied?
- If not, what result?

B. Contracts WITHIN the Statute of Frauds

1. Promises in Consideration of Marriage

- *For Example:* Michael orally promises to marry Lisa Marie. NO Statute of Frauds problem. Promises TO marry are not within Statute of Frauds, (Promises IN CONSIDERATION of MARRIAGE Are within the statute of frauds)
- *For Example:* Michael orally promises Lisa Marie that her father can live with them if she marries him. Statute of Frauds problem here. This is a promise in consideration of marriage and thus within the statute of frauds.
- *Most Likely to Appear as a **pre-nuptial agreement***

2. Promises by Executor or Administrator to Pay Obligation of Estate from Own Funds

- *For Example:* Anna Nicole Smith, executrix for the estate of her late husband, J. Howard Marshall promises that the estate will pay burial expenses. NO statute of frauds problem. That's the way it is done
- *For Example:* Anna Nicole Smith, executrix for the estate of J. Howard Marshall, promises that she will use her own assets to pay the burial expense. That is unusual, requires special proof. Ergo, it is a Statute of Frauds issue.

3. Other Promises to Answer for the Debts of Another

- Key Phrase: Answer For = Guarantee, 2ndary liability
- *For Example:* D tells C to deliver paint to X and promises that she (D) will pay for the paint. This happens a lot, not within the Statute of Frauds
- *For Example:* X buys paint on credit from C. D promises C that she will pay for the paint if X does not pay. This IS a Statute of Frauds problem. Answering for the debts, or guaranteeing the debts of another, is within the statute of frauds
- *For Example;* Same facts as above, except that D's 'main purpose' (or leading object) in promising to pay was that the paint was to be used by X in painting D's house. If guarantee and the guarantor's main reason for making the guarantee was some benefit to herself (the guarantor), then no Statute of Frauds problem (MAIN PURPOSE EXCEPTION)

4. SERVICE Contract NOT CAPABLE of being performed within ONE year from time of contract

- Ignore what Actually happened, the KEY is WHAT MIGHT HAVE Happened. If performance within a year is POSSIBLE by its terms, the contract is NOT WITHIN the statute of frauds
 - *For Example:* IN January of 1997, X contracts to cut all of the trees on Y's land. Is this contract Capable of being performed within a year of the contract?
 - YES: Could be performed within a year. Not within statute of frauds. Don't deal with reality or probability, here, it is just capability

- *For Example:* What if X does not actually finish cutting the trees until December of 1998? Is this contract capable of being performed within a year from the time of the contract?
 - *YES.* Still capable of being performed within a year and outside the statute of frauds
- *For Example;* X agrees to employ Y for life. Is this contract capable of being performed within a year from the time of the contract?
 - *YES:* Could die tomorrow, full performance possible, then, within a year, and outside the statute of frauds
- *For Example:* A orally agrees to employ B for 3 years. Is this contract capable of being performed within a year from the time of contract?
 - *NO:* 3 years of performance can't be performed in a year. So within the statute of frauds (FIXED TERM > 1 YEAR)
- *For Example:* A orally agrees to employ B for 3 years. The contract provides that B can terminate the contract on 30 days notice. Is this contract capable of being performed within a year from the time of the contract?
 - *NO:* Termination is Separate from Performance. Thus, within the statute of frauds
- *For Example:* On August 1, 1997, Club Putz hires John Denver to perform on December 24, 1998. Is this contract capable of being performed within a year from the time of the contract?
 - *NO:* Can't be capable of being performed within a year. Required performance is more than a year away. Thus, it is within the statute of fraud.

5. Transfers of Interest in REAL ESTATE

- Applies to not just any real estate deal, but only where transfer an interest in real estate for more than a year.
 - *For Example:* X contracts to sell Redacre to Y for \$400.
 - *YES:* this is within the Statute of Frauds: Transfer an interest
 - *For Example:* B contracts with O to build a house in Blackacre.
 - *NO:* not within Real estate (though deals with real estate, it is not a transfer of an interest in Real Estate)
 - *For Example:* L rents an apartment to T on a year lease
 - *NO:* if 1 year or less transfer of interest in real estate, need not be within the statute of frauds

6. SALE OF GOODS > \$500

- *For Example:* Conviser contracts to buy Willard Scott's top hat for \$498.
 - Not within the statute of frauds, but still within the UCC
 - This is the only Sale of Goods Rule that has a specific dollar amount.

MA only: 7. Agreement to make or Revoke a Will is within the Statute of Frauds

MA only: 8. A contract to pay a Broker's or Finder's Fee is within the Statute of Frauds

C. How to SATISFY the Statute of Frauds

- Usually look for a Writing, but Performance can also Satisfy the Statute of Frauds

1. Performance

- The Statute of Frauds can be satisfied by performance. The rules for satisfaction by performance vary depending on whether the contract is a SERVICES contract, a SALE OF GOODS contract, or a REAL ESTATE TRANSFER contract

(a) Services Contract

- **Full performance** by *either* party satisfies the statute of frauds
 - *For Example:* Epstein orally agrees to write mini review materials in exchange for Conviser's promise to advertise the course as the Epstein mini-review for the next five years. (*Services Contract: call it Epstein Review for 5 years, not capable of performance within one year, ergo, Statute of Frauds issue*) Epstein completes the materials. Conviser continues to call the course the Conviser mini-review. Epstein sues Conviser for breach of contract. Does Conviser have a statute of frauds defense?
 - This agreement is WITHIN the statute of frauds, but party (Epstein) fully & completely performed. Full performance satisfies the Statute of Frauds and this is a legally enforceable agreement. Remember; 3 steps (1) Within Statute of Frauds? (2) Satisfy Statute of Frauds (writing or performance), (3) If satisfied, no defense
 - **Part performance** of a Services Contract **does not** satisfy the statute of frauds
 - *For Example:* P orally agrees to work for D for 5 years (within Statute of Frauds, not capable of performance within a year). P works for 13 months and then D fires her without cause. P sues D for breach of contract. D asserts a statute of frauds defense. Can P recover her salary for the work she has done? Can P recover the remainder of her salary under contract law?
 - This is WITHIN the statute of frauds. But, part performance of a services contract DOES NOT satisfy the statute of frauds. So, under contract law, a statute of frauds defense does exist. But, it seems inequitable. Therefore, under equity and QUASI-CONTRACT, P may recover.
 - Analysis:
 - (1) Is the Agreement within the statute of Frauds? If Yes
 - (2) Is the Statute of Frauds Satisfied?
 - (3) If yes, there is NO Statute of frauds defense, If no, there is a statute of frauds defense
 - (4) Even if there is a statute of frauds defense and a contract, Is there a quasi-contract?

(b) Sale of Goods Contract

- General Rule: Part performance of a contract for the SALE OF GOODS SATISFIES the statute of frauds, but only to the EXTENT of the part performance. This means than in an oral agreement for the sale of goods

> \$500, the seller will be able to recover under contract law for the goods delivered, but the buyer will not be able to recover any breach by non-delivery under contract law

a. *Action by Seller for Performance*

- For Example: S orally agrees to sell 2,000 pounds of polyester for \$10,000. S delivers 600 pounds. S sues B for the 600 pounds that have been delivered. Will B have a statute of frauds defense?
 - Within the statute of frauds
 - Statute of frauds is satisfied by part performance to the extent of part performance
 - No statute of frauds defense

b. *Action by Buyer for Non-performance*

- For Example: Same facts except that B sues for the 1,400 pounds that were not delivered. Will S have a statute of frauds defense?
 - Within the statute of frauds
 - Statute of frauds satisfied by part performance to the extent of the part performance (up to the 600 pounds, not the unshipped 1,400 pounds)
 - Statute of Frauds Defense

- *Specially Manufactured Goods Exception:* The agreement will be legally enforceable once there has been a substantial beginning by the seller
 - For Example: B orders a pair of Custom Made Cowboy boots from S for \$500. Nothing is put in writing. S starts work on the boots. B changes his mind. If B cancels the order and S sues for breach of contract, will B have a Statute of Frauds defense?
 - NO, Specially manufactured goods exception

(c) *Real Estate Transfer Contract*

- Full Payment by BUYER of real estate DOES NOT satisfy the Statute of Frauds
 - *For example:* B orally agrees to buy Blackacre from S for \$10,000. B pays the \$10,000. Is the statute of frauds satisfied so that B can enforce S's oral promise to convey Blackacre?
 - NO
- Performance by SELLER of real estate DOES satisfy the Statute of Frauds
 - *For example:* B orally agrees to buy Blackacre from S for \$10,000. S conveys Blackacre to B. Is the statute of frauds satisfied so that S can enforce B's oral promise to pay \$10,000?
 - YES
- MA Difference: Part Performance by Buyer of Real Estate CAN satisfy the Statute of Frauds

- *For Example*; B orally agrees to buy Blackacre from S for \$10,000. B takes possession of Blackacre and pays \$2,000. Is the statute of frauds satisfied so that B can enforce S's oral promise to convey Blackacre?
 - *YES*
 - MA Difference: Part performance by buyer in real estate agreement can satisfy the statute of frauds
 - MBE (any 2 of 3): payment, possession, improvements
 - MA (all 3): Partial payment, possession improvement

2. Writing

a. Common Law

- All Material Terms Test
- Look at the contents of the writing or writings – ALL MATERIAL TERMS TEST. Look also at WHO signed the writing – signed by person to be charged
 - *For Example*: 'your offer of January 15th is hereby accepted' s/ Webb Hubbell. This writing is signed, but doesn't satisfy the Statute of Frauds because NOT ALL MATERIAL TERMS. Material terms must have WHO + WHAT
 - *For Example*: "The law firm of King & Spaulding hereby agrees to employ Marcia Clark as an attorney for 3 years at \$200,000 per year" s/David Epstein for the firm. King & Spaulding wrongfully dismisses Ms. Clark. She sues for breach of contract. Does King & Spaulding have a statute of frauds defense? NO. This writing contains the Who & What
 - *For Example*: Same writing only Ms. Clark breaches. If King & Spaulding sues her for breach of contract, will she have a statute of frauds defense, notwithstanding the signed writing? YES, because she (the person to be charged) did not sign it. For things other than a sale of goods, the writing must be signed by the person to be charged

b. Sale of Goods

- Again, look to the contents of the writing and Who signed the writing. The writing must contain the QUANTITY term. The Writing must be signed by the person to be CHARGED or BOTH PARTIES MUST BE MERCHANTS and the person who receives a signed writing with a quantity term that claims there is a contract FAILS to respond within TEN DAYS OF RECEIPT
 - *For example*: Pleasure Time products sues Conviser for breach of an alleged contract to buy dolls for \$500. The only writing is the following, "I agree to buy 17 dolls" s/Richard Conviser. Does Conviser have a statute of frauds defense? NO, for a sale of goods require only A QUANTITY term and the Signature of the person to be charged
 - *For example*: B, a store that sells polyester, receives the following fax from S, a polyester distributor: "as we agreed during our telephone conversation today, I will be sending you 200 pounds of polyester and billing you \$600." s/S. B does not respond. S sends the polyester and

the bill. B refuses to pay. Does B have a statute of frauds defense?
NO, since both are merchants and the person who received the writing failed to respond within 10 days, there is no statute of frauds defense.

c. *2A Leases of Personal Property*

- 2A's writing requirements are more like the common law requirements than Article 2. The writing must (1) indicate that it is a lease, (2) describe what is being leased, and (3) state the duration of the lease (I think it also requires the signature of the party to be charged.)

3. Judicial Admission of Sale of Goods Agreement

- Judicial Admissions (from Pleadings, Discovery, Testimony) by a party will satisfy the statute of frauds and there will be no statute of frauds defense

SUMMARY of Statute of Frauds

- a. Within the statute of frauds?
- b. Satisfy the statute of frauds?
- c. If yes, no statute of frauds defense: If no, statute of frauds defense, but maybe Quasi-contract recovery

D. Related Issues

1. Authorization to Enter into a Contract for TRANSFER of Interest in REAL ESTATE

- The issue is When does a person need a written authorization in order to execute a contract for someone else? The Authorization must be in writing if the contract to be signed is WITHIN the Statute of Frauds (that is, the Authorization must be OF EQUAL DIGNITY). So, if sign contract for another that is within the statute of frauds, require written authority.
- *For Example:* Conviser rents an apartment in Atlanta. He arranges for Epstein to sign the lease for him. Does Epstein need written authorization if the lease is for 2 months? 2 years?
 - The 2 month lease is NOT within the statute of frauds, so it does not require written authorization
 - The 2 year lease is WITHIN the statute of frauds, so it requires written authorization. (EQUAL DIGNITY)

2. Contract MODIFICATION

- Issue is when does a modification of a contract have to be in writing. TEST is looking to the contract AS MODIFIED. If the contract, with the modification, is within the statute of frauds, the modification agreement must be in writing.
- Common Law
 - *For example:* T leases a building from L for 3 years (*within the statute of frauds*). T and L want to modify the rent under the lease. Is a writing required? YES, the deal after the change is within the statute of frauds, therefore, require a written modification
 - *What if T & L want to reduce the duration of the lease from 3 years to 11 months?* No writing is required, since the agreement, as modified, is not within the statute of frauds.
 - *For example:* R employs E for 11 months (*services contract capable of being performed in less than a year, not with the statute of frauds*) They

sign a contract. It provides that all Modification have to be in writing. Can R and E orally modify the contract? YES, this is the ONLY place on the bar exam to ignore the express contract language and intent of the parties. Under the common law, Contract Clause Requiring written modification can be IGNORED.

- UCC
 - *For Example:* Conviser contracts to buy 600 bottles of Thunderbird wine from Epstein for \$600. They subsequently modify the contract by increasing the number of bottles to 650. Does the modification of the agreement have to be in writing? YES; look to the contract as modified. Essentially the same as common law. If the agreement, after the modification is within the statute of frauds, the agreement modification must be in writing.
 - *What if the contract is modified so as to reduce the price to \$450.* NO, that modification need not be in writing. Since the agreement, as modified, is not within the statute of frauds, the modification need not be in writing.
 - *What if Conviser & Epstein contract says no Oral modifications?* UCC not the same as the common law. Under the UCC, a contract clause REQUIRING written modification is EFFECTIVE unless waived.

9. Illegality, Duress or Fraud

A. *Illegal Subject Matter v Illegal Purpose*

- If the SUBJECT MATTER is ILLEGAL, the Agreement is VOID
- If the subject matter is legal, but the PURPOSE is ILLEGAL, the agreement is enforceable ONLY by the person who DID NOT KNOW of the illegal purpose
 - *For Example:* Jeff Gilooly agrees to pay \$5,000 to Conviser to cause physical injury to Nancy Kerrigan by means of a dangerous instrumentality. Can Gilooly enforce this agreement? Can Conviser enforce this agreement?
 - NO: the subject matter (injuring another) is illegal, and the agreement is void. Neither party may enforce
 - *For Example:* Conviser agrees to pay Epstein Limo Service \$200 to drive him from New York to Boston where Ms. Kerrigan is skating. Can Epstein enforce this agreement? Can Conviser enforce this agreement?
 - Epstein can enforce because he is a party that does not know of the illegal purpose. The subject matter is driving, which is legal, but the purpose is to harm Kerrigan. So long as Epstein does not know about the purpose, he can enforce. Conviser, though can't enforce.

B. *Fraud in Execution (Factum) v Fraud in Inducement*

- If fraud results in a person not knowing that she is signing a contract, the agreement is VOID (fraud in Factum/execution)
- If fraud results in person being deceived about the material term of the contract, the agreement is VOIDABLE (inducement)

C. *Personal Duress v Economic Duress*

- Personal or Physical Duress (NOT economic) is a basis for AVOIDING an agreement

10. Unconscionability

- This contract was originally applicable only to sales of goods, but now is a part of contract law in general
- It empowers a court to refuse to enforce all or part of an agreement
- Two Basic Tests: (1) Unfair Surprise & Oppressive Terms are (2) Tested as of the time the agreement was made by the court. Under 2A, a court may grant relief from a consumer lease even though no provision of the lease is unconscionable, if there is unconscionable conduct in inducing or enforcing the lease. If the agreement is FAIR as of the TIME MADE (though unfair 10 years later) no Unconscionability issues.

11. Ambiguity (Raffles v Wichelhaus)

- There will be NO contract if
 - (1) the parties use a term that is open to at least 2 REASONABLE interpretations, and
 - (2) Each party attaches different meaning to the term, and
 - (3) Neither party knows or has reason to know the meaning attached by the other
- *For Example:* B and S contract for cotton to be delivered on the Peerless. B intends the October Peerless, and S intends the December Peerless. Neither B nor S knows that there are 2 ships named Peerless. NO CONTRACT
- *What result if B knows that there are 2 Ships named Peerless?* If either party is aware of the Ambiguity, the Agreement is LEGALLY ENFORCEABLE under the terms understood by the Other.

12. Mistake of Fact

A. Mutual Mistake of Fact (*Sherwood v Walker*)

- There will be NO CONTRACT if:
 - Both Parties are Mistaken, and
 - The Mistake is as to a Basic Assumption of Fact, and
 - The Mistake Materially Affects the Agreed Exchange
- KEY is whether the agreed upon subject matter exists. (What the agreement is: basic & material, what the agreement is worth: neither basic nor material)
 1. *Mistake as to Existence of Subject Matter*
 - For Example: S sells B a painting for \$50,000. Both believe that it is a genuine Warhol. It is Not. What result? NOT a LEGALLY ENFORCEABLE AGREEMENT. There was a Mutual Mistake of Fact as to the subject matter's existence.
 2. *Mistake as to Value of Subject Matter*
 - For Example: What if the painting is a Warhol but is worth only \$1,000, not the \$50,000 that both S and B believed? Regardless of the amount, if the mistake is only as to the value of something, that mistake is NOT material or basic. This agreement will be enforceable.

B. Unilateral Mistake of Material Fact

- General Rule: Generally, courts have been reluctant to allow a party to avoid a contract for a mistake made by only one party
- Exceptions

- Palpable Mistakes: If the other party to the contract knows or should have known of the mistake, courts grant relief to the mistaken party. Most often occurs in a bid situation when 1 bid is way out of whack.
- Avoidance before Significant Reliance by the Other Party: Courts have granted a bidder relief from a unilateral mistake in the Calculation of its bid if avoidance is sought before any significant reliance by the other party.

§ 3: TERMS OF THE CONTRACT

1. Overview

- The words of the party, though the major source of contract terms, are not the only source
- Other sources include: custom & usage, Past dealings between the parties, & the UCC

2. Parol Evidence Rule

A. Nature of Parol Evidence

- Substantive Law (NOT a rule of Evidence)
- Affects the TERMS of the Contract, not the Formation of the Contract

B. Overview of what need to know for Bar

1. What the rule is
2. Facts that trigger the Rule
3. Possible Issues and who resolves those issues
4. How Parol Evidence differs from the Statute of Frauds

C. Rule

- *When Parties Have Agreed to a WRITTEN contract as the FINAL EXPRESSION of their agreement, a PRIOR or CONTEMPORANEOUS agreement CANNOT be used to VARY the terms of the Written contract*
- The extent to which a later writing keeps out earlier terms

D. Triggering Facts

1. Written Contract, which is
2. Intended as the Final Agreement (INTEGRATED), and
3. The Earlier or Contemporaneous Agreement ADDS or CHANGES that *Later, Integrated, Written Contract*
 - *For Example*; In January, S and B execute a written contract for the sale of Blackacre. In February, S orally agrees to remove all trash from Blackacre. If S fails to remove the trash and B sues for breach of contract, will S have a Parol Evidence Argument? NO; there was a writing & Later Agreement. Parol Evidence does NOT look Ahead, it looks BACK. Effect of Writing on Earlier Agreements, NOT LATER Agreements

E. Issues (to be decided by the JUDGE)

1. *Does the Rule Apply (what is the SCOPE of the Parol Evidence Rule)*
 - Is the written contract an INTEGRATED instrument?
 - Is the other agreement EARLIER or CONTEMPORANEOUS?
2. *If the Earlier Agreement ADDS terms rather than CHANGES terms in the written contract, is the written contract not only intended as the final agreement, but also the Complete Agreement (Is there a COMPLETE INTEGRATION)*
 - Turns on the Merger Clause. Look for the merger clause, “This is a Complete and Final Agreement” or “Contract is limited to terms herein”
3. *If the Earlier Agreement does NOT ADD terms, but instead CHANGES, or explains terms, in the written contract, is one of the following EXCEPTIONS to the Parol Evidence Rule available?*
 - Use of Earlier Agreement to establish a **contract formation defect** (e.g., mutual mistake of material fact)
 - Use of Earlier Agreement to establish **an error in writing the contract** (i.e., reformation)
 - Use of Earlier Agreement to **explain terms in written contract**
 - **Collateral Agreements**, i.e., naturally and normally not included in the integrated agreement
 - *For Example:* In 1997, S and B enter into a written contract for the sale of Blackacre. B later sues S for breach of contract claiming that S orally agreed in 1996 to remove trash from an Adjacent tract.
 - *This ADDS to the writing (i.e., it does NOT change it). Judge looks to the writing to see if Full Integration*

F. Comparison: Parol Evidence v Statute of Frauds

- Usually, on MBE, combined in the same hypo.
- For *Parol Evidence*: Require a WRITTEN Contract with an EARLIER AGREEMENT
- For *Statute of Frauds*, Think about the ORAL agreement (is it WITHIN the statute of frauds)
 - *For Example:* On March 1, Zeller orally agreed to sell his land, Homestead, to Byer for \$46,000 to be paid on March 31. (*within the statute of frauds*). Byer orally agreed to pay \$25,000 of the purchase price to Quincy in satisfaction of a debt which Zeller said he had promised to pay Quincy. (*NOT within Statute of Frauds, this is not answering for or guaranteeing the debts of another*). On March 10, Byer dictated the agreement to his secretary, but omitted all reference to the payment of the \$25,000 to Quincy. IN typing the agreement, the secretary mistakenly typed in \$45,000 rather than \$46,000 as the purchase price. Neither Byer nor Zellar carefully read the writing before signing it on March 15. Neither noticed the error in price and neither raised any question concerning omission of the payment to Quincy. *In an action by Quincy against Byer for \$25,000, which of the following is correct?*
 - *I: Byer could successfully raise the statute of frauds defense because the Byer-Zeller agreement was to answer for the debt of another. (WRONG, there is no guarantee here),*

- *II: Byer could successfully raise the statute of frauds defense because the Byer-Zeller agreement was for the sale of an interest in land (WRONG: w/in statute of frauds, Statute of frauds satisfied by the writing, no statute of frauds defense)*
 - (a) *I only (WRONG)*
 - (b) *II only (WRONG)*
 - (c) *Both I & II (WRONG)*
 - (d) *Neither I nor II (RIGHT)*
- *Which of the following would be Most Important in deciding an action by Quincy against Byer for \$25,000? (Add to writing -> Completeness of Integration)*
 - (a) *Whether the Byer-Zeller agreement was Completely Integrated (RIGHT)*
 - (b) *Whether Byer was negligent in not having carefully read the agreement (WRONG)*
 - (c) *Whether Zeller was negligent in not having carefully read the written agreement (WRONG)*
 - (d) *Whether Zeller was a party to the contract (WRONG)*
- *If Byer refused to pay more than \$45,000 for Homestead, in an action by Zeller against Byer for an additional \$1,000, it would be to Zeller's advantage to try to prove that (CHANGE, reformation)*
 - (a) *The writing was intended only as a sham (WRONG)*
 - (b) *The writing was only a partial integration (WRONG)*
 - (c) *There was a mistake in integration (RIGHT)*
 - (d) *There was a misunderstanding between Zeller and Byer concerning the purchase price (WRONG)*

3. UCC Terms

A. Delivery Obligations of Seller of Goods

- Need to focus on OBLIGATION of Seller, not the actual delivery
 - *For Example: S, a Snook, TX pet store, contracts to sell armadillos to B, a Buffalo, NY pet store. Obviously, the armadillos need to get to Buffalo. Your concern is not where the armadillos go, but what S's delivery obligations are.*

1. Possible Obligations

a.) Shipment Contracts –

- S must get goods to a *COMMON CARRIER*
- S must make *REASONABLE DELIVERY ARRANGEMENTS*
- S must *NOTIFY B*

b.) Destinations Contracts

- S must get goods to *FINAL BUYER LOCATION*

2. Sources of Delivery Term

a.) Course of Dealing, Usage of Trade

b.) Parties' Words

- Watch for Key Terms
- *Shipment*: FOB_{seller}, FAS_{seller or buyer}, CIF_{seller or buyer}, C&F_{seller or buyer}
- *Destination*: FOB_{buyer}

B. Risk of Loss

- Pre-requisite: goods are lost or damaged without the fault of either the buyer or the seller
- If Risk of Loss on Buyer: he must pay the full contract price for the lost or damaged goods
- If Risk of Loss on Seller: he must possess liability for non-delivery
- Factors to LOOK at: (1) Timing – After the contract signed, but before the buyer receipt; (2) Occurrence – Bad Act for which nobody to blame
- How to Resolve:
 1. **Agreement of Parties Controls**
 2. **BREACHING Party liable for any UNINSURED loss even though breach UNRELATED to problem**
 3. **Delivery by COMMON CARRIER other than Seller**
 - FOB_{Seller}: Shipment contract. If the seller meets the 3 Delivery Obligations, they Risk of Loss Transfers to the Buyer
 - FOB_{Buyer}: Destination contract: Seller bears the risk of loss until reach destination
 4. **No Agreement, No Breach, No Delivery by Common Carrier**
 - Key is whether the SELLER is a MERCHANT. Risk of loss shifts from a MERCHANT-SELLER to the BUYER on the BUYER's RECEIPT of GOODS. Risk of loss shifts from a non-merchant seller when he or she TENDERS the goods
 - MERCHANT-SELLER bears risk of loss until Receipt by Buyer
 - NON-MERCHANT-SELLER loses risk of loss when goods are TENDERED to BUYER
 5. **Sale or Return.** Above rules apply
 6. **Sale on Approval**
 - Risk of Loss on SELLER in sale on APPROVAL until BUYER ACCEPTS the goods

C. Warranties of Quality

1. Express

- a.) *Words*: Promise, Description, Affirmation of Fact
 - Distinguish from Sales Talk or Puffing
 - Puffing is an OPINION, a Warranty is a PROMISE, description, or affirmation of fact
 - Puffing is NOT part of the contract
 - WARRANTY is part of the contract
- b.) *Conduct*: Use of Sample or Model
 - If sales clerk shows you a sample/model, product you get should be same as sample/model
 - 2-313: Express Warranty of Quality
- c.) *Basis of Bargain (MA)*
 - the Buyer RELIES on the Warranty when making the purchase decision

2. IMPLIED Warranties of MERCHANTABILITY

- When any person buys any GOODS from ANY MERCHANT, a term is AUTOMATICALLY ADDED to the contract by OPERATION OF LAW – that the goods are FIT FOR THE ORDINARY PURPOSE for which such goods are used
- Triggering Fact: Seller is a MERCHANT which means it DEALS in Goods of the KIND (very narrow for this purpose)
- WARRANTY: goods are FIT FOR THE ORDINARY PURPOSE
 - *For Example:* Conviser buys a ‘gold chain’ from Golden Fleece Fine Jewelry Store. His neck and chest hairs turn green. Can Conviser recover from the seller on a breach of warranty theory? YES; breach of implied warranty of merchantability. Store is a merchant which deals in gold jewelry
 - *For Example:* Conviser buys a display case from Golden Fleece Fine Jewelry Store. Any implied warranty for merchantability? NO; because the store does not deal in those kinds of goods regularly.

3. Implied Warranty of FITNESS for PURPOSE

- Triggering Facts:
 - BUYER has a PARTICULAR PURPOSE;
 - BUYER is RELYING on SELLER to SELECT SUITABLE GOODS;
 - SELLER has REASON TO KNOW of PURPOSE & RELIANCE

4. 2A Warranties on Leases

- Rule: Lessor of Personal Property makes the same Warranties as a SELLER OF GOODS. (EXPRESS, MERCHANTABILITY, FITNESS)
- Finance Lease: Warranties made by a supplier to lessor are enforceable by lessee.

D. Contractual Limitations on Warranty Liability

1. Disclaimer: Eliminates warranties

- Express Warranties: NO disclaimer of Express Warranties (both MBE & MA)
- Implied Warranties of Merchantability & Fitness: (MBE ≠ MA)
 - “As Is” OR “WITH ALL FAULTS”, MBE, can disclaim with either phrase, BUT **MA** CANNOT disclaim implied warranties (either merchantability or fitness) on CONSUMER GOODS (although, OK on Commercial Transactions)
 - CONSPICUOUS language of Disclaimer, Mentioning Merchantability: MBE, must be CONSPICUOUSLY different type of print before it can be disclaimed

2. Limitation of Remedies: Does NOT eliminate warranty, simply limits or sets recovery for any breach of warranty

- Possible to LIMIT remedies even for EXPRESS warranties
- General Test is UNCONSCIONABILITY
- *Prima Facie* Unconscionable if breach of warranty on CONSUMER GOODS causes personal injury

§ 4: PERFORMANCE

1. Conditions

A. Definition of Condition

- A CONDITION is an EVENT BEYOND the Control of the Parties to a contract that affects a Party's Duty to perform under the contract
 - *For Example:* Epstein agrees to sell his 1973 Cadillac to Conviser if the Braves win the World Series
 - This condition modifies/limits/affects duty to perform

B. Terms Used to Describe Condition

- *True Condition v Condition Coupled with a Covenant*
 - True Condition: an event that affects the party's duty to perform under the contract that is BEYOND the CONTROL of the Parties
 - Condition coupled with a Covenant: an event that affects the duty to perform that is to some extent WITHIN the control of ONE of the Parties and creates a legal obligation on that party to use REASONABLE GOOD FAITH efforts to cause the event to occur
 - *For Example:* B agrees to buy S's house if she can obtain a mortgage. This is a Condition coupled with a Covenant.
- *Condition Precedent v Condition Subsequent*
 - Condition Precedent: occurs BEFORE performance
 - Condition Subsequent: must NOT occur DURING performance, occurs AFTER performance
 - Both have the same substantive law, but important to identify
 - *For Example:* Epstein agrees that Conviser can use his 1973 Cadillac for \$10 a month until the Braves win the World Series. This is a Condition SUBSEQUENT
- *Express v Constructive Conditions*
 - Express Conditions: created by the language of the contract. Key words include, "if", "provided that", "so long as", "subject to", "in the event that", "on the condition that". MOST contracts do NOT have express conditions.
 - Constructive Conditions: Created by OPERATION of LAW, keyed to order of performance.
 - *For Example:* Epstein goes into a barbershop for a haircut. When does he have to pay the barber for the \$10 for his haircut? What does this have to do with constructive conditions?
 - Rule: In a **services contract**, if no time for stated as to payment, then **performance is a constructive condition precedent** to the payment obligation.
 - *For Example:* Epstein contracts to sell his 1973 Cadillac to Conviser for \$400. Under the contract, Epstein is to deliver the Cadillac on January 15 and Conviser is to pay the \$400 on February 1. Does Conviser still have to pay on February 1 if Epstein does not deliver the Cadillac on January 15?
 - Rule: in a contract which **sets out the order of performance**, the **1st performance is a condition precedent to the 2nd performance**.

C. Excusability of Condition

1. *Failure to Co-operate : Best Efforts*

- When Party who benefits from the protection of a condition fails to co-operate or give his best effort, the condition will be excused and performance required.

2. *Estoppel or Waiver*

- Estoppel: based on a statement by the person protected by the condition BEFORE the conditioning event was to occur and REQUIRES a change of that position
- Waiver: a similar statement AFTER the conditioning event was to occur and DOES NOT REQUIRE a change of position
 - *For Example*: X's duty to make monthly progress payments under a construction contract is conditioned on Y's furnishing an architect's certificate by the 10th of the month. X tells Y that future payments will be made without certificates. X is protected by the condition precedent. X will be estopped from demanding the certificates.
 - *For Example*: Same contract, except Y fails to provide an architect's certificate for the last month's work. X says that she will make the progress payment even though the certificate was not furnished. X is protected by the express condition precedent. X waives (for that month only).

D. Satisfaction of Condition

1. *Strict or Complete Satisfaction of Express Conditions*

- For Example: B contracts to buy a house from S on the condition that the house is appraised at \$100,000. Will the condition be satisfied if the house is appraised at \$95,000? NO

2. *Condition of Satisfaction*

- For example: Conviser contracts with Vargas to have his portrait painted and to pay \$1,000 "IF I AM SATISFIED". What if everybody else likes the portrait except Conviser? Satisfaction is a SUBJECTIVE test here, requires GOOD FAITH. If in good faith, one is dissatisfied, condition is not satisfied.
- For example: Conviser contracts to have his house painted and to pay \$1,000 "if I am satisfied". What if everyone likes the work but for Conviser? Well, this is an OBJECTIVE Standard.
 - Subjective: work of art, special taste, personal style
 - Objective: ordinary contract, Reasonable person standard

3. *Substantial Performance of the Constructive Conditions*

- For Example: O contracts with P to have his house painted with 2 coats of paint and to pay P \$1,000. P neglects to put a 2nd coat of paint in one of the closets. Was O's legal duty to pay conditional? Has the constructive condition precedent been satisfied? Since this is a SERVICES contract with no explicit time of payment clause, the performance of the work is an IMPLIED CONDITION PRECEDENT to the payment performance. This will be satisfied by SUBSTANTIAL PERFORMANCE (won't be satisfied if there is a Material Breach)

2. Sale of Goods Performance Concepts

A. Perfect Tender

- PERFECT TENDER is the general Standard of Article 2. Subject to limited exceptions, the seller is obligated to Deliver PERFECT GOODS

B. Cure

- In some LIMITED circumstances, a seller who fails to make a perfect tender will be given a 'second chance', an option of CURING. Note that every seller does NOT have the opportunity to cure and that buyer CANNOT compel the seller to cure.
- Only 2 situations where curing is permitted
 1. *Time for Performance has NOT YET EXPIRED (pre-deadline)*
 - When the WRONG goods are sent EARLY (PRE-DEADLINE) seller has chance to cure
 - For Example: B ordered green widgets from S to be delivered no later than 6/6. S delivers yellow widgets on 5/5. B notifies S that he is rejecting the yellow widgets. Advise S. 2 KEY FACTS: delivery deadline & wrong goods sent early. If wrong goods sent early, seller has a chance to cure
 2. *Time for Performance has EXPIRED (post-deadline)*
 - In LIMITED situations, a seller has the option of CURING even after the contract delivery date (post-deadline). The STATUTORY TEST is whether the Seller has REASONABLE GROUNDS for Believing that the improper TENDER would be Acceptable.

C. Rejection of the Goods: General Rules

- **How:** A buyer that wishes to REJECT must NOTIFY the seller
 - Notice of Rejections MUST be TIMELY and the notice must State REASONS for REJECTIONS (to give the seller an opportunity to CURE)
- **When:** Rejections Must occur BEFORE ACCEPTANCE (thus, the buyer has a choice of either Rejecting or Accepting, there is nothing in between).
 - If the goods are less than perfect, the buyer has the option to reject unless it is an INSTALLMENT Sales contract

D. Installment Sales Contracts

- **What** is an Installment Sales Contract?
 - An installment sales contract REQUIRES or AUTHORIZES delivery in separate lots to be separately accepted
 - *For example:* B orders 20 kegs of beer from S. S makes 5 separate deliveries of 4 kegs each. Is this an installment sales contract? Well, there are not enough facts given. It is Not Whether S happens to make separate deliveries, it is whether the contract AUTHORIZES or REQUIRES separate deliveries.
- **Why** is it necessary to identify an Installment Sales contract?
 - Rejection rule is normally the PERFECT TENDER unless it is an Installment Sales contract.
 - The Buyer has the right to reject an installment ONLY where there is a **substantial impairment** in the installment that can't be cured
 - *For Example:* S and B enter into an installment sales contract for the delivery of 5 kegs of beer at 6 PM for each night of the bar review. One night S

delivers 4 kegs at 6:30. Can B reject the installment? Well, not perfect, but since installment sales contract, the small problem is not a SUBSTANTIAL IMPAIRMENT that can't be cured. One party to an installment sales contract may reject only where there is a substantial impairment

E. Acceptance of the Goods

1. *When*

- a. Express Acceptance
- b. Implied Acceptance (Retention after Inspection without Objection)
 - Key is When Buyer got the Goods and When He Complained about them. Rule of Thumb is that if he fails to complain within a month, it is an IMPLIED ACCEPTANCE
- c. Payment without INSPECTION is NOT ACCEPTANCE
 - If just a DOCUMENTARY transactions (just send paper back & forth) without inspection, that will not be acceptance
 - *For example:* Conviser orders clothing from Frederick's of Hollywood. The goods arrive in a plain brown box, COD. Conviser pays the mail carrier. At what point in time is Conviser deemed to have accepted the goods? While there has been a payment, this is not yet acceptance. Acceptance is Not Complete UNTIL INSPECTION

2. *Effect of Acceptance of the Goods*

- If Buyer Accepts the goods, he MAY NOT LATER REJECT those goods.

F. Revocation of Acceptance of the Goods

- When buyer accepts the goods, he may not later reject. However, in LIMITED circumstances, a buyer can effect the cancellation of the contract by REVOKING its acceptance of the goods. Requirements for Revocation of Acceptance:
 1. *Non-conformity SUBSTANTIALLY IMPAIRS the VALUE of the goods, and*
 2. *Excusable IGNORANCE of Grounds for Revocation or Reasonable RELIANCE on Seller's Assurance of Satisfaction, and*
 3. *Revocation within a REASONABLE TIME after Discovery of the Non-conformity*
- *For example:* In July, B buys a Sleeping bag from S insulated for temperatures as low as 10 degrees. B uses the sleeping bag for various camping adventures throughout the summer. When B goes camping in October, she learns that the sleeping bag is Not insulated for temperatures as low as 10 degrees. Can B REJECT the Goods? NO WAY. Can B REVOKE her Acceptance of the goods? YES, there is a non-conformity which substantially impairs the value of the goods, reasonable ignorance, and revocation within a reasonable time after discovery
- Between REJECTION and REVOCATION, the Key is TIMING. Right away = rejection, later =revocation

G. Comparison of Rejection of the Goods and Revocation of Acceptance

	<u>REJECTION</u>	<u>REVOCATION</u>
<i>Timing</i>	<i>EARLY, pre-acceptance</i>	<i>LATER, post-acceptance</i>
<i>Standard</i>	<i>Generally, Perfect Tender</i>	<i>Substantial Impairment</i>
<i>Consequences</i>	<i>Seasonably notify seller, hold goods for seller, follow reasonable seller instructions</i>	

H. Buyer's Payment Obligation

1. *Unless Agreement for Credit, it is a CASH DEAL*
2. *Checks are OK (= Cash)*
3. *S need not take check, but S's refusal to accept a check gives B an additional Reasonable Time (to come up with cash)*
 - *For example; Conviser contracts to buy Epstein's 1973 Cadillac. The contract calls for payment on Saturday. If Conviser tenders a check on Saturday, has Conviser breached? NO, checks = cash. Can Epstein refuse the check? YES, but he must give B additional reasonable time to come up with cash payment.*

§ 5: EXCUSE OF NON-PERFORMANCE (DISCHARGE)

1. Excuse by Reason of Failure of Condition

- If a Party's duty to perform is **CONDITIONAL**, failure of the condition excuses the duty to perform. Remember, that if B contracts to buy a house on the condition that it is appraised at \$100,000, she does not have to buy the house if it is appraised at \$95,000. Excuse by reason of failure of condition.

2. Excuse by Reason of Other Party's Breach

A. Sale of Goods – Perfect Tender

- In a Sale of Goods Contract, the seller is generally obligated to make a perfect tender. If the tender is less than perfect, the buyer can reject the goods and withhold payment – the buyer is excused from paying. Excuse by reason of the other party's breach.

B. Other Contracts – Material Breach

- Common Law generally requires only **SUBSTANTIAL PERFORMANCE**. If one party to a contract substantially performs, the other party is required to perform. A minor breach by one party to the contract will not excuse performance by the other party.
- Common Law; only a **MATERIAL BREACH** by one party excuses the other party's performance. "Material Breach" is the converse of substantial performance. Material breach results from a performance that is not substantial. It is a question of fact.
 - *For Example: P contracts to paint O's house white, two coats, for \$1,000. P neglects to put a 2nd coat in one of the closets. Is that a breach? Yes. Is that a 'material breach' that excuses O from performing (paying)? NO, it is substantial performance. Just a minor screw-up; allow an adjustment in price, but not excuse performance. But if P paints O's house Purple instead of White, that would be a Material breach.*

3. Excuse by Reason of Other Party's Anticipatory Repudiation on Inability to Perform

- *Anticipatory Repudiation* is a Statement that the Repudiating Party will not perform, made prior to the time that performance was due. Anticipatory repudiation by one party excuses the other party's duty to perform. It also generally gives rise to an immediate claim for damages for breach.
 - *For Example: P contracts to paint O's house for \$1,000 with payment to be made within 30 days after P finishes the work. After P begins, O tells him that he is doing a great job, but that O is not going to pay him. What are P's contract Law rights?*

Since O told P that there would be no payment, P is not obligated to fully perform. Where 1 Party Anticipatory Repudiates the other party need not complete performance. Also, can sue Immediately if there was an Anticipatory Repudiation.

4. Excuse by Reason of Later Contract

A. *Rescission*

- On MBE, key is whether Performance is Still remaining from Each of the contract parties
- *For Example (MBE):* P contracts to paint O's house for \$1,000 with payment to be made when the work is completed. P begins work. Before P completes the work, P and O agree to cancel the contract.
 - That is Valid. There is some performance left for EACH Party.
- *For Example:* P contracts to paint O's house for \$1,000 with payment to be made when the work is completed. After P completes the work, P and O agree to cancel the contract.
 - There is No Rescission here because P had completed the performance.
- MBE: In order to have a legal Rescission, it is Necessary that some performance REMAIN for EACH party
- MA: may rescind even though 1 of the parties has FULLY performed

B. *Accord & Satisfaction*

1. *Meaning of Accord & Satisfaction*

- ACCORD = agreement to do something that will EXTINGUISH or SATISFY an existing obligation
- SATISFACTION = performance of the accord
 - *For Example:* P owes O \$1,000. P and O agree that if P paints O's house within 30 days then P's debt will be extinguished. Accord is the new agreement to paint the house instead of paying the debt. Satisfaction is the performance of the new agreement (accord). Old deal is not extinguished until Accord & satisfaction.

2. *Effect of Accord Alone*

- The Accord SUSPENDS enforcement of the prior Obligation
 - *For Example:* Can O sue P on the \$1,000 debt during the 30 days after the accord? NO, Accord suspends the enforcement of the prior obligation, must give a reasonable time to satisfy.

3. *No Satisfaction*

- If the Accord is NOT performed, the other party can sue on EITHER the Existing Obligation or the Accord
 - *For Example:* What are O's rights if P does not paint the house within 30 days after the accord? O may sue either for the \$1000 debt (existing obligation) or the painting of the house (accord)

4. *Consideration*

- There must be Consideration for an accord. Remember the consideration rules for part payment of a debt.
 - *For Example:* P owes O \$1,000. P and O agree that if P pays O \$400 within 30 days, the balance of the debt will be extinguished. What result if the

\$1,000 debt is due and undisputed? Part payment of a debt that is DUE and UNDISPUTED is NOT Consideration.

C. *Novation*

1. *Definition of Novation*

- NOVATION = an Agreement between BOTH parties to an Existing contract to the SUBSTITUTION of a NEW Party
 - *For Example:* P contracts to paint O's house. Subsequently P, O, and X agree that X will do the work instead of P. This is a NOVATION. Factually, the thing that makes a later agreement a novation is that BOTH parties to an existing contract must agree to the substitute.

2. *Liability of Novation*

- Novation EXCUSES the CONTRACTED for performance of the party who is SUBSTITUTED for or REPLACED
 - *For Example:* If X does not paint the house, can O still sue P for breach of contract? NO; O can sue only X. P is excused due to Novation.

3. *Novation & Delegation*

- Novation requires the AGREEMENT of BOTH parties to the original contract and EXCUSES the person replaced from any liability for Non-performance. DELEGATION does NOT require the agreement of BOTH parties and does NOT excuse the performance of the original party
 - *For example:* P contracts to paint O's house. Subsequently, P, without consulting O asks X to do the work. If X doesn't paint the house, can O still sue P? YES: DELEGATION neither requires agreement nor excuses non-performance.

5. **Excuse by Reason of Later, Unforeseen Event**

- Performance of contractual duties can be Excused under IMPOSSIBILITY, IMPRACTICABILITY, or FRUSTRATION of purpose by:
 - Something that Happens AFTER contract formation but BEFORE Completion of contract performance
 - That was UNFORSEEN
 - That affects either a Party's ABILITY to perform or the VALUE of performance
- Possible difference between Impossibility & Impracticability include (1) Impossibility is Subjective, (2) Impossibility means can't be done while Impracticable means can only be done with EXTREME and UNREASONABLE difficulty and expense. Bar Exam will likely test on whether there is any basis for excusing performance rather than whether the basis should be called Impossible or Impracticable.

A: Common Law: Destruction of Subject Matter:

- *For Example:* Caldwell contracts to Lease his music hall to Taylor for Concerts. Prior to the First Concert, the Music Hall was destroyed by a fire. Taylor sues Caldwell for breach of contract. This is an example of *Impossibility*: where a later, unforeseen occurrence which destroys the subject matter of the contract excuses performance.

B: Article 2: Casualty to Identified Goods Before the Risk of Loss has Passed

- Essentially the same rule. Destruction of the Subject Matter excuses performance. Really, this concept only deals with the seller (because the only performance required from the buyer is payment and money can't be destroyed).

1. Risk of Loss Concepts

- If the risk of Loss is on the BUYER, the buyer has to pay notwithstanding any problems with the goods. There is NO need to excuse the seller's performance
- Note, do the RISK OF LOSS analysis 1st: if the risk of loss on the buyer, there is no need to do Destruction of the Subject Matter analysis.
 - *For example:* Epstein contracts to sell his 1973 Cadillac to Conviser for \$400. It is actually worth \$1,000. After Epstein tenders the car to Conviser but before Conviser takes the car, Epstein's 1973 Cadillac is washed to sea by a hurricane. Under the risk of loss rules, does Conviser have to pay for the Car? YES; 2 non-merchants, as soon as seller tenders, risk of loss on Buyer (so no need to worry about seller's excuse)
 - *For Example:* Same facts except that the car is washed to sea by a hurricane before Epstein even tendered the car. Under risk of loss rules, does Conviser have to pay for the car? NO. If not, and if Conviser sues Epstein for \$600 damages resulting from Epstein's non-performance of the contract will Epstein's non-performance be excused? YES, seller's performance is excused by Destruction of the Subject Matter.

2. Identifiable Goods Concept

- Goods are IDENTIFIABLE if Required by or Earmarked to the contract. In the above problems, Epstein's 1973 Cadillac is 'identifiable goods'
 - *For Example:* S contracts to sell 100 bales of hay to B for \$50. Some of S's hay is destroyed by a fire caused by lightning. S needs her remaining hay for her own cattle. Is S excused from performance of the contract to sell 100 bales of the hay? NO: When deal with FUNGIBLE GOODS, rule of excuse only works if talk about identifiable goods. If not identified or earmarked, DESTRUCTION WILL NOT EXCUSE PERFORMANCE

C: Other Grounds

- Excuse of Performance because of Unforeseen post-contract occurrence can also be based on (1) UNAVAILABILITY of Raw Materials or other problems with suppliers, (2) Labor Strikes, (3) Death or Incapacity of a person necessary to perform, (4) Government Regulations promulgated or legislation enacted after the contract.

D: Comparison of IMPOSSIBILITY v IMPRACTICABILITY & Frustration of Purpose

- Look to UNFORESEEN, post-contract occurrence that DOES NOT AFFECT the ability to perform but does ELIMINATE the purpose for the performance
- Krell v Henry: Frustration of Purpose: though performance possible, if the purpose of the contract is frustrated, performance is excused.
- *For Example:* B contracts to buy a satellite dish from S. After the contract but before delivery, the town in which B lives BANS the use of satellite dishes. B wants to be excused from performing the contract with S (excused from purchase)

and payment). Should B assert Impracticability or Frustration of Purpose?
SINCE not Illegal, frustrates the purpose, ergo excuses performance

§ 6: BREACH REMEDIES FOR AN UN-EXCUSED NON-PERFORMANCE

1. Liquidated Damages

- Contracts can Stipulate Damages or Method of Fixing Damages. A contract CANNOT provide for a PENALTY. 2 tests for determining whether a contract provision is a valid liquidated damages clause or an invalid penalty provision:
 1. *AT TIME of Contract, damages difficult to estimate, and*
 2. *At Time of Contract, Provision reasonable forecast of possible damages*
- Watch for information about ACTUAL loss sustained that makes liquidated damages seem too high or too low. Actual damages, if different from estimated liquidated damages, is irrelevant. Key is Validity at TIME CONTRACT FORMED

2. Punitive Damages

- Punitive Damages are generally NOT recoverable for breach of contract claims

3. Damages Rules for Ordinary Contracts

A. General Measure of Damages for Breach of an Ordinary Contract (*expectation*)

- Generally, the Injured Party is entitled to recover an amount that would put her in as good a position as if the contract had been performed (EXPECTATION)
- Who is Innocent? What would he get if performed? What needed to place in position of performance?
 - *For Example:* P contracts to paint O's house for \$1,000. P breaches and O has to pay \$1,400 to another painter for the same work. How much can O recover: \$1,000; 1,400; 400 or none of the above? O is the injured party, if performed, his house would have been painted for \$1,000, his actual position is that his house was painted for \$1,400. Therefore, he requires \$400 to put him back to position would have been in if contract had been performed as expected.
 - *For Example:* Same facts as above, except that O breaches shortly after P begins. How much can P recover; contract price, costs, costs + lost profit or none of the above? Costs + Lost Profit (place where P would have been if performed)

B. Additions & Limitations

1. Plus Foreseeable CONSEQUENTIAL DAMAGES

- Recovery for Consequential Damages that were in Reasonable Contemplation of BOTH parties at the time of Contract
 - Hadley v Baxendale: Fix the mill, get screwed. Lost profits claimed. Key, Recovery is limited to Reasonable Contemplation by both parties at time of contract (ERGO, breaching party must KNOW of the Consequential damages if he were to breach AT THE TIME of contract)
 - *For Example:* P contracts to paint O's house for \$1,000. P breaches. Because the house is unpainted, O is unable to lease the house. Can O recover the lost rent payments from P. NO, this was NOT reasonably contemplated by both parties at the time of contract.

2. Plus INCIDENTAL DAMAGES

- *For Example;* P contracts to pay O's house. P breaches, O pays \$50 to an employment agency to find a replacement for P. O may sue P for INCIDENTAL damages (COST of Coping/Dealing with the breach as long as REASONABLE)

3. *Minus AVOIDABLE DAMAGES*

- NO recovery for Loss that could have been AVOIDED by Appropriate steps. Burden of Proof is on the DEFENDANT
 - *For Example:* L Law School wrongfully dismisses Professor P with 2 years remaining in her \$100,000 per year contract. What if X Law School offers P a comparable position at \$85,000 per year? Then, P can't recover the full \$100,00 per year.
 - *In an EMPLOYMENT CONTRACT Breach*, one looks for the words (comparable or similar). P not required to take a job driving a school bus to have avoidable damages subtracted from recovery.
 - *Though referred to as A DUTY TO MITIGATE*, misleading; rather this is a DEFENSE of the Defendant, and not part of the Plaintiff's case.

4. Damages Rules for Sales of Goods

- Part 7 of Article 2 Reflects the General Contract Law Damages Policy of Putting the Innocent Party where it would have been had the contract been performed (expectancy). There are **2 Relevant Facts**; (1) WHO breached and (2) WHO has the GOODS. Thus, there are FOUR basic Article 2 Damages fact patterns and sets of Rules.

A. **SELLER breaches, BUYER keeps the goods** ($FMV_{perfect} - FMV_{delivered}$)

- *For Example:* S sells B an antique car for \$30,000. The car is defective. B keeps the car and sues for breach of contract. The jury finds that the car as delivered was worth only \$20,000; the jury also finds that if the car had been delivered as contracted, it would have been worth \$34,000. How much can B recover? \$14,000 ($34,000 - 20,000$)

B. **SELLER breaches, BUYER does not have goods** ($Price_{replacement} - Price_{contract}$)

- *For Example;* S contracts to sell B carpeting for \$5,000. S never delivers the carpeting (or S delivers and B rejects because it is not a perfect tender). At the time of the breach, the market price of comparable carpeting is \$6,600. How much can B recover? \$1,600 ($6600 - 5000$)
- *What if B pays \$7,000 for the carpeting?* \$2,000. THE standard is REASONABLE REPLACEMENT)

C. **BUYER breaches, BUYER keeps the goods** ($Price_{contract}$)

- *For Example:* B contracts to buy carpeting from S. Contract price is \$800. B receives the carpeting and does not pay for it. How much does B owe? \$800. What if the market price of the carpeting is now \$900? Still, the \$800.

D. **BUYER breaches, BUYER does not have goods** ($Price_{contract} - Price_{resale}$)

- *For Example:* Epstein contracts to sell his 1973 Cadillac to Conviser for \$1,000. Conviser breaches. Epstein then sells his 1973 Cadillac to Sharon Stone for \$800. What recovery? \$200 ($\$1,000 - \800)
- *For Example;* S&M leather contracts to sell leather clothing to Conviser for \$1,000 (Assume that Conviser is buying goods that are part of S&M's regular inventory, so called off the rack). Conviser breaches. S&M sells the very same Items to Janet Reno for \$1,000. Can S&M recover any damages from Conviser? YES, may recover the LOST PROFITS. The key to **lost profits** is that the item is in the regular inventory and the later sale (post-breach) is at the same price

5. Restitution

- UNJUST ENRICHMENT (see earlier part of outline)

6. Non-monetary Remedies

A. Specific Performance – Injunction

- Equitable Remedy: Unclean Hands, Adequacy of Remedy at Law, etc.
- 1. *Contracts for Sale of Real Estate*
 - *For example:* S contracts to sell Blackacre to B. S breaches
 - May get Specific Performance in Real Estate contracts
- 2. *Contracts for Sale of Goods*
 - Generally, NO remedy for Specific Performance UNLESS:
 - Unique Goods: includes Art, Antiques, Custom Made
- 3. *Contracts for Services*
 - NO Specific Performance is ever Possible, though possible injunctive relief
 - *For Example:* Under the contract between the Patriots and Parcells, Parcells was to coach the Patriots in 1997. When Parcells breached, could the Patriots obtain a Specific Performance Order? NO, there is NO SPECIFIC PERFORMANCE remedy to breach of Service Contracts
 - *For Example;* Same facts, Could the Patriots obtain an injunction barring Parcells from Coaching the JETS? YES, while can't get specific performance Remedy in a breach for Services contract, may get Injunctive Relief (sometimes called a NEGATIVE SPECIFIC PERFORMANCE)
 - *For Example:* Assume that the Parcells-Jets contract provides that after the expiration of the term of the contract, Parcells cannot coach for another NFL team for 5 years, Will the Jets be able to obtain enforcement of this Covenant Not to Compete? 3 TEST FOR VALIDITY for Covenant not to compete:
 1. Must be REASONABLE BUSINESS need for protection
 2. GEOGRAPHIC limitation is reasonable
 3. Reasonable TIME limitation

B. Reformation

- Reformation is the Correction of an Error that is Reduced to a written agreement
 - *For Example:* Epstein agreed to sell his 1973 Cadillac to Conviser. The written agreement provides for the sale of a 1983 Cadillac. This may be reformed.

C. Adequate Assurance of Future Performance

- Look for (1) One party to a contract Learning something AFTER the contract that gives him REASONABLE grounds for INSECURITY about the other's performance, and (2) a written demand for adequate assurance.
 - *For Example:* P contracts to paint O's house for \$1,000, with payment due in 30 days after completion of the work. After making the contract but before performing the contract, P learns of O's record of not paying his bills. At this point, may demand an adequate assurance of future performance (like a deposit)

D. Reclamation

- Right of an UNPAID SELLER to get its goods Back. (generally, an unsecured creditor). Key facts are that the BUYER MUST HAVE BEEN INSOLVENT at the time it RECEIVED the goods and that the BUYER must STILL POSSESS the goods. Additional Requirements that the SELLER DEMAND RETURN of goods WITHIN 10 DAYS of RECEIPT. This 10 day rule becomes a "REASONABLE TIME" rule if before delivery, there had been an EXPRESS representation of Solvency by the Buyer.

- *For Example:* On January 15, S sells B polyester on credit. The polyester is delivered to B on January 22. On January 30, B files for bankruptcy without paying S. What facts are needed to determine whether S can reclaim?
 - B is insolvent at time received goods?
 - S demands Return of goods within 10 days of receipt?
 - B must still have the goods when Reclamation demand is received.

E. Stopping the Goods in Transit or Recovering the Goods in Storage if Buyer is Insolvent

F. Rights of Good Faith Purchaser

- The GOOD FAITH purchaser from DEALER cuts off the rights of the ENTRUSTEE
- To have ENTRUSTMENT, 2 big facts. (1) true owner of the goods voluntarily turns over the goods, (2) person to whom he turns over the goods must be person who regularly sells used goods of that kind.
 - *For Example:* Epstein takes his 1973 Cadillac to the dealer for servicing. The dealer puts the car on his used car lot. He then sells it to Cal Ripken, Jr. Can Epstein recover the car from Cal Ripken, Jr.? NO, while there is a conversion C.O.A. against the dealer, there will be no case against the Good Faith, Bona Fide Purchaser.

§ 7: 3RD PARTY BENEFICIARY PROBLEMS

1. 3rd Party Beneficiaries

A. Identifying 3rd Party Beneficiaries

- Look for 2 parties contracting with the INTENT of Benefiting a 3rd party
 - *For Example:* Heidi Fleiss takes out an Insurance Policy with Allstate Insurance. The insurance contract provides that (1) Ms. Fleiss will make annual premium payments of \$3,000 and (2) Allstate will pay Conviser \$250,000 on Ms. Fleiss's death. Here, Conviser is the 3rd Party Beneficiary (though he didn't contract, he has contractual rights)
 - *For Example:* Riady agrees to pay \$100 to Jumbo Bagels to deliver 9 dozen bagels to Clinton. Clinton is the 3rd Party Beneficiary

B. Vocabulary

1. Third Party Beneficiary

- Not a party to a contract. But able to enforce the contract that others made for her benefit

2. Promisor

- The person who is making the promise that benefits the 3rd Party (here, Insurance Company & Bagel Company)

3. Promisee

- The person who obtains the promise to benefit the 3rd Party (Riady & Fleiss)

4. Intended v Incidental

- INTENDED Beneficiaries are NAMED in the Contract, they have contractual rights
- INCIDENTAL beneficiaries have no contractual rights

5. Creditor v Donee

- Determine whether the 3rd Party Beneficiary was a creditor of the Promisee; if so and the new agreement satisfies the earlier obligation, he is a creditor beneficiary

C. Efforts to Cancel or Modify

- The test is whether the 3rd Party KNOWS of and ASSENTS to the contract. If the 3rd Party Beneficiary has assented to the contract, her rights have VESTED and the contract CANNOT be CANCELLED or MODIFIED without her CONSENT, unless the contract otherwise provides. **KNOWLEDGE + ASSENT**
 1. *Can Riady and Jumbo cancel the bagel contract BEFORE Clinton learns of the terms of the contract?*
 - YES: may always cancel before the 3rd party knows since his rights WILL NOT VEST until he has KNOWLEDGE of and ASSENTS to the contract
 2. *Can Riady and Jumbo Cancel the contract AFTER Clinton learns of the contract?*
 - Mere knowledge alone does not make the rights of the 3rd party IRREVOCABLE. If 3rd Party Beneficiary is a Creditor Beneficiary, then need CLEAR & DIRECT evidence of ASSENT. A donee beneficiary has a lesser standard for assent.

D. Liability

1. *3rd Party Can Sue Promisor*
 - For Example: Can Clinton (3rd Party Beneficiary) sue Jumbo (Promisor) if he does not get the Bagels? YES, a 3rd Party Beneficiary has Legal contractual rights even though there is no direct engagement in agreement
2. *Promisee Can Sue Promisor*
 - For Example: If Riady pays \$100 for the bagels and Jumbo never delivers the bagels to Clinton, can Riady sue Jumbo? YES, the parties to the contract can sue each other (ergo the promisee may sue the promisor for breach)
3. *Creditor-Beneficiary Can Sue Promisee on the Underlying Debt*
 - For Example: If Jumbo does not deliver the bagels, can Clinton sue Riady? A creditor beneficiary may sue the Promisee on the underlying debt.

E. Defenses

- If the 3rd PARTY sues the PROMISOR, the Promisor may assert ANY DEFENSE that he would have had if sued by the Promisee
 - *For Example:* The check Jumbo receives from Riady bounces. Jumbo does not deliver the bagels to Clinton. Can Clinton sue Jumbo? If the 3rd Party sues the promisor, the Promisor may assert any defense he could have asserted against the promisee.

2. Assignment of Rights

A. Definition of Assignment

- Look for contract followed by a later transfer of rights under that contract to a 3rd party.
 - *For Example:* Batman contracts with Gotham to provide security services for a year; the contract provides that Batman is to be paid \$300,000 for the services. Batman later assigns his rights under the contract to Robin.
 - This is an assignment. There is a big factual difference between Assignment & 3rd Party beneficiary; An assignment happens in STAGES where as a 3rd Party Beneficiary Agreement happens in the same transaction.

B. Vocabulary of Assignment

1. *Assignor*: Party to the contract who LATER TRANSFERS his rights under the contract to another (here, Batman)
2. *Assignee*: NOT a party to the contract. Able to ENFORCE the contract because of the assignment (here, Robin)
3. *Obligor*: The other party to the contract (here Gotham)

C. Limitations on Assignment

1. Contract Provisions

- Determine whether the contract (1) PROHIBITS assignments or (2) INVALIDATES assignments
 - *For Example*: Batman-Gotham contract provides “rights hereunder are not assignable” Notwithstanding this contract provision, Batman assigns the right to the \$300,000 payment to Robin.
 - This is Language of PROHIBITION. Language which prohibits assignment takes away the RIGHT to Assign, but not the POWER. Thus, Assignor technically breaches, but it is valid.
 - *For Example*: Batman-Gotham contract provides “all assignments of rights under this contract are VOID”. Notwithstanding this contract provision, Batman assigns the right to the \$300,000 payment to Robin.
 - This is Language of INVALIDATION. This takes away the RIGHT and the POWER to assign and the assignment is VOID

2. Common Law

- Even if a contract Does NOT in any way limit the right to Assign, Common Law BARS an Assignment that SUBSTANTIALLY CHANGES the duties of the OBLIGOR
 - *Assignment of Right to Payment*
 - For Example: Batman assigns his rights under the contract with Gotham to Robin, i.e., Gotham is to pay Robin not Batman. This does NOT substantially change the duty of the obligor, therefore, it is a valid assignment to Robin
 - *Assignments of Other Performance Rights*
 - For Example: Gotham assigns its rights to security services to Metropolis, i.e., Batman is to defend Metropolis, not Gotham. This is INVALID. It substantially changes the duty of the obligor. Really, the Assignment of anything other than a right to payment will be found to be a substantial change to the duty of the obligor.

D. Requirements for Assignment

1. *Language of PRESENT Assignment* (I Assign, not I Will Assign, not I promise to Assign)
2. *Assignment must be in WRITING if the underlying contract is REQUIRED to be in Writing (i.e., the Statute of Frauds must be satisfied)*
3. *Generally, Consideration is NOT Required* (gift assignments are permissible)

E. Rights of Assignee

1. Assignee can Sue the Obligor

- For Example: Can Robin sue Gotham City if he is not paid for Batman's work? Yes, Assignee may enforce the contract.

2. Obligor has the same defenses against Assignee as it would against Assignor

- For Example: If Batman fails to perform the services, can Robin Still collect from Gotham? NO, any defense of obligor against assignor is effective against Assignee.

3. Payment by Obligor to Assignor is Effective UNTIL Obligor Knows of the Assignment

- For Example: You rent an apartment from ACME Apartment Rentals. In March, Acme assigns your rental contract and the rental contracts of all other tenants in the building to Baker Rentals. You DO NOT KNOW of the assignment and so make your April rental payment to ACME. Does Baker have a legal right to recover the April rental payment from you? NO: until knowledge of the Assignment reaches the Obligor, he can continue making payments to the Assignor (not the Assignee)

4. Modification Agreement between Obligor and Assignor is Effective if the Obligor did not Know of the Assignment

- For Example. Same facts as above except that after the Assignment, ACME agrees to reduce your rent in exchange for your agreeing to vacate your apartment earlier. Can you enforce this modification against Baker? YES, without the knowledge of the assignment, modifications between the OBLIGOR and the ASSIGNOR are effective as against the Assignee.

F. Multiple Assignments

1. Gratuitous Assignments

- a.) General Rule: It is possible to make a Gratuitous Assignment. Generally, however, such a gift assignment can be FREELY REVOKED. Revocation may be accomplished DIRECTLY or INDIRECTLY by bankruptcy, death, the assignor taking performance directly from obligor, or the MAKING of ANOTHER Assignment. Since a Later gift Assignment REVOKES and earlier gift assignment, the general rule for resolving claims among assignees who did not provide consideration is a LAST IN TIME RULE

- *For Example*: Batman gives Robin the right to the \$300,000 payment from Gotham on January 15. On April 15, Batman makes a gift of the same payment right to Conviser. Which assignee has the Rights to the payment? CONVISER: Latter gift assignments wipe out earlier gift assignments
- b.) Exceptions: A Gratuitous GIFT Assignment is NOT REVOCABLE if it is the SUBJECT matter of a WRITING delivered to the Assignee, the Assignee has received some sort of INDICIA of Ownership, OR the Assignee has relied on the Assignment in a way that is Reasonable, Foreseeable, and Detrimental. If the gift assignment is NOT revocable, then it will take priority over a latter assignment

2. *Assignments for Consideration*

a.) General Rule: First Assignee for Consideration WINS

- *For Example*: On January 10, Batman PROMISES to assign his rights under the contract with Gotham to Paula Jones for \$100,000. On February 2, Batman assigns his rights under the contract with Gotham to Robin for \$100,000. On March 3, Batman assigns his rights under the same contract with Gotham to Conviser for \$100,000. Whom should Gotham Pay? ROBIN, he is the 1st Valid Assignment for Consideration (Paula Jones' assignment was not valid because it was a promise, and not a present assignment)

b.) Limited Exception: A Subsequent Assignee takes priority over an Earlier Assignee for Value only if he (1) DOES NOT KNOW of the earlier assignment, and (2) is the 1st to obtain payment, a judgment, a novation, or indicia of ownership

- *For Example*: If Conviser is the 1st to notify Gotham that he is an assignee, what are his rights against Gotham? Robin, the 1st Assignee for consideration still wins. If the latter assignee for value is the 1st to notify, that is not enough to displace the original assignee for value.

c.) Multiple Assignments for Consideration as Breach of Warranty: In an assignment for Consideration, the Assignor Makes a WARRANTY that the rights assigned are assignable and enforceable.

- *For Example*: What are Conviser's rights against Batman? The Latter assignee for value can sue the Assignor for breach of warranty that the assigned contractual rights are assignable and enforceable

3. **Delegation of Duties**

A. *Delegation of Duty Defined*

- Delegation occurs when a party to a contract Transfers his Duty under that contract to a 3rd Party
 - *For Example*: P contracts to paint O's house. P and X agree that X will paint O's house. This is a Delegation of a duty. Remember, a duty does not equal a right. Duties are Delegated, Rights are Assigned.

B. *Vocabulary*

- Bar examiners typically use assignment terminology to cover the transfer of duties under a contract as well as a transfer of rights. In the Above example;
 - P is the DELEGATING PARTY (may be called Assignor)
 - X is the DELEGATE (may be called the Assignee)

C. *Delegable Duties*

- Generally, CONTRACTUAL duties are Delegable. The LIMITATIONS on Delegation of duties are very limited
 1. *Contract Prohibits Delegation or Assignment* (if K prohibits assignment, implicitly prohibits delegation)
 2. *Contract Calls for SPECIAL SKILLS*
 3. *Person to perform the contract has a SPECIAL REPUTATION*

D. Requirements for Delegation

- Essentially, there are NO requirements
- Consideration is NOT required, but no legal obligation on delegate unless consideration
- Consent of Either party to the original contract is NOT required for the delegation
 - *For Example:* P contracts to paint O's house. P and X agree that X will paint the house. Does O have to consent to the delegation? NO (but if O consented to P & X having X do the work, it wouldn't be a delegation, but it would be a NOVATION)

E. Consequences of Delegation

1. Delegating Party Remains Liable

- *For Example:* P contracts to paint O's house. P delegates the work to X. X does not do the work. Can O still sue P? YES: delegating party remains liable (unlike a novation)

2. Delegate Liable to Obligee only if he receives Consideration from the Delegating Party

- *For Example:* P contracts to paint O's house for \$1000. P and X then agree that X will do the work. X does not do the work.. Is X liable to anyone for breach of contract? NO, unless there was consideration, this agreement is not legally enforceable. Delegating without consideration creates no legal obligation
- *For Example:* P contracts to paint O's house for \$1,000. P and X then agree that X will do the work and P will pay X \$900. X does not do the work. Is X liable to anyone for breach of contract? YES: X is liable to P. A delegation for consideration creates a 3rd Party beneficiary obligation (here, O is the 3rd party beneficiary). So X is also liable to O