

CONTRACTS

I. VOCABULARY

- a. **K** = legally enforceable agreement (or legally enforceable promise)
- b. **Quasi-K** = equitable remedy. NOT K law.
 - i. **Elements:**
 - 1. P has conferred a benefit on D, and
 - 2. P reasonably expected to be paid, and
 - 3. Ds unjust enrichment if P not compensated.
 - ii. **Measure of recovery**
 - 1. K price is NOT the measure of recovery.
 - 2. Focus on the *value of benefit* conferred.
 - 3. The K price is a ceiling if P is in default.
- c. **Unilateral K** = results from an **offer** that **expressly** requires performance as the only possible method of acceptance.
- d. **Bilateral Ks** = all other Ks.
 - i. Bilateral K UNLESS:
 - 1. Reward, prize, contest
 - 2. Offer expressly requires performance for acceptance
 - a. This is very important. It's only going to be a unilateral K if the offer EXPRESSLY requires that the other party perform in order to accept.

II. APPLICABLE LAW

- a. Responsible for:
 - i. The common law of Ks, and
 - ii. UCC law of sales
- b. **ARTICLE II**
 - i. Applies to Ks that are primarily sales of goods.
 - ii. **Factors to determine whether Art II applies:**
 - 1. **Type of transaction** – sale
 - 2. **Subject matter of transaction** – goods, tangible, personal property
 - iii. If anybody is selling goods to anybody, Art II applies (not just merchants).
 - iv. **MIXED DEAL (goods and services)**
 - 1. **GR: all or nothing/more important part**
 - 2. If selling a Cadillac and two lessons in parallel parking, Art II applies if there is disagreement about the lessons because the Cadillac (the Art II part) is the MORE IMPORTANT PART.
 - v. **MIXED DEAL EXCEPTION**
 - 1. IF K divides payments, then apply UCC to sale of goods part and common law to the rest.
- c. **Common law ONLY**
 - i. Real estate
 - ii. Service Ks

III. FORMATION OF A K

a. Steps

i. *Look first for an agreement.*

1. Level one: initial communication offers
2. Level two: what happens after the initial communication (termination of the offer)
3. Level three: who responds and how she responds (acceptance)

ii. *Then determine whether the agreement is legally enforceable.*

b. LEVEL ONE: Offer

i. General test: manifestation of commitment

1. An offer is a manifestation of an intention to K — words or conduct showing commitment: whether a RP in the position of the offeree would believe that his or her assent creates a K.

ii. Specific problems to watch for

1. Content of initial communication

a. **GR:** *Offer is NOT required to contain all material terms.*

b. Specific prb to watch for: missing PRICE term in SALES K

i. If it is an alleged agreement to sell real estate, we are applying common law. *Unless the communication states the price and describes the land, it's NOT an offer.*

ii. By contrast, sale of goods: *Article 2 has NO PRICE REQUIREMENTS offer if parties so intend.*

c. Another specific prb to watch for: *if the first communication has vague or ambiguous terms, it is not an offer at all under either CL or UCC.*

i. Watch out for words: appropriate, fair, reasonable. These words fail the vague and ambiguous terms test. *Even if sale of goods, which CAN be an offer if it does not say anything about price, it will NOT be an offer if it says FOR A FAIR PRICE.*

d. Another prb: requirements Ks/output Ks

i. A K for the sale of goods can state the quantity of goods to be delivered under the K in terms of the buyer's requirements or seller's output or in terms of exclusivity.

ii. Watch out for these words: all, only, exclusively, solely.

iii. When instead of stating quantity in numerical terms, it says ALL, ONLY, etc., that's saying requirements and it IS a VALID OFFER to enter into a requirements K.

iv. For INCREASES in requirements, we have a NOT UNREASONABLY DISPROPORTIONATE LIMITATION ON INCREASES:

1. *Buyer can increase requirements so long as the increase is in line with prior demands.*

2. Context

a. **GR:** an advertisement is NOT an offer

b. **Exceptions:**

- i. *An advertisement can be an offer if it is in the nature of a reward: 100 pound reward to anyone who catches flu after using smoke ball as directed.*

- ii. *An advertisement can be an offer if it is specific as to quantity and expressly indicates who can accept:* 1 fur coat \$10 – first come, first served.

c. **LEVEL TWO: Termination of offers (4 methods)**

- i. An offer cannot be accepted if it has been terminated.
- ii. **FIRST METHOD: LAPSE OF TIME**
 - 1. ***Time stated or reasonable time***
 - 2. **TIP:** Fact 1: when offer received. Fact 2: when there was response. Bar is trying to raise the LAPSE rule. If gap of a month or more, look for an answer that says there is no K.
- iii. **SECOND METHOD: DEATH OF A PARTY PRIOR TO ACCEPTANCE**
 - 1. ***When you die, your offers die with you***
 - a. Death or incapacity of either party terminates the offer.
 - 2. ***Exceptions:***
 - a. Option
 - b. Part performance of offer to enter into unilateral K
- iv. **THIRD METHOD: WORDS OR CONDUCT OF OFFEROR (revocation of an offer)**
 - 1. How?
 - a. ***Unambiguous statement by offeror to offeror of unwillingness or inability to K OR***
 - b. ***Unambiguous conduct by offeror indicating an unwillingness or inability to K that offeree is aware of.***
 - i. Can still accept offer if, as an offeree, you find out offeror just made the offer to someone else as well. Multiple offers being made does not constitute a revocation.
 - 2. When does revocation of an offer become effective?
 - a. Revocation of an offer sent through the mail is not effective until received.
 - b. An offer cannot be revoked after it has been accepted.
 - c. **Offers that CANNOT be revoked.**
 - i. Generally, offers can be freely revoked by the offeror. There are 4 different situations in which an offer cannot be revoked:
 - 1. **OPTION:** an offer cannot be revoked if the offeror has (i) promised to not revoke (or promised to keep the offer open) AND (ii) this promise is supported by payment or other consideration.
 - a. Applies to ALL deals.
 - b. Requires a PAYMENT.
 - 2. **UCC FIRM OFFER RULE:** an offer cannot be revoked for *up to 3 months* if (i) offer to buy or sell goods, (ii) *signed, written promise* to keep the offer open, and (iii) party is a merchant (merchant is GENERALLY a person in business).
 - a. Applies only to SALES OF GOODS.
 - b. NO requirement of payment.
 - c. Does not need to state time period for which irrevocable: it will be a time fixed by the ct, but LESS than 3 months.
 - 3. **An offer cannot be revoked if there has been**
 - a. **(1) reliance that is**

- b. (2) reasonably foreseeable and
- c. (3) detrimental
- 4. **The start of performance pursuant to an offer to enter into a unilateral K makes that offer irrevocable for a reasonable time to complete performance.** Watch for these words: “offer” and “only by.”
 - a. Unilateral/performance
 - b. Unilateral/mere preparation

v. **FOURTH METHOD: WORDS OR CONDUCT OF THE OFFEREE (rejection)**

1. **First method of indirect rejection: COUNTEROFFER**
 - a. Counteroffer always terminates the offer and becomes a new offer. Thus, where a counteroffer has been made, there is no express K unless that counteroffer has itself been accepted.
 - b. Counteroffers need to be distinguished from bargaining. Bargaining does not terminate the offer.
 - c. Distinguish counteroffer from BARGAINING (I will only pay 9k vs. will you take 9k?).
 - i. If the response to an offer is a question it’s bargaining.
2. **Second method of indirect rejection: CONDITIONAL ACCEPTANCE**
 - a. A conditional acceptance always operates the same way as a counteroffer: it terminates the offer and becomes a new offer. Look for a response to an offer with the word “accept” followed by one of these words or phrases: if, only if, provided, so long as, but, or on condition that.
3. **Third method of indirect rejection – additional terms to a common law K: MIRROR IMAGE RULE (COMMON LAW ONLY)**
 - a. Under CL, an acceptance that adds new terms is treated like a counteroffer rather than an acceptance.
4. **Additional terms still acceptance under UCC 2-207: reasonable expression of acceptance**
 - a. A fact pattern in which there is (i) offer to buy or sell goods and (ii) a response with additional terms raises 2 separate questions:
 - i. First question: Is there a K?
 1. Under the UCC, a response to an offer that adds new terms, but does not make the new terms a condition of acceptance, is generally treated as an acceptance – is generally a “reasonable expression of acceptance.”
 - ii. Second question: Is the additional term a part of the K?
 1. Look to see whether both parties are merchants.
 2. If at least one is NOT a merchant, the additional term is merely a proposal that is to be separately accepted or rejected.
 3. If both parties are merchants, the GR is that the additional term is part of the K.
 - a. Two exceptions: the additional term is NOT part of the K if
 - i. It MATERIALLY CHANGES the offer or
 - ii. The offeror OBJECTS to the change.

d. **LEVEL THREE: Acceptance of an offer**

i. **Methods of accepting an offer (6 fact patterns)**

1. FIRST FACT PATTERN: LATER CONDUCT BY OFFEROR IMPLYING K NOTWITHSTANDING IMPROPER RESPONSE TO AN OFFER
 - a. Under both CL and Art 2, a conditional acceptance does NOT qualify as an acceptance.
 - b. Under CL, a response with additional terms does NOT qualify as an acceptance.
 - c. Sometimes, notwithstanding a response to an offer that does not qualify as an acceptance, the parties act as if there is a K.
 - i. Under CL, such conduct is treated as an acceptance.
 - ii. Under Art 2, such conduct is treated like a new K.
2. SECOND FACT PATTERN: THE OFFEREE FULLY PERFORMS
 - a. Watch for fact pattern in which (1) there is a verbal offer, but (2) not words in response. Instead (3) only response is full performance. No question that full performance is acceptance.
 - b. Only possible question is whether notice of performance is required. Answer to question of notice turns on (i) what offer requires or (ii) whether offeree has reason to believe that offeror will not learn of acceptance.
 - i. Watch for geographical information that lets you know that offeror does not have notice that offeree fully performed (because offeror is in a different place/state than where the offeree performs).
 - ii. **Legal limitation: if P fails to notify O that she painted the house and O then pays K to paint the house, O's obligation to P is excused by P's failure to give notice.**
3. THIRD FACT PATTERN: THE OFFEREE STARTS TO PERFORM

Start of performance is acceptance of an offer to enter into a bilateral K but is not acceptance of an offer to enter into a unilateral K.

 - i. **GR:** start of performance is acceptance treated as an implied promise to perform and so there is a K.
 - ii. **Exception:** start of performance is not acceptance of unilateral K offers; completion of performance is required. If offer requires performance for acceptance, then performance for purposes of acceptance of that offer means completion of performance.
4. FOURTH FACT PATTERN: THE OFFEREE PROMISES TO PERFORM
 - a. Only words. Words of offer, words of acceptance but not performance.
 - i. Most offers can be accepted by a promise to perform; and
 - ii. Offers that expressly require performance for acceptance and reward offers require performance for acceptance.
5. FIFTH FACT PATTERN: MAIL BOX RULE
 - a. The offeror and the offeree are at different places and there are conflicting communications. Mailbox rule is 3 rules on the bar exam.
 - i. First, **acceptance** is **GENERALLY** effective **when mailed**.
 - ii. Second, **all other communications** are effective only **when received**.
 - iii. **Third, if rejection is mailed before an acceptance is mailed, then neither is effective until received.**
6. SIXTH FACT PATTERN: THE SELLER OF GOODS SENDS THE WRONG GOODS (sale of goods only)
 - a. **GR:** acceptance and breach

i. If B requests red widgets and S sends blue widgets, S accepted the offer and a K was created. However, there was also a breach by S because S sent blue instead of red widgets.

b. **Accommodation exception:** counteroffer and no breach

i. B orders red widgets. S sends blue widgets **with the explanation “out of red widgets, hope that you can use blue widgets instead.”** In this case, there is no K, no breach of K

ii. Who can accept?

1. Generally, an offer can be accepted only by (1) a person who knows about the offer (2) who is the person to whom it was made.

2. **Offers cannot be assigned; options can be assigned unless the option provides otherwise.**

IV. FORMATION: SECOND VIEW/OVERVIEW

a. Legal reasons for not enforcing an agreement include:

- i. Lack of consideration or a consideration substitute
- ii. Lack of capacity of person who made the promise
- iii. Statute of Frauds
- iv. Existing laws that prohibit the performance of the agreement
- v. Public policy
- vi. Misrepresentations
- vii. Duress
- viii. Unconscionability
- ix. Ambiguity in words of agreement
- x. Mistakes at the time of the agreement as to material facts affecting the agreement

V. REASON FOR NOT ENFORCING AGREEMENT: LACK OF CONSIDERATION OR CONSIDERATION SUBSTITUTE

a. **What is consideration?**

i. Bargained-for legal detriment.

b. **Form of consideration**

- i. Performance, i.e., doing something not legally obligated to do
- ii. Forbearance, i.e., not doing something legally entitled to do
- iii. Promise to perform
- iv. Promise to forbear

c. **Possible consideration issues**

i. *Bargained for*

1. Asked for by the promisor **IN EXCHANGE** for her promise. Consideration test patterns have people doing stuff that they were **asked to do**.

ii. *Legal detriment*

iii. *Promise as consideration*

1. I promise to buy your house, you promise to sell it to me.

a. **Illusory promise exception:** promise to sell **UNLESS I change my mind**.

b. **TIP:** Highly unlikely that there will be a question about illusory promises, so if you see it as an answer, it will probably be wrong.

iv. *Adequacy of consideration*

1. Not relevant in K law

2. **TIP:** Always a wrong answer.

- v. *Past consideration (important)*
1. **GR:** not consideration
 - a. Stuff that happened before a promise is never consideration.
 - b. First: something happens
 - c. Second: a promise based on what happened. But that is NOT consideration. You cannot bargain for someone doing something that they have already done.
 2. **Exception:** expressly requested and expectation of payment
- vi. *Preexisting contractual or statutory duty rule (CL ONLY) (also important)*
1. **GR:** doing what you are already legally obligated to do is not new consideration for a new promise to pay you more to do merely that. Under CL, new consideration is required for K modification.
 2. **Exception:** addition to or change in performance
 - a. Any bargained for change in the performance is new consideration and the promise to pay more is then legally enforceable.
 3. **Exception:** unforeseen difficulty so severe as to excuse performance
 4. **Exception:** third party promise to pay
 5. Article 2
 - a. Does not have preexisting legal duty rule
 - b. New consideration is NOT required to modify sale of goods K.
 - c. Good faith is the test for changes in an existing sale of goods K.
- vii. *Part payment as consideration for release, i.e., promise to forgive balance of debt (important)*
1. Key is whether debt is due and undisputed. **If debt is due and undisputed, then part payment is NOT consideration for release.**
 2. Due and undisputed
 3. Not yet due (or disputed)
 - a. An agreement to pay early = new consideration.
- viii. **TIP:** 2 answers deal with consideration, 2 deal with promissory estoppel. If there is any way for the consideration answers to be true, you don't even look at the promissory estoppel answers.

1. Consideration substitutes

- i. A promise is legally enforceable even though there is no consideration if there is one of the following consideration substitutes:
 1. *A written promise to satisfy an obligation for which there is a legal defense is enforceable without consideration.*
 - a. Look for:
 - i. An earlier obligation no longer enforceable (barred by SoL).
 - ii. There must be a written promise to pay.
 - iii. The new writing acts as consideration.
 2. *Promissory estoppel (detrimental reliance)*
 - a. Elements
 - i. Promise
 - ii. Reliance that is reasonable, detrimental and foreseeable
 - iii. Enforcement necessary to avoid injustice

VI. REASON FOR NOT ENFORCING AGREEMENT: DEFENDANT PROMISSOR'S LACK OF CAPACITY

i. Who lacks capacity to K?

1. Infant – under 18
2. Mental incompetents – lacks ability to understand agreement
3. Intoxicated persons **if the other party has reason to know**

ii. Consequences of incapacity

1. Right to disaffirm by person without capacity
2. Implied affirmation by retaining benefits after gaining capacity (ratification)
 - a. ELEMENTS:
 - i. Agreement before age of 18
 - ii. Person who made agreement before he was 18 is now 18
 - iii. Person continues to keep and benefits of the K without complaint
3. Quasi-K liability for necessities
 - a. A person who does not have capacity is legally obligated to pay for things that are necessary such as food, clothing, medical care or shelter but that **liability is based on quasi-K law, not K law**
 - i. THERE IS NO K LIABILITY FOR NECESSARIES IF PERSON DOES NOT HAVE CAPACITY

VII. REASON FOR NOT ENFORCING AGREEMENT: STATUTE OF FRAUDS DEFENSE (crucial on the bar exam)

a. SoF is a statute or statutes designed to prevent fraudulent claims – to make it harder to fool the court by claiming falsely that there is a K. SoF makes it harder to make such a false or fraudulent claim by requiring the claiming have special proof that K exists. The special proof required to satisfy the SoF is typically proof of either (1) performance (2) or a writing signed by the person who is asserting that there was no such agreement.

b. Overview of primary SoF issues

i. IS THE K WITHIN SOF?

1. The SoF does not cover all Ks. At CL, 5 kinds of Ks were covered.

ii. IF SO, IS THE SOF SATISFIED?

1. SoF is evidentiary. The requirement of special proof that the alleged agreement is made is generally satisfied by either proof of performance or a writing. And, if the SoF is satisfied, then there is not a SoF defense.

iii. IS THERE A SOF DEFENSE?

1. SoF is a defense to enforcement of the agreement. If (1) the agreement is within the SoF, and (2) the SoF is not satisfied and (3) the D asserts a SoF defense, no K.

c. Contracts within the SoF

1. Promises to answer for [guarantee] the debts of another [suretyship]

1. Not merely a promise to pay but rather a promise to pay if someone else does not. LOOK FOR A GUARANTEE: X promises to pay IF Y DOES NOT PAY.

a. S Store sells P paint on credit to be used in painting Epstein's house. S alleges Conviser promised to pay for the paint IF P DID NOT PAY. Is Conviser's alleged promise w/in the SoF? YES!

2. **Main purpose/primary object exception**

a. If the main purpose of the obligation allegedly guaranteed was to benefit the guarantor, then it's much more believable that there was such a guarantee. This is not w/in SoF.

- b. S Store sells paint to P to use in painting Conviser's house. S alleges Conviser promised to pay for the paint if P did not pay. Is Conviser's alleged promise w/in SoF? NO!

ii. Promise by executor to answer for **personally** (guarantee personally) the debts of the decedent

1. If estate representative promises to use own money to pay estate obligations, that is weird and so it comes within SoF.
2. Key word is "personally."

iii. Promise **in consideration of marriage**

1. Not merely a promise to marry but rather a promise to do something or refrain from doing something if we marry.

iv. Service K **not capable of being performed** within a year from the time of the K (i.e., more than one year)

1. *Specific time period, more than a year* – SoF applies
 - a. Termination is irrelevant – we want to know if you are able to do everything you need to do in ONE YEAR.
2. *Specific time, more than a year from date of K* – SoF applies
 - a. If difference between time of agreement and time performance will be complete is more than 1 year, it comes within SoF because it cannot possibly be completed within 1 year.
3. *Task (nothing said about time)* – SoF does NOT apply
 - a. Capable of being performed – theoretically possible with unlimited resources.
4. *Life* – SoF does NOT apply.

v. **Transfers of interest in real estate** (with exception for leases of 1 year or less)

1. Does not have to be transfer of a fee simple. SoF applies to easements as well if for longer than 1 year.
2. Leases of one year or less are not within SoF.

vi. Sale of goods for \$500 or more

vii. Leases of goods with the payments totaling \$1,000 or more

d. **How is SoF satisfied?**

i. **Performance**

1. **Performance and services Ks**
 - a. **Full performance** by either party satisfies the SoF
 - b. **Part performance** of a services K does not satisfy the SoF (important)
 1. P agrees to work for D for 3 years (SoF because 3 years). P works for 13 months and D fires her without cause. Is SoF satisfied by P's working for 13 months? No, because only part performance.
 1. Does D have a SoF defense?
 - a. Yes b/c we are w/in the SoF and it has not been satisfied.
 2. Can P recover under K law for the 13 months of work she had done?
 - a. Not under K law.

- ii. **If there is a services K w/in SoF and all that you have is part performance, there is NO K LAW RIGHT to recover for that part performance.**

1. **While there is no K law recovery, this is a prime example of the use of quasi-K to avoid an inequitable result.**
 2. Sale of goods Ks
 - a. **Ordinary goods**
 - i. GR is that part performance of a K for the sale of goods satisfies the SoF but **only to the extent of the part performance**. More specifically, see if question is about:
 1. *Delivered goods* OR
 - a. SoF is satisfied if dispute is over goods that have been delivered.
 2. *Undelivered goods*
 - a. SoF is not satisfied. There is a defense.
 - b. **Specially manufactured goods exception**
 - i. If the K is for the sale of goods that are to be specially manufactured, then the SoF is satisfied as soon as the seller makes a **substantial beginning** which means that the seller has done enough work that it is clear that what she is working on is specially manufactured, i.e., custom made or made to order.
 3. Performance and transfers of interests of real estate
 - a. Part performance by buyer of real estate can satisfy the statute. Part performance is generally **any 2 of the following 3**: (1) full or part payment, (2) possession and/or (3) improvements. Full payment alone by buyer of real estate does not satisfy the SoF.
- ii. **Writing**
 1. **UCC**: written agreement alone – no SoF.
 - a. Written agreement with details of writing – need to discuss adequacy of writing.
 2. **SoF other than the UCC?**
 - a. Look at the contents of the writing or writings – **all material terms test** (writing must tell us who is making the agreement – BOTH parties – and what they are agreeing to; that's it, just WHO AND WHAT).
 - b. Look also at who signed the writing. It must be signed by the person who is asserting the SoF defense – by the person who is saying that there is no such agreement.
 1. Any time fact pattern says one party signed and is silent about whether the other party signed, make the inference that the other party did NOT sign.
 3. **UCC SoF**
 - a. Again, look to the contents of the writing and who signed the writing. **The writing must contain the quantity term (how many). The writing does NOT have to state the purchase price; only the quantity of the goods the seller has to provide.**
 - b. Generally, the writing must be signed by the person asserting the SoF defense.
 - i. **Exception**: based on that person's failure to respond to a signed writing. Both parties must be merchants and the person who

receives a signed writing with a quantity term that claims there is a K fails to respond within 10 days of receipt.

iii. **Judicial Admission**

1. Looking for statement claiming the SoF defense. The statement should be like this: **we agreed, but we never put it in writing**. This statement appears in pleadings or in in-court testimony or in a response to discovery. If you see this, the SoF has been satisfied (no more concern about fraud).

e. **Use of SoF on the bar for questions other than whether there is a SoF defense to enforcement of agreement**

i. **Equal dignity**

1. Need authorization to enter into a K for someone else if the K is within the SoF.
2. Rules of law require that the authorization must be in writing only if the K to be signed is within the SoF, i.e., the authorization must be of equal dignity.

ii. **K modification**

1. When do rules of law require written evidence of modification of a written K?
 - a. Sometimes, there is no legal requirement of written evidence of an alleged modification of a written K. Resolve any legal issue of whether such written evidence of the modification is needed by

i. ***Looking at the deal with the alleged change and***

ii. ***Determining whether the deal with the alleged change would be within SoF***

1. If the deal with the alleged change would be within the SoF, then the alleged modification agreement must be in writing.
2. What if the agreement is in writing and requires that all modifications be in writing?
 - a. Under CL, K provision requiring that all modifications be in writing are not effective – **ignore K language**.
The sentence that says a writing is required is ignored, it has no effect under CL.
 - b. Under UCC, K provisions requiring written modifications are effective **unless waived**.

III. **OTHER REASONS FOR NOT ENFORCING AN AGREEMENT: ILLEGALITY, PUBLIC POLICY, MISREPRESENTATION, DURESS**

a. **Illegal subject matter/illegal purpose**

- i. 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.

b. **Public policy**

- i. Cts can refuse to enforce an agreement because of public policy. Look for an exculpatory agreement that exempts intentional or reckless conduct from liability or a covenant not to compete without a reasonable need or reasonable time and place limits.

- c. **Misrepresentation or nondisclosure** (will be on the bar – can be either a tort q or a K q; if q is about canceling the K, rescinding the K, apply K law; if action for money damages, apply tort law)

- i. **Look for a false assertion of fact** (S tells B house has no termites when it does) **or concealment of facts** (S puts carpet over termite damage) **that induces the K**. No requirement of fraud in actions to rescind a K because of misrepresentation; nondisclosure may require fraud.
 - ii. In K law, even innocent and honest misrepresentations matter. As long as a person relies on the misrepresentation, it matters and K can be rescinded even if misrepresentation was honest.
 - iii. If question about recovery of money damages, honest and innocent misrepresentations do not matter – must establish at least damages.
- d. Duress: Physical or economic
- i. Elements of economic duress
 - 1. Bad guy – improper threat
 - 2. Vulnerable guy – no reasonable alternative
 - ii. Most common example of economic duress
 - 1. Watch for fact pattern about existing K. One party threatens to breach existing K unless she gets a new one. Must also have a vulnerable party, who doesn't have another choice other than to enter into new K because there is no other source of supply.

- IX. REASON FOR NOT ENFORCING AGREEMENT: UNCONSCIONABILITY (not important on the bar)
- a. Empowers a ct to refuse to enforce all or part of an agreement.
 - b. The two basic tests, **unfair surprise (procedural)** and **oppressive terms (substantive)**, are tested as of the time the agreement was made by the ct.

- X. REASON FOR NOT ENFORCING AGREEMENT: MISUNDERSTANDING, I.E., AMBIGUITY IN WORDS OF AGREEMENT
- a. There will be no K if:
 - i. Parties use a material term that is open to at least 2 reasonable interpretations, and
 - ii. Each party attaches different meaning to the term, and
 - iii. Neither party knows or has reason to know the term is open to at least 2 reasonable interpretations.

- XI. REASON FOR NOT ENFORCING AGREEMENT: MISTAKE OF FACT EXISTING AT TIME OF K

a. Distinguish from misunderstanding which focuses on words in K and misrepresentation which focuses on words before K.

i. Mutual mistake of material fact

1. There will be no K if:

a. *Both parties mistaken, and*

b. *Basic assumption of fact, and*

c. *Materially affects the agreed exchange, and*

d. *Not a risk that either party bears.*

2. Turns on the facts. One fact to turn to is whether the agreed upon subject matter exists. Mutual mistake as to what it is, i.e., existence of subject matter, means the agreement is not legally enforceable.

3. **A mistake is basic and material if it is a mistake about WHAT IT IS, not about its worth.**

a. **Generally, seller has a risk of knowing what it is she is selling.**

ii. Unilateral mistake of material fact

1. Generally, courts have been reluctant to allow a party to avoid a K for a mistake made by only one party. Look for situations in which the other party had reason to know of the mistake.

THIRD ISSUE: TERMS OF THE CONTRACT

I. PARTIES' WORDS AND THE PAROL EVIDENCE RULE

a. Overview

- i. Issue is whether ct can consider evidence and purpose for which the evidence is to be introduced is often determinative.
- ii. Look at this from an evidence perspective.

b. Vocabulary

i. Integration

1. Written agreement that ct finds is the final agreement, triggers the parol evidence rule. No parol evidence rule w/o integration.

ii. Partial integration

1. Written and final, but not complete
2. **TIP:** If you see answer that uses term "partial or complete integration," your strong inclination is that's a WRONG answer.

iii. Complete integration

1. Written, final, and complete

iv. Merger clause

1. Contract clause such as "This is the complete and final agreement."
 - a. **Merger clauses are highly persuasive, but not conclusive.**

v. Parol evidence

1. Words of party (or parties)
2. **Before** integration, i.e., before agreement was put in written form
3. Oral or written

vi. Reformation

1. Equitable action to modify written K to reflect actual agreement
2. Generally not available

c. Triggering facts

- i. Written K that ct finds is the final agreement; AND
- ii. Oral statement made at the time the K was signed OR earlier oral or written statements by the parties to the K.

1. Parol evidence fact patterns

i. Contradicting the written deal

1. Regardless of whether writing is complete or partial integration, the parol evidence rule prevents a ct from admitting evidence of earlier agreements for the purpose of contradicting the terms in the written K. A ct may, however, consider evidence of such terms for the limited purpose of determining whether there was a mistake in integration, i.e., a mistake in reducing the agreement or writing.
2. **CR:** you cannot even CONSIDER parol evidence to reform the deal. But if evidence of POST-K statements, it's not a parol evidence rule, which simply looks BACK IN TIME.
3. **Exception (mistake in integration):** leaving something out, getting numbers reserved (clerical errors).
 - a. You can admit it if in the nature of explaining a clerical error.

ii. Getting out of a written deal

1. Regardless of whether writing complete or partial integration, the parol evidence rule does NOT prevent a ct from admitting evidence of earlier words of the parties for the limited purpose of determining whether there is a defense to the enforcement of the agreement such as misrepresentation, fraud, duress.
 2. **Defense exception:** evidence admissible for the limited purpose of whether there is a defense and getting out of the K (such as misrepresentation).
- iii. Explaining term in the written deal
1. Regardless of whether writing complete or partial integration, the parol evidence rule does NOT prevent a ct from admitting evidence of earlier agreements to resolve ambiguities in written K.
- iv. Adding to the written deal (ONLY PLACE where it matters is if there is a complete integration)
1. *The parol evidence rule prevents a ct from admitting evidence of earlier agreements as a source of consistent, additional terms unless the ct finds*
 - a. *That the written agreement was only a partial integration; OR*
 - b. *That the additional terms would ordinarily be in a separate agreement.*
- e. **Comparison of parol evidence rule and SoF**
- i. Parol evidence rule is all about the persuasive conclusive effect of a final writing. If not told there was a written agreement, it cannot be a parol evidence question.
 - ii. SoF: there was no written agreement, it was merely oral.

II. CONDUCT AND COURSE OF PERFORMANCE AND... (important)

- a. **Course of performance** – same people, same K
 - i. Information in the fact pattern about what these people have already done under this K.
- b. **Course of dealing** – same people, different but similar K (not as persuasive as course of performance)
- c. **Custom and usage** – different but similar people, different but similar K (what other people have done under similar Ks)

III. UCC FOR TERMS IN SALES OF GOODS KS (DEFAULT TERMS)

a. Delivery obligations of seller of goods if delivery by common carrier

- i. **Shipment Ks** (seller completes obligation before delivery is complete)
 1. One possibility is that the K is a shipment K which means that the seller completes its delivery obligation when it
 - a. Gets the goods to a common carrier, and
 - b. Makes reasonable arrangements for delivery, and
 - c. Notifies the buyer.

ii. **Destination Ks**

1. The other possibility is that the K is a destination K, which means that the seller does not complete its delivery obligation until the goods arrive where the buyer is.

iii. **Determining whether K is a shipment or a destination**

1. Most Ks with delivery obligations are shipment Ks.
2. Watch for the use of FOB – free on board (city) – as source for determining whether the K is a shipment K or a destination K.
 - a. *FOB followed by city where the seller is or where goods are means shipment K.*
 - b. *FOB followed by any other city means destination K.*

b. Risk of loss

i. **Risk of loss issues arise where**

1. After the K has been formed but before the buyer receives the goods

2. The goods are damaged or destroyed and
3. Neither the buyer nor the seller is to blame.

ii. Consequences of risk of loss problem:

1. When, after the K has been entered into, goods are lost or damaged WITHOUT THE FAULT of the buyer or seller, which party has the risk of loss: buyer or seller?
 - a. If the risk of loss is on the buyer, he has to pay the full K price for the lost or damaged goods.
 - b. If the seller has the risk of loss, no obligation on the buyer; possible liability on seller for nondelivery.

iii. Risk of loss rules (TIP: TITLE is irrelevant, therefore WRONG answer) Do rule 1 first, if that one does not apply do rule 2, etc.

1. *Agreement of parties controls*
2. *Breaching party is liable for any unimpaired loss even though breach is unrelated to problem*
3. *Delivery by common carrier other than seller: risk of loss shifts from seller to buyer at the time that the seller completes its **delivery obligations***
4. *No agreement, no breach in delivery by a carrier (catch-all).*
 - a. **The determining factor is whether the seller is a merchant**
 - b. Whether the buyer is a merchant is irrelevant
 - c. Risk of loss shifts from a merchant seller to the buyer on the buyer's receipt of the goods.
 - d. Risk of loss shifts from a non-merchant seller when he or she tenders the goods.
 - e. Tender means seller has told the buyer where the stuff is and how to get it.
 - f. Receipt – physical possession by the buyer

c. Warranties of quality

i. Express (words or conduct)

1. Look for words that promise, describe or state facts or for use of sample or model.
 - a. Examples:
 - i. All steel (statements about facts are express warranties)
 - ii. Top quality is NOT a warranty (puffery)
 - iii. Guaranteed to operate for two years – express warranty
 - iv. Seller's showing buyer a sample – express warranty
2. **TIP:** goods have been delivered to buyer and buyer is unhappy with goods. Seller says goods are as good as K requires. What quality does K require?

ii. Implied warranty of merchantability (important)

1. When any person buys any goods from any merchant, a term is automatically added to the K by operation of law – **that the goods are fit for the ordinary purpose for which such goods are used.**
 - a. Triggering fact: seller is a merchant which here means it deals in **GOODS OF THAT KIND.**
 - b. Warranty: goods are fit for ordinary purposes

iii. Implied warranty of fitness for a particular purpose

1. Triggering facts: buyer has particular purpose; buyer is relying on seller to select suitable goods; seller has reason to know of purpose and reliance.
2. Warranty: goods fit for particular purpose

d. Contractual limitations on warranty liability

- i. Disclaimer (e.g., there are no warranties): **eliminates IMPLIED warranties**
 1. Express warranties generally cannot be disclaimed

2. Implied warranties of merchantability and fitness can be disclaimed in either of the following ways:
 - a. Conspicuous language of disclaimer mentioning merchantability OR
 - b. “as is” or “with all faults”
- ii. Limitation of remedies: does not eliminate warranty, simply limits or sets recovery for any breach of warranty
 1. Possible to limit remedies even for express warranties
 2. General test is unconscionability
 3. Prima facie unconscionable if breach of warranty on consumer goods causes personal injury

FOURTH ISSUE: PERFORMANCE

I. SALE OF GOODS PERFORMANCE CONCEPTS

a. Goods concepts (6 – all important)

i. First: perfect tender

1. Only do perfect tender if it is a sale of goods
2. It means exactly what the words suggest
3. If less than perfect, buyer has rejection options

ii. Second: rejection of the goods, general rules

1. Be able to distinguish rejection of an offer from rejection of the goods
2. If the seller does not meet the perfect tender standard, the buyer has the option to retain and sue for damages or reject all or any commercial unit and sue for damages
3. This rejection alternative is limited by CURE or INSTALLMENT K or ACCEPTANCE.

iii. Third: cure

1. In some instances, a seller who fails to make a perfect tender will be given a second chance, an option for curing. Note that every seller does not have the opportunity to cure, and that the buyer cannot compel the seller to cure.
 - a. Seller's reasonable ground to believe would be ok
 - i. In very limited situations, a seller has the option of curing even after the 1st delivery date. *The statutory test is whether the seller has reasonable grounds for believing that the improper tender would be acceptable, perhaps with a money allowance.* Look for info in question about prior deals between that buyer and seller with such an allowance.

b. Time for performance has not yet expired

1. Look for fact pattern:
 1. K specified deadline
 2. Wrong goods delivered early

iv. Fourth: installment sales Ks

1. An installment sales K requires or authorizes
 - a. Delivery of the goods in separate lots
 - b. To be separately accepted
 - c. The buyer has the right to reject an installment only where there is a substantial impairment in that installment that cannot be cured.

v. Fifth: acceptance of the goods

1. Effect of acceptance of the goods: again, if the buyer accepts the goods, it cannot later reject them.
2. Effect of payment: payment without opportunity for inspection NOT acceptance.
3. Effect of buyer's keeping goods' implied acceptance – LOOK FOR THE BUYER'S KEEPING THE GOODS WITHOUT OBJECTION: more specifically, look for a fact pattern that states when buyer first received goods and when buyer first complained to seller.

vi. Sixth: revocation of acceptance of the goods

1. If a buyer accepts the goods, it can NOT later reject the goods. In limited circumstances, a buyer can effect a cancellation of the K by revoking its acceptance of the goods.
2. **The requirements for revocation are as follows:**
 - a. *Nonconformity substantially impairs the value of the goods, and*
 - b. *Excusable ignorance of grounds for revocation or reasonable reliance on seller's assurance of satisfaction, and*
 - c. *Revocation within a reasonable time after discovery of nonconformity.*

TWO DIFFERENT WAYS OF BUYER'S RETURNING GOODS AND RECOVERING ANY PAYMENT

		REJECTION	REVOCATION
1.	Timing	Early, before acceptance	Later, after acceptance
2.	Standard	Generally, perfect tender	Substantial impairment
3.	Other Requirements	<ul style="list-style-type: none"> • Seasonably notify seller • Hold the goods for seller • Follow reasonable seller instructions 	Same
4.	Consequences	<ul style="list-style-type: none"> • Goods back to seller • No buyer payment obligation 	Same

II. COMMON LAW PERFORMANCE CONCEPTS

- a. Perfect tender is NOT a CL concept. The CL counterpart is **substantial performance**. In a sale of goods K, if the seller makes a perfect tender, then the buyer must perform by paying the K price. In a common law K, if one party substantially performs, then the other party must pay or otherwise perform.

FIFTH ISSUE: REMEDIES FOR AN UNEXCUSED NONPERFORMANCE

I. NONMONETARY REMEDIES (IN REM)

a. Specific performance/injunction

- i. **GR:** no specific performance
- ii. **Ks for sale of real estate**
 1. Usually get specific performance here.
 2. But if sold to a BFP, no specific performance.

- iii. **K for sale of goods:** unique goods (art, antiques, custom-made) or other appropriate circumstances
- iv. **K for services:** NEVER specific performance, possible injunctive relief

b. Reclamation

- i. Right of an unpaid seller to get its goods back. Seller delivered goods to buyer on credit. Buyer hasn't paid and seller wants money, but if he cannot get money, he at least wants his money back. When can seller get his stuff back?
- ii. **Key facts:**
 - 1. Buyer must have been insolvent at the time that it received the goods and
 - 2. Seller must demand return of goods within 10 days of receipt (this becomes a reasonable time rule if before delivery there had been an express representation of solvency by the buyer), and
 - a. **The critical date is the date the buyer received the goods. That's when the 10 days start running and that's also when we test for insolvency.**
 - 3. Buyer still has goods at time of demand.

c. Rights of good faith purchaser in entrustment

- i. If an owner leaves her goods with a person who sells goods of that kind and that person wrongfully sells the goods to a third party, then such a good faith purchaser from dealer cuts off rights of the original owner/entruster.
- ii. If there is a thief, no matter how bona fide the P is, O can recover the watch from B.

II. MONEY DAMAGES FOR BREACH OF K. GENERAL CONCEPTS

a. Overview

- i. Policy: compensate P, not punish D
- ii. Vocabulary
 - 1. Expectation
 - a. When a person makes a K, they have the expectation that it will be performed without breach.
 - 2. Reliance
 - 3. Restitution
 - 4. Incidental
 - 5. Consequential
 - 6. Avoidable
 - 7. Liquidated

b. Measure of damages

- i. General approach – protection of **expectation**
 - 1. **Put P in same economic position as if K had been performed**, i.e., compare money value of D's performance without breach with money value of what D actually did.
 - a. **On essay:** In CA, the money damage rules for breach of K are based on the protection of expectation interests. That means person making K expects it will be performed without breach. That means money damages are based on how much money it takes to put P in the same dollar position as if K had been performed without breach.
- ii. Another approach – protection of **reliance interest**
 - 1. **Put P in same economic position as if K had never happened.**
- iii. Another approach – protection of **restitution interest**
 - 1. **Pay P by putting D in same economic position as if K had never happened (confusing because money goes to P but you focus on what D got in determining how much P can recover).**

a. We don't want people who breach Ks to gain from their breach.

c. **Damage rules for sale of goods**

IMPORTANT: look for who breached and who has the goods

- i. Seller breaches, buyer keeps the goods → FMV if perfect - FMV as delivered
- ii. Seller breaches, seller keeps the goods → market price at time of discovery of breach - K price OR replacement price - K price
 1. Article 2 encourages replace transactions.
- iii. Buyer breaches, buyer has the goods → K price
- iv. Buyer breaches, seller has the goods → K price - market price at time and place of delivery OR K price - resale price and, in some situations, provable lost profits
 1. Lost profits for lost volume seller
 - a. Recoverable amount is provable lost profit
 - b. **TIP:** looking for a fact pattern that has the following 3 facts to it:
 - i. K for the sale of regular inventory
 - ii. Breach
 - iii. Resale to someone else at exactly the same price

d. **Additions and limitations**

- i. Plus INCIDENTAL damages
 1. Costs incurred in finding replacement performance - ALWAYS recoverable
- ii. Plus foreseeable CONSEQUENTIAL damages (important)
 1. Damages arising from P's special circumstances; **recoverable only if D had reason to know at time of K.**
 - a. **TIP:** Watch for fact pattern where, after K is made, P tells D about the special circumstances. That's too late; it doesn't count.
 2. There will be something in the fact pattern that makes this P and her losses atypical.
- iii. Less AVOIDABLE damages
 1. No recovery for damages that could have been avoided without undue burden on P. Burdens of pleading and proof on D.
 2. Watch for phrase: "D is able to show that..."
 - a. The concept of avoidable damages is in the nature of a defense, so it must be pleaded and proved by D.
- iv. CERTAINTY limitation
 1. Reasonable certainty test. Look for fact pattern involving a new business or a new business activity.
 2. **TIP:** If fact pattern emphasizes the subject matter of the K is something new for P, think P may not be able to establish with certainty what her position would have been if the K were performed without breach.

e. **K provisions regarding damages, i.e. LIQUIDATED damages**

- i. Look for K provision fixing amount of damages. Issue will be validity. Concern is whether provision is too high, a penalty.
- ii. Tests are
 1. *Damages were difficult to forecast at time K was made, and*
 2. *Provision is a reasonable forecast.*
- iii. **TIP:** If liquidated provision is simply a single number, think that is presumptively INVALID because it cannot represent a reasonable forecast of all possibilities.

SIXTH ISSUE: EXCUSE OF NONPERFORMANCE OF K BECAUSE OF SOMETHING THAT HAPPENED AFTER K WAS MADE

Look for info: (1) nonperformance of K and (2) something happening after K, i.e., one guy argues that he does not have to do what he agreed to do because of something that happened after the K.

I. EXCUSE BECAUSE OTHER GUY'S IMPROPER PERFORMANCE

a. Common law and material breach rule

i. 4 rules

1. Damages can be recovered for any breach.
2. Only a **material** breach by one guy excuses the other guy from performing.
3. Whether a breach is material is a fact question.
4. If there is substantial performance, then the breach is not material. If the breach is material, then the performance was not substantial.
 - a. **TIP:** If dealing with a number based question (painting 7 apartments out of 10), if performance is LESS THAN HALF, that is not substantial performance → material breach. **There is no K law right to recover for less than substantial performance (there is, however, quasi-K).**
 - b. **Divisible K exception:** When the K says that P will get paid a certain amount PER APARTMENT, the K is divisible. In that case, P can get money for the 3 apartments he has painted.

b. Article 2 and perfect tender rule

- i. We NEVER do material breach in a sale of goods, we only do perfect tender. If delivery requires 100 red widgets, and only 99 red widgets are delivered, still a breach → perfect tender.

II. EXCUSE BECAUSE OF NON-OCCURRENCE OF A CONDITION

a. What a condition is

- i. A condition is a mutually agreed upon promise modifier. It is language in a K that does not create a new obligation, but merely limits obligations created by other language in the K.
- ii. Watch for words such as:
 1. If
 2. Only if
 3. Provided that
 4. So long as
 5. Subject to
 6. In the event that
 7. Unless
 8. When
 9. Until
 10. On condition that
- iii. Conditional acceptance S offers to sell B his house for 100k. B responds that he will buy the house IF he can obtain a mortgage at no more than 6%. Is there a K? NO!
 1. The words here are those of only ONE person in response to an offer, which means we don't have a K because the words don't connect.
- iv. Conditional K S and B **enter into an agreement that states** that B will buy S's house for 100k IF B can obtain a mortgage at no more than 6%. Is there a K? YES!
 1. The words here are words of both parties and, since both parties agreed to them, there is a K.
 2. **Where there is language of condition and the condition does not occur, performance is excused.**

b. What is the standard for satisfying an express condition?

- i. **GR: strict compliance** with conditions
 - 1. 6.1% does not satisfy a 6% condition.
- c. **How can a condition be excused?**
 - i. *Good faith/avoidance of forfeiture*
 - 1. The law abhors forfeiture.
 - ii. *Waiver/estoppel*
 - 1. Identify the person who benefits from or is protected by the condition. Then look for a statement by that person giving up the benefits and protection of the condition.
 - 2. Estoppel is based on a statement by the person protected by the condition BEFORE the conditioning event was to occur and requires reliance. Waiver is based on a statement by the person protected by the condition AFTER the conditioning event was to occur and does not require reliance.
 - 3. Common fact pattern: B contracts to build an office building for O. The K provides for monthly progress payments but conditions such payments on B's obtaining a certificate from CM construction management firm certifying the quality of work done. In May, O tells B that it will not be necessary to obtain any further certificates.

III. EXCUSE OF PERFORMANCE BY REASON OF THE OTHER PARTY'S ANTICIPATORY REPUDIATION

- a. *Anticipatory repudiation is an unambiguous statement or conduct indicating*
 - i. *That the repudiating party will not perform*
 - ii. *Made prior to the time the performance was due.*
- b. 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 (AR does not give rise to an immediate claim for damages if the claimant has already finished her performance).
 - i. **You can sue immediately.**
 - ii. **Exceptions:**
 - 1. If nonrepudiating party has finished performance, she must wait until the date of the K to sue.
 - 2. AR can be reversed or retracted so long as there has not been a material change in position by the other party. If the repudiation is timely retracted, the duty to perform is reimposed but performance can be delayed until adequate assurance is provided.
 - iii. **TE:** If doing work for a thing instead of money, but that thing is sold before you finish performance, you are excused from finishing your performance.

IV. INSECURITY

- a. Look for this in sale of goods problems.
- b. If the words or conduct of one party give reasonable grounds for insecurity, then the other party can demand adequate assurance and, if it is commercially reasonable, can suspend performance until it gets adequate assurance. The 3 concepts again:
 - i. *Reasonable grounds for insecurity*
 - ii. *Demand for adequate assurance*
 - iii. *Commercially reasonable to stop performance*

V. EXCUSE BY REASON OF A LATER K

- a. **Rescission**
 - i. The key is whether performance is still remaining from each of the K parties (executory).

- ii. Look for phrases, such as “Before P completes the work.” This is a valid rescission. If says, AFTER P completes the work, rescission is not valid and the K obligation continues unexcused.
- b. Accord and satisfaction (substituted performance)**
 - i. On bar exam, accord question will have an agreement by the parties to an already existing obligation to accept a different **performance** in satisfaction of the existing obligation satisfaction.
 - ii. If the new agreement (accord) is performed (satisfaction), the performance of the original obligation is excused.
 - iii. If the accord is not performed, then the other party can sue on either the original obligation or the accord.
 - iv. **TIP:** two words that signal accord and satisfaction: IF and THEN (as part of the new agreement).
- c. Modification (substituted agreement)**
 - i. Modification is an agreement by the parties to an existing obligation to accept a different **agreement** in satisfaction of the existing obligation.
 - ii. If you make new agreement, the old obligation goes away. In accord and satisfaction, the old obligation does not go away until you have performed.
 - iii. In a substituted agreement, the parties intend the new agreement to replace the old. In accord and satisfaction, they intend the old agreement to stay there until the new one is performed.
- d. Novation (substituted person)**
 - i. A novation is an agreement between BOTH parties to an existing K to the substitution of a new party, i.e. same performance, different party.
 - ii. Novation excuses the contracted for performance of the party who is substituted for or replaced.
 - iii. Novation requires the agreement of BOTH parties to the original K and excuses the person replaced from any liability for nonperformance. Delegation does not require the agreement of both parties and does not excuse.

VI. EXCUSE OF PERFORMANCE BY REASON OF A LATER, UNFORESEEN EVENT

- a. *Performance of contractual duties (other than a contractual duty to pay money) can be excused under impossibility or impracticability or frustration of purpose.***
 - i. Something that happens after K formation but before the completion of K performance; and
 - ii. That was unforeseen; and
 - iii. That makes performance impossible or commercially impracticable or frustrates the purpose of the performance.
- b. *Differences between impossibility and impracticability:***
 - i. Former is objective, latter is subjective
 - ii. Former means cannot be done while latter means can only be done with extreme and unreasonable difficulty and expense.
- c. *Damage or destruction of subject matter of K AFTER K***
 - i. Seller’s risk of loss and destruction
 - 1. E contracts to sell C his Cadillac for 700. After the K but before the risk of loss has passed to C, E’s Cadillac is destroyed by an unseasonable flood. When E fails to perform the K, C sues Epstein for breach. Is E’s nonperformance excused? Yes!
 - ii. Seller’s risk of loss and destruction – different answer

1. E contracts to sell C 100 sacks of grits for 300. After the K but before the risk of loss has passed to C, E's grits are destroyed by an unseasonable flood. When E fails to deliver the grits, C sues for breach. Is E's nonperformance excused? No, because the goods involved here are grits, not just one 1973 Cadillac.
- iii. Buyer's risk of loss and destruction
 1. Assume in above hypos that the flood occurred after the risk of loss had passed to C. C refuses to pay E. If E sues C for breach, is C's nonperformance excused? No.

d. Death AFTER K

- i. General effect of death on K obligations
 1. Death does NOT make a person's K obligations disappear.
- ii. Death of party to K who is "special" person
 1. Then death excuses performance.

e. Subsequent law or regulation

- i. Later law makes performance of K illegal – excuse by impossibility
 1. Even if it is physically possible to perform, performance is excused because the law makes the performance illegal.
- ii. Later law makes mutually understood purpose of K illegal – excuse by frustration of purpose
 1. There must be a mutually understood purpose of the K.
 2. Mutually understood purpose is eliminated by later occurrence.

SEVENTH ISSUE: THIRD PARTY PROBLEMS

I. A PERSON TRYING TO ENFORCE A K SHE DID NOT MAKE: THIRD PARTY BENEFICIARY

a. Identifying third party beneficiary problem

- i. Look for 2 parties contracting with the intent of benefit to a third party.

b. Knowing the vocabulary

- i. Third-party beneficiary
 1. Not a party to the K. Able to enforce K others made for his benefit.
 2. Will ALWAYS be named in the K.
- ii. Promisor
 1. Look for person who is making the promise that benefits the third party.
- iii. Promisee
 1. Look for person who obtains the promise that benefits the third party.
- iv. Intended/incidental
 1. Only intended beneficiaries have K law rights. Intent of parties to K determines whether intended or incidental.
- v. Creditor/donee
 1. Intended beneficiaries are either donees or creditors. Usually donees. Look at whether beneficiary was a creditor of the promisee.

c. Dealing with efforts to cancel or modify

- i. The test is whether the third party **knows of** and has **relied on** or **assented as requested**. If so, her rights have vested and the K cannot be canceled or modified without her consent unless the K otherwise provides.

d. Who can sue whom?

- i. **4 bar exam important rules**
 1. **Beneficiary can recover from promisor**
 2. **Promisee can recover from promisor**
 3. **Donee beneficiary cannot recover from promisee**

a. Donee beneficiary can only go after the PROMISOR.

4. Creditor beneficiary can recover from promisee but only on pre-existing debt

e. Defenses

- i. If the third party sues the promisor, the promisor can assert any defense that he would have had if sued by the promisee.

II. A PERSON TRYING TO ENFORCE A K SHE DID NOT MAKE: ASSIGNMENT OF RIGHTS

a. What an assignment is

- i. Transfer of rights under a K in 2 separate steps:
 1. K between only 2 parties
 2. One of the parties later transfers rights under that K to third party

b. Vocabulary

- i. Assignor: party to the K who later transfers rights under the K to another.
- ii. Assignee: not party to the K. Able to enforce the K because of the assignment.
- iii. Obligor: other party to the K.

c. Limitations on assignment

i. K provisions

1. Courts favor assignability of K rights and so are reluctant to read language as preventing an assignment. Determine whether K

- a. Prohibits assignments; or
- b. Invalidates assignments.

ii. **Prohibition** (much more likely than invalidation for the bar):

language of prohibition takes away the right to assign but not the power to assign, which means that the assignor is liable for breach of K but an assignee who does not know of the prohibition can still enforce the assignment.

ii. **Invalidation**: language of invalidation takes away both the right to assign and the power to assign so that there is a breach by the assignor and no rights in the assignee.

ii. Common law

1. *Even if a K does not in any way limit the right to assign, CL bars an assignment that substantially changes the duties of the obligor (important)*

- a. Assignment of right to payment (never substantial change)
- b. Assignment of right to K performance other than right to payment (usually substantial change on bar)

d. Requirements for assignment

- i. GR: consideration is NOT required but gratuitous assignments (and ONLY gratuitous assignments) can be revoked.

1. Gift assignments are valid, but freely revocable.

ii. Watch for present assignment and not promise to collect and pay or promise to assign.

e. Right of assignee

- i. Assignee can recover from obligor

ii. **Assignor for consideration cannot recover from obligor**

1. Batman contracts to perform security services for Gotham for 300k. After assigning the K with Gotham to Robin for \$10 and doing all of the work himself, can Batman collect from Gotham? No, because Robin paid consideration.

- iii. Obligor has same defenses against assignee as it would have against assignor

- iv. Payment by obligor to assignor is effective until obligor knows of assignment. Similarly, modification agreements between obligor and assignor are effective if the obligor did not know of the assignment.
- v. Implied warranties of assignor IN AN ASSIGNMENT FOR VALUE
 - 1. In an assignment for consideration only, the assignor warrants
 - a. The right assigned actually exists and
 - b. The right assigned is not subject to any defenses by the obligor and
 - c. The assignor will do nothing to impair the value of the assignment.
 - Assignor, however, does not warrant what the obligor will do.

f. **Multiple assignments**

i. **Gratuitous assignments**

1. **GR: last assignee generally wins.**

- a. It's possible to make a gratuitous assignment, but it can be freely revoked. Since a later gift assignment revokes an earlier gift assignment, the GR for resolving claims among assignees who did not provide consideration is a last in time rule.

2. **Exceptions**

- a. A gratuitous 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 later assignment.

ii. **Assignments for consideration**

1. **GR: first assignee for consideration wins.**

- 2. **Very limited exception:** a subsequent assignee takes priority over an earlier assignee for value only if he both does not know of the earlier assignment and is the first to obtain payment, a judgment, a negotiation, OR indicia of ownership.

III. DISPUTES ARISING FROM A PERSON'S PERFORMING A K SHE DID NOT MAKE: DELEGATION OF DUTIES

a. **What delegation is**

- i. Party to a K transferring work under that K to third party

b. **Relationship of assignment and delegation**

- i. A K creates both rights and duties.
- ii. Assignment is the transfer by a party to a K of his rights or benefits under the K to a third party who was not a party to the K.
- iii. Delegation is the transfer by a party to a K of his duties or burdens under the K to a third party who was not a party to the K.

c. **Which duties are delegable**

- i. Generally contractual duties are delegable.
- ii. The limitations on delegation are very limited.
- iii. Delegations are permitted unless EITHER
 - 1. K prohibits delegations or prohibits assignments OR
 - 2. K calls for very special skills OR
 - 3. Person to perform K has a very special reputation.

- iv. **TRICK QUESTION:** P contracts to paint O's house for 1,000. P delegates the work to X who does a great job. Can delegatee X recover the 1,000 from O? NO! But P can recover from O!

v. **If K says no assignments, it also means no delegation.**

d. **What if the third party does not perform?**

- i. Delegating party **always** remains liable.
 - ii. Delegatee liable only if she receives consideration from delegating party.
 - iii. **Any time you have a delegation for consideration, you have the possibility of a third party beneficiary.**
- e. Examples:
- i. *Delegation without consideration:*
 - 1. P contracts to paint O's house for 1,000. X then agrees with P that she (X) will do the painting for P because P is a good friend. X does not do the work. Can O recover from P? Yes because delegating party ALWAYS remains liable.
 - 2. Same facts. Can P recover from X? No because delegatee liable only if she receives consideration from delegating party.
 - ii. *Delegation for consideration:*
 - 1. 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. Can O recover from P? Yes because delegating party always remains liable.
 - 2. Same facts. Can P recover from X? Yes – delegatee liable if she receives consideration from delegating party.
 - 3. Same facts. Can O recover from X? Yes, third party beneficiary.

REMEDIES

REMEDIES

I. HOW TO SPOT A REMEDIES QUESTION

- a. The call of the question will do 1 of 3 things:
 - i. One: use the word "remedies"
 - ii. Two: use the word "relief"
 - iii. State a specific remedy, e.g. specific performance
- b. The remedies issues will be incorporated into a substantive law fact pattern. The most relevant areas for bar exam purposes are torts and contracts (and the related property areas).
- c. The question may be a pure remedies question or a crossover. The tip-off will be found in how the call-of-the-question lines are worded.

II. HOW TO APPROACH A REMEDIES QUESTION

- a. Step one
 - i. Determine what substantive area of law is involved. Could be more than 1.
 - ii. What specific type problem is at issue within that substantive area.
 - iii. **TIP:** the fact pattern may be susceptible to more than one substantive law interpretation, e.g., tort and contracts.
- b. Step two
 - i. Make sure that P has a case, e.g., a tort committed, a K breached.
- c. Step three
 - i. Determine what remedies require discussion.
 - ii. This must be done in the right chronological order as follows:
 - 1. FIRST: LEGAL REMEDIES
 - 2. SECOND: RESTITUTIONARY REMEDIES

3. THIRD: EQUITABLE REMEDIES

- a. Only write about these after you determine remedies at law won't take care of the problem.
- iii. **TIP:** There are 2 types of restitutionary remedies, legal and equitable. The legal remedies must be considered first.

III. THE TORT REMEDIES

a. The legal remedies

i. Damages

1. D is ordered to pay money to P.

ii. **FIRST TYPE OF DAMAGES: COMPENSATORY**

1. They are based on the injury to the P. They put the injured party in the position he would have been in had the injury not occurred.

2. **The four requirements checklist:**

a. *First requirement: causation*

- i. This refers to actual causation (but for test)

b. *Second requirement: foreseeability*

- i. Proximate causation: the injury must have been foreseeable at the time of the tortious act.

c. *Third requirement: certainty*

- i. This means the damages cannot be too speculative.
- ii. **TIPS:**
 1. Past losses have to be established with more certainty than future losses.
 2. If there is a historical record that helps to provide certainty, e.g., old vs. new business, used to establish what losses will be.
 3. For future damages, P must show that they are more likely to happen than not. This is the ALL OR NOTHING rule. Are odds better than 50-50 that she would have gone to law school/passed her classes/pass the bar, etc.? Hypo: injured P is an outstanding undergrad student who has been accepted to law school. Basis of future lost income calculation?

d. *Fourth requirement: mitigation*

- i. P must take reasonable steps to mitigate damages.

3. **Compensatory damages: particular problem area – personal injury torts**

a. The certainty rules

- i. *Economic losses (special damages)*, e.g., medical expenses, lost earnings

1. The basic certainty rules apply here, i.e., calculation must be with sufficient certainty.

- ii. *Non-economic losses (general damages)*, e.g., pain and suffering, permanent disfigurement

1. The basic certainty rules do NOT apply here. The jury may award any amount it wishes subject to proper instructions.

b. Form of judgment payment

- i. The award must be a single lump sum payment. Installment payments are NOT allowed.
- ii. *Two calculation items*

1. The award must be discounted to present value.
2. Inflation is NOT taken into account. Under the modern view it is.

iii. SECOND TYPE OF DAMAGES: NOMINAL

1. These are awarded where P has no actual injury.
2. They serve to establish or to vindicate the P's rights.

iv. THIRD TYPE OF DAMAGES: PUNITIVE

1. These are awarded to punish the D.
2. **The three rules**
 - a. *First rule: in order to get punitive damages, P must have first been awarded compensatory or nominal damages.*
 - i. Note: punitive damages can also be attached to restitutionary damages.
 - b. *Second rule: in order to get punitive damages, D's type fault must be greater than negligence.*
 - c. *Third rule: generally, punitive damages are awarded in an amount relatively proportionate to actual damages.*
 - i. As actual damages go up, punitive damages go up.
 - ii. S Ct would limit punitive damages to a single digit multiple of actual damages unless conduct facts are extreme.

b. The restitutionary remedies

- i. These remedies are based on the theory that D should not be *unjustly enriched*.

ii. LEGAL RESTITUTIONARY REMEDY

1. These are based on the benefit to the D.
2. And the amount is calculated based on the value of the benefit.
3. Contrast with compensatory damages, which focus on the injury to P.

iii. COMPENSATORY VS. RESTITUTIONARY DAMAGES, THE 3 BAR EXAM FACT PATTERN POSSIBILITIES

1. *Only compensatory damages are available*
 - a. D destroys P's car. No benefit to D, so no restitutionary damages.
2. *Only restitutionary damages are available*
 - a. D manufacturing company drives trucks across road on P's vacant property to get to railroad reducing trip from ten miles to one mile. P wasn't injured at all here, but nominal damages might be available here.
3. *Both compensatory and restitutionary damages are available*
 - a. D steals your machine to use in its business. Remedy?
 - i. Compensatory for P's loss of use
 - ii. Restitutionary because D benefited and he would be unjustly enriched.

iv. REPLEVIN, LEGAL RESTITUTIONARY REMEDY

1. Recovers possession of specific personal property.
2. *Two part test:*
 - a. *Establish that P has a right to possession; and*
 - b. *That there is a wrongful withholding by D.*
3. Most likely bar exam issue
 - a. P can recover the chattel BEFORE the trial.
 - b. **TIP:** if this is in issue, mention in your answer that:
 - i. P will have to post a bond.

- ii. D can defeat an immediate recovery by posting a redelivery bond.
D can then keep the chattel until after the trial.

1. Note: the sheriff repossesses the property for P.

- c. **TIP:** replevin is ALMOST ALWAYS coupled with damages (compensatory or restitutionary) for lost use or benefit to P during the time of detention.

v. **EJECTMENT, LEGAL RESTITUTIONARY REMEDY**

- 1. P recovers possession of specific real property.

2. **Two part test:**

- a. *Establish that P has a right to possession and*
- b. *That there is a wrongful withholding by D.*

3. Most likely bar exam issue

- a. Status of D: ejectment only available against D who has possession of property.
- b. Note: sheriff ejects D from property.
- c. **TIP:** ejectment is ALMOST ALWAYS coupled with damages (compensatory or restitutionary) for lost use or benefit to D during time of wrongful withholding.

vi. **CONSTRUCTIVE TRUSTS AND EQUITABLE LIENS, EQUITABLE RESTITUTIONARY REMEDIES**

- 1. **Constructive trust:** imposed on improperly acquired property to which D has title. D serves as “trustee” and must return property to P.

- 2. **Equitable lien:** imposed on improperly acquired property to which D has title. Property will be subject to an immediate court-directed sale. The monies received go to the P. If the proceeds of the sale are less than the FMV of the property when it was taken, a deficiency judgment will issue for the difference and can be used against D’s other assets.

- 3. **TIP:** constructive trusts and equitable liens can be used only when the fact pattern indicates that P has title to the property.

4. **The rules**

a. **Inadequate legal remedy alternative**

- i. Basic alternative: money damages

1. The 2 reasons:

- a. P is insolvent; or
- b. For constructive trusts: the property is unique.

b. **Tracing is allowed**

c. **BFPs prevail over P**

d. **P will prevail over unsecured creditors**

- 1. Note: to extent you have a deficiency judgment in connection with an equitable lien, you stand on equal footing with other unsecured creditors.

5. Choice of remedy: constructive trust or equitable lien?

- a. If the property value subsequent to taking goes up, go with a constructive trust.
- b. If the property value subsequent to taking goes down, go with an equitable lien.
- c. When D’s property cannot be traced solely to P’s property, only an equitable lien is available.

c. The equitable remedies

i. INJUNCTIVE RELIEF, EQUITABLE REMEDY

1. D is ordered (enjoined) to do or refrain from doing something.
2. Threshold inquiry
 - a. Determine if you're required to discuss permanent or temporary injunctive relief.
 - b. Permanent injunction: issued AFTER trial on the merits.
 - c. Temporary (preliminary, interlocutory) injunction: issued pending trial on the merits.
 - d. **TIP**: if in doubt, go with a permanent injunction.

ii. TEMPORARY INJUNCTIVE RELIEF

1. Two part test:
 - a. *Establish that there is irreparable injury.*
 - i. Facts must be discussed in a time frame context. One must show that he will incur irreparable injury while waiting for a full trial on the merits – and that's why he or she needs relief now.
 - ii. Balancing of hardships: irreparable injury is weighed against any hardship D will suffer if a temporary injunction is granted.
 - b. *Establish P's likelihood of success.*
 - i. **TIP**: bond requirement → if a temporary injunction is sought on the exam, mention that there should impose a bond requirement on P to reimburse D if the injunction injured him and the P does not succeed.

iii. CONTRAST: TEMPORARY RESTRAINING ORDER WITH TYPICAL TEMPORARY INJUNCTION

1. TRO: issued pending a hearing to determine whether temporary injunction should issue.
2. *Test for obtaining a TRO: identical to that for temporary injunction.*
3. TRO proceeding can be ex parte. Thus
 - a. Notice not required
 - b. Adversarial proceeding not required
4. Even though a TRO can be issued ex parte, if there is an opportunity to give D notice and a chance to appear to contest the injunction, a good faith effort must be made to do so.
5. TROs are limited to 10 days. Must have regular temporary injunction hearing by then.
6. It is very difficult to get any type of temporary injunctive relief that is mandatory in form. This is particularly true for a TRO.

iv. PERMANENT INJUNCTIVE RELIEF

1. The permanent injunction 5-part checklist:
 - a. *Inadequate legal remedy alternative*
 - i. The 3 legal remedy alternatives: replevin, ejectment, money damages
 - ii. *Replevin*
 1. It would be inadequate because:
 - a. The sheriff may not be able to recover it.
 - b. D can file a redelivery bond (and then run off with or destroy chattel in interim).
 - iii. *Ejectment*
 1. It would be inadequate because:
 - a. The sheriff may refuse to act.

iv. *Money damages*

1. They would be inadequate because:

- a. They're too speculative
- b. D is insolvent
- c. Irreparable injury
- d. Avoiding a multiplicity of actions

b. *Property right/protectable interest requirement*

i. **Traditional rule:** equity will grant relief only where a protectable property right is involved.

1. Any legitimate property interest will suffice.

ii. **Modern trend:** a protectable interest will suffice.

c. *Feasibility of enforcement*

i. Negative injunction: no enforcement problem

ii. Mandatory injunction: there may be an enforcement prob based on the difficulty of supervision, or concern with effectively ensuring compliance.

iii. The 3 exam favorite mandatory injunction fact patterns

1. *An act involves application of great taste, skill, or judgment.*

a. Bar exam answer: injunction denied

2. *A series of acts over a period of time.*

a. Bar exam answer: injunction denied unless P's case is otherwise great.

3. *An out-of-state act is required.*

a. Bar exam answer:

i. Resident D: injunction granted.

ii. Non-resident D: injunction denied.

4. **MP:** if a decree can be couched as negative injunction, you should note that in your answer and eliminate the enforcement problem.

d. *Balancing of hardships*

i. P's benefit against D's hardship if relief granted

ii. 4 balancing of hardship rules:

1. There must be a gross disparity between detriment and benefit.

2. Even then, there will be no balancing if D's conduct was willful.

3. If you decide to balance hardships, in whole or in part, consider money damages.

4. Hardship to the public is also taken into account.

iii. **MP:** balancing of hardships defense is almost always a primary discussion item when the tort is nuisance or trespass to land.

e. *Defenses*

i. Unclean hands

1. Available only if P's alleged improper conduct is related to the lawsuit.

ii. Laches

1. It's a running of a period of time defense. Unlike SoL, which involves the mere passage of time, laches is concerned with the effect of the passage of time.

2. Laches time period will never be greater than the SoL.

3. *Three laches rules:*

- a. Clock starts to run when P knows of the injury
- b. Delay cuts off the right to relief when it has been both unreasonable and prejudicial to the D.
- c. If laches applies, consider giving the P some money.

iii. Impossibility

1. Impossible for D to carry out terms of injunction.

iv. Free speech

1. If the tort is defamation of a private publication branch, your best exam answer is injunction denied based on free speech grounds.

2. **Miscellaneous injunctive relief problems**

a. Crimes

- i. Equity will not enforce them.

b. Who will be bound by injunction

- i. Parties
- ii. Employees and agents WITH NOTICE
- iii. Third parties acting WITH NOTICE

c. Erroneous injunction

- i. If there is an erroneous injunction, you still have to obey it.
- ii. So what one must do is have it modified or dissolved.

d. Contempt

i. Civil contempt (to coerce)

1. Money (fine)
2. Imprisonment: D holds the keys to the jailhouse

ii. Criminal contempt (to punish)

1. Money (fine)
2. Imprisonment: cannot get out of prison. Remain for set amount of time.
3. Note: constitutional safeguards apply to criminal contempt cases
4. **TIP:** there is no civil, civil or criminal, contempt for non-compliance with a money judgment (exceptions: alimony, child support).
5. **TIP:** injunctive relief is almost always coupled with damages for injuries incurred in the time period prior to obtaining the injunction.

3. **PERMANENT INJUNCTION MEMORIZER**

a. I put five bucks down

- i. Inadequate legal remedy
- ii. Property right/protectable interest requirement
- iii. Feasibility of enforcement
- iv. Balancing of hardships
- v. Defenses (ALWAYS discuss them → unclean hands and laches are the big ones)

d. **SPECIFIC TORT FACT PATTERN POSSIBILITIES → EXAMSMANSHIP: GENERAL THOUGHTS**

- i. *Two sets of basic bar exam questions*

1. First set
 - a. Has/is P been/being injured?
 - b. Has D derived a benefit?
 - c. Does P want the property returned?
 - d. Does P need an injunction?
 2. Second set
 - a. Do the wrongs relate to the past only? (only damages available)
 - b. Do the wrongs relate to the future only? (no damages available)
 - c. Do the wrongs relate to both the past and the future? (all remedies in play)
- ii. *How to handle compensatory damages measures*
1. Bar exam compensatory damages language
 - a. **P is entitled to compensatory damages to put him in the position he would have been in had this wrong and resulting injury not occurred. On these facts...**

IV. THE CONTRACT REMEDIES

a. The legal remedies

i. Damages

1. Legal remedy

ii. **FIRST TYPE OF DAMAGES: COMPENSATORY**

1. Based on injury to P
2. 4 requirements:
 - a. *Causation*
 - b. *Foreseeability (tested at time of formation)*
 - c. *Certainty*
 - d. *Avoidability (mitigation)*
3. Consequential damages
 - a. Available for related damages foreseeable at the time of formation.
4. **TIP:** bar exam favorite fact pattern: the reputation fact pattern.

iii. **SECOND TYPE OF DAMAGES: NOMINAL**

1. Allowed

iv. **THIRD TYPE OF DAMAGES: PUNITIVE**

1. Not allowed
2. **TIP:** if D's conduct is willful, you should always try to see if you can characterize this as a tort case.
3. The liquidated damages fact pattern
 - a. **2 part test for validity:**
 - i. *Damages are very difficult to ascertain at time of K formation.*
 - ii. *This was a reasonable forecast of what they would be.*
 - b. Results:
 - i. If valid: only liquidated amount available
 - ii. If invalid: only actual damages available
 - c. **TIP:**
 - i. Trick fact pattern: clause provides that one can get either actual damages or liquidated damages → invalid provision.

b. The restitutionary remedies: to prevent unjust enrichment

i. **LEGAL RESTITUTIONARY REMEDIES**

1. Restitutionary damages
2. Replevin

3. Ejectment
- ii. **EQUITABLE RESTITUTIONARY REMEDIES**
 1. Constructive trusts
 2. Equitable liens
- iii. **THE BASIC BAR EXAM RESTITUTIONARY CONTRACT FACT PATTERN**
 1. Contract “fails” after P has rendered performance (partial or complete)
 2. Two ways this occurs on bar exam:
 - a. The K is unenforceable
 - b. The K is breached
 3. Unenforceable Ks
 - a. The K is unenforceable due to, e.g., mistake, lack of capacity, SoF, illegality.
 - b. **The 2 questions:**
 - i. *Can P get restitutionary damages for property/money given to, or services rendered for, D?*
 1. Yes, for the value of the benefit.
 - a. D need not use the benefit, he just needs to be given the benefit.
 - b. If value of the services is greater than the K rate, P can recover & pay for value of benefit rendered, whether used or not.
 2. No, if D is insolvent.
 - ii. *Can P get the property back?*
 1. Yes, if it is unique or D is insolvent.
 4. Breached Ks
 - a. **Bar exam threshold inquiry: who is the P? is he the non-breaching or breaching party?**
 - b. *P as non-breaching party*
 - i. **The 2 questions:**
 1. *Can P get restitutionary damages for property/money given to, or services rendered for, D?*
 - a. Yes, for the value of the benefit.
 - b. Again, value may be greater than the K rate.
 2. *Can P get the property back?*
 - a. Yes, if it is unique or D is insolvent.
 - c. *P as breaching party*
 1. Hypo: contract for land, price = 100k. P, after paying 30% of installment land sales K, defaults. Land is now only worth 80k.
 - ii. Can P get any restitutionary damages?
 1. Traditional view: no recovery b/c P defaulted
 2. Modern view: recovery allowed, but cannot be greater than the K rate and is reduced by any damages suffered by D as a result of the breach.
 - iv. **SPECIFIC PERFORMANCE, EQUITABLE REMEDY**
 1. D is required to perform the K.
 2. **6-part checklist:**
 - a. *K is valid*
 - i. Note: in order to obtain specific performance, P must be able to show the K terms with more certainty and definiteness than would

be the case in an action for money damages at law. Otherwise it will be too difficult to enforce according to the K's terms.

b. K conditions of P must be satisfied

- i. P must be able to show his K conditions have been fulfilled (already performed, ready and able to perform, or excused from performing).
- ii. The 2 favorite bar exam conditions fact patterns (both involve land sale Ks)

1. Deficiencies fact pattern (seller cannot deliver the agreed upon consideration)

a. Seller as P

- i. Can enforce the K if the defect is minor
- ii. Cannot enforce K if the defect is major unless the seller can cure the defect before or at closing (won't happen on the bar)

b. Buyer as P

- i. Can enforce the K even if defect is major
- ii. Cannot enforce the K if defect is VERY major. The ct will simply not act in this case.

c. Bar exam imperative: if you decide that specific performance should be granted under the rules above even though a defect still remains, you MUST include a sentence noting that the ct will lower the purchase price to take into account this defect in consideration.

d. Bar exam buzz word: *abatement* in the purchase price.

2. Time of the essence clause fact pattern (buyer does not meet the K condition of timely performance)

- a. There will be a land sale K with an express time of the essence clause.
- b. This clause will contain a forfeiture provision (forfeiture of all performance rendered to date if performance is not timely).
- c. There will have been partial performance which is now potentially subject to forfeiture.
- d. Buyer will have made a late payment.
 - i. This triggers the time of the essence clause and its forfeiture provision. Seller wants to keep both the land and any performance rendered to date.
- e. Buyer will bring a lawsuit for specific performance.
- f. **Note: equitable maxim → EQUITY ABHORS FORFEITURES.**
- g. Factors cts can look at to avoid the harsh result of a forfeiture:
 - i. Loss to seller is small
 - ii. Tardiness is de minimis

- iii. Waiver (seller has accepted late payment in past)
- iv. Buyer would suffer undue hardship
- h. The above fact pattern relates to partially performed Ks. If the K is wholly executory (buyer has done nothing yet), the time of essence clause will be strictly enforced.

c. Inadequate legal remedy alternative

i. Money damages could be inadequate because:

- 1. Damages are speculative
- 2. D is insolvent
- 3. Multiple suits are necessary
- 4. The thing bargained for is unique

ii. The uniqueness problem

- 1. If property is unique, then even if P received money damages, he could not simply go out and buy it.
- 2. Determine whether K was for real or personal property

a. Real property

- i. Land is unique
- ii. **TIP:** Bar examiners try to trick you by making every parcel of land look identical.
- iii. The special seller's rule: sellers can get specific performance even though all they have coming in is money.

b. Personal property

- i. Personal property is not unique, but see exceptions.
- ii. One of a kind or very rare
- iii. Personal significance to buyer
- iv. Circumstances make chattel unique

iii. Bar exam favorite issue: liquidated damages clauses

- 1. **GR:** liquidated damages clause does NOT make money damages adequate. Specific performance is still available.
- 2. **Exception:** where the clause provides that this is to be the only remedy.

d. Mutuality of remedy (only going to be an issue when dealing with party that lacks contractual capacity)

- i. First, determine and discuss that you have a mutuality fact pattern → P should not be able to enforce this K against me because I could not enforce it against him.
- ii. Second, set out the rule → ct will reject the mutuality argument if it feels secure that the P will perform.
- iii. Third, grant specific performance → in your answer, have the decree provide for simultaneous performance.

e. Feasibility of enforcement

i. Personal services K enforceability

- 1. **Rule:** they are NOT specifically enforceable.
- 2. **Reasons**
 - a. Enforcement problem
 - b. Involuntary servitude

f. *Defenses*

i. **Equitable defenses**

1. Unclean hands
2. Laches
3. Unconscionability
 - a. More than simply a bad deal. There must also be some small factor facts that brought it about.
 - b. Tested at the time of K formation.

ii. **Contract defenses**

1. Mistake
2. Misrepresentation
3. SoF

iii. **Bar exam favorite: SoF part performance doctrine problem**

1. How do you spot the problem?
 - a. The contract must involve land. It could be either a land sale K or one to make a testamentary disposition of land.
 - b. This contract will have been an oral K.
2. Once you have spotted and set out the problem, discuss the rule:
 - a. *If one has received (i) invaluable part performance, (ii) in reliance on the K, this will take the case out of the SoF and specific performance will be granted.*
 - b. What is valuable part performance? Any 2 of the top 3 taken together:
 - i. Payment in whole or part
 - ii. Possession
 - iii. Valuable improvements
 - iv. Valuable services (modern trend)

Specific performance: 2 particular problem areas

a. **Equitable conversion**

Where a valid land sale K is entered into, an equitable conversion occurs upon execution.

- ii. Result: the property interests of the buyer and seller are regarded as switched. Thus:
 1. The buyer will now be regarded as having the real property interest (the specifically enforceable right to the land); and
 2. The seller will now be regarded as having the personal property interest (specifically enforceable right to the money).

iii. **TIP**: timing of bar exam issues → they occur between K execution and the closing.

iv. **The 2 basic bar exam fact patterns:**

1. *Death (who gets what, assuming equitable conversion)*
 - a. Doofus enters into a specifically enforceable K to sell Blackacre. Before the closing, he dies. His will gives his real property to Bowater, his personal property to Lulu. Who gets what?
 - i. Bowater: real property.

- ii. Lulu: personal property (purchase price).
- 2. *Damage/destruction* → risk of loss, assuming equitable conversion
 - a. Majority rule: the risk is on the buyer.
 - b. Modern trend: the risk is on the seller.

b. Covenants not to compete enforceability

- i. The covenant must protect a legitimate interest of the person in whose favor it runs. For this to be the case, the services must be unique.
- ii. The covenant must be reasonable in both its geographical and durational scope.

4. SPECIFIC PERFORMANCE MEMORIZER

a. *Cha Cha is my favorite dance.*

- i. Contract validity
- ii. Conditions of P satisfied
- iii. Inadequate legal remedies
- iv. Mutuality of remedy
- v. Feasibility of enforcement
- vi. Defenses

v. RESCISSION, EQUITABLE REMEDY

- 1. The original P is considered voidable and rescinded.
- 2. **Rescission requires a two-step analysis:**

a. *Determine if there are grounds for rescission.*

- i. General grounds (all relate to formation)

1. Mistake

Mutual mistake

- i. Material fact: rescission granted.
- ii. Collateral fact (going to quality, desirability, or fitness of property for a particular purpose): rescission denied.

Unilateral mistake

- i. Rescission denied
- ii. Exceptions: the non-mistaken party knows or should know of the mistake; the mistaken party would suffer undue hardship if there is no rescission (modern trend exception).

2. Misrepresentation

- a. Rescission: granted
- b. In order to get rescission based on misrepresentation grounds, P must show that they have *actually relied* upon the misrepresentation.

- 3. Coercion
- 4. Undue influence
- 5. Lack of capacity
- 6. Failure of consideration
- 7. Illegality

b. *Determine if there are valid defenses.*

- i. Unclean hands
- ii. Laches

- iii. Negligence of P is NOT a good defense.
- 3. Two specific items
 - a. *Election of remedies*
 - i. P sues for damages first: rescission is NOT allowed.
 - 1. This is regarded as an *affirmance* of the K.
 - ii. P sues for rescission first: damages ARE allowed.
 - 1. P can even sue for both at the same time, but must elect the preferred remedy BEFORE judgment.
 - b. *Availability of restitution*
 - i. If a P who is entitled to rescission has previously rendered performance on the K, he can get compensated for it or get the property back via restitution.
- 4. **RESCISSION MEMORIZER**
 - a. **Good dog.**
 - i. Grounds
 - ii. Defenses

vi. **REFORMATION, EQUITABLE REMEDY**

- 1. Changes written agreement to conform with the parties' original understanding.
- 2. **3-step analysis:**
 - a. *Determine if there is a valid K.*
 - b. *Determine if there are grounds for reformation.*
 - i. Mutual mistake → reformation granted.
 - ii. Unilateral mistake → reformation denied.
 - 1. *Exception:* where the non-mistaken party knows of the mistake (contrast with "knew or should know" for rescission).
 - iii. Misrepresentation → reformation granted.
 - 1. This is available for both innocent and intentional misrepresentations. Rewriting reflects expressed intent of the parties.
 - c. *Determine if there are valid defenses.*
 - i. Unclean hands
 - ii. Laches
 - iii. Negligence of P, SoF, and Parole Evidence Rule are NOT valid defenses.
 - iv. **Bar exam note:** reformation is NOT allowed where it would adversely affect the rights of a subsequent BFP.

3. **REFORMATION MEMORIZER**

- a. **Very good dog.**
 - i. Valid K
 - ii. Grounds
 - iii. Defenses

c. **SPECIFIC CONTRACT FACT PATTERN POSSIBILITIES**

- i. Has P been injured?
- ii. Has D derived a benefit?
- iii. Does P want the property returned?
- iv. Does P want the K performed?
- v. Does P want the K ripped up (rescission)?

vi. Does P want the K rewritten (reformation)?

d. HOW TO HANDLE COMPENSATORY DAMAGES MEASURES

i. Bar exam compensatory damages language:

1. P is entitled to compensatory damages to put him in the position he would have been in had this wrong and resulting injury not occurred. On these facts...

ii. Threshold inquiry fact analysis for compensatory damages:

1. Which party to the K committed the breach and how did they do it?

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