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**Essay Attack Templates**

**Contracts**

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# BarEssays.com Essay Attack Template

## Valid Contract

### <sup>1</sup>Valid Contract

A valid contract requires (1) <sup>2</sup>**offer**, (2) **acceptance**, (3) **consideration**, and (4) **no formation defenses**.

### Preliminary Negotiation

Preliminary negotiation<sup>3</sup> does not constitute an offer.

Here,

Thus,

### Advertisement

An advertisement is an **invitation to receive offers**, unless (1) associated with a stated **reward**, or (2) the advertisement specifies **who** may accept, **how** acceptance is made, and is **not negotiable**.

<sup>4</sup>Here,

<sup>5</sup>Thus,

### <sup>6</sup>Offer

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<sup>1</sup> Use legal issues as headings to save time by dispensing with issue statements.

<sup>2</sup> Offer + Acceptance = Mutual Assent

<sup>3</sup> Preliminary negotiation means bargaining.

<sup>4</sup> Use “Here” or “In this case” to signal analysis. Do not put the conclusion at the beginning; redundant since need a conclusion at the end. Analysis should contain keywords from the rules to ensure each part of the rules is proven with the facts. Match only enough facts to prove the rules. Do not use facts meant for other issues or elements.

<sup>5</sup> Use “Thus” or “Therefore” to signal the conclusion, not in the analysis. Conclusion should not have new arguments. Conclusion should reflect the issue or element (heading), and be 1-2 sentences at most on whether the facts prove the issue or element. Have a conclusion for each element and issue.

<sup>6</sup>Analyze if each event constitutes an offer. If the question tests Offer, there will be multiple events with the first few events not an offer because one or more offer elements are missing. Organize the answer by dates in chronological order. Each event should have a heading. If one event, question unlikely focused on testing Offer; use one paragraph to show Offer elements met.

Do not conclude there is no Offer, and then discuss Acceptance. Cannot have Acceptance until find the Offer.

An offer requires (1) an express **present intent to be legally bound** to a contract, (2) **certain and definite terms**, and (3) **communication to an identifiable offeree**. [<sup>7</sup>Under common law, essential terms (subject, price, quantity) must be covered.]

[Event 1]

<sup>8</sup>Here,  
Thus,

[Event 2]

Here,  
Thus,

### Termination

#### Lapse of Time

<sup>9</sup>[If the offer specifies a termination date, the offer terminates at midnight on that date.] [If the offer terminates after a specified number of days, the time runs from the time the offer is received.] [If the offer specifies no time, the time limit is what a <sup>10</sup>reasonable offeree assumes.]

Here,  
Thus,

#### Death

An offer terminates upon the offeror's death, even when the offeree does not know of the death, except for an offer that is an **option**, which is **irrevocable** for the period consideration was paid.

Here,  
Thus,

### Revocation

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<sup>7</sup>Add this sentence if common law. For UCC, the only required term is quantity.

<sup>9</sup> Tailor the rules to fit the facts. Example rules for different fact scenarios. Do not give rules will not use in the analysis.

<sup>10</sup> Reasonable time means time needed to receive, consider, and reply to offer under the circumstances. Example: In a face-to-face conversation, reasonable time ends when the parties part.

An offer terminates if (1) an offeror <sup>11</sup>**directly communicates** revocation to the offeree, or (2) the offeree acquires reliable information that the offeror has taken definite **action inconsistent** with the offer. A **revocation is effective when received** by the offeree.

Here,

Thus,

### <sup>12</sup>UCC Firm Offer

Under the UCC, an offer to buy or sell goods is irrevocable if (1) **offeror is a merchant**, (2) there are **assurances the offer is to remain open**, and (3) the assurances are contained in an <sup>13</sup>**authenticated writing** from the offeror. <sup>14</sup>**Irrevocability** may not exceed **three months**.

Here,

Thus,

### <sup>15</sup>Bilateral Contract

In a bilateral contract, **one party's promise is exchanged for the other party's promise**. The exchange of promises renders both enforceable.

Here,

Thus,

### Unilateral Contract

In a unilateral contract, the **offeror promises** to perform in return for the **offeree's act**. The offeree's promise to perform is insufficient to constitute acceptance; the offeree must perform the act to accept the offer.

Here,

Thus,

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<sup>11</sup> Offer retraction.

<sup>12</sup> If UCC contract and offeror is merchant, do UCC §2-205 Firm Offer below Offer.

<sup>13</sup> Authenticated means signed. For merchants, writing can be met with email, fax, electronic signature.

<sup>14</sup> No consideration by offeree needed to keep offer open.

<sup>15</sup> Do not do Bilateral v. Unilateral Contract for a UCC contract because UCC contract is bilateral so no controversy on contract type. For a common law contract, after finding the Offer, determine if the offer is for a bilateral or unilateral contract before Acceptance because the method to accept (promise or action) depends on the contract type. Choose bilateral or unilateral; do not do both.

## Unilateral Contract – Irrevocable Offer

Starting performance makes an offer for a unilateral contract irrevocable for a reasonable time to allow for complete performance.

Here,

Thus,

### <sup>16</sup>Counteroffer

<sup>17</sup>Common Law: Generally, an **acceptance** is effective upon <sup>18</sup>**posting**. At common law, acceptance must **mirror** the offer terms, neither omitting nor adding terms. **Modifications** to an offer act as a **rejection** of the offer and create a new offer (counteroffer).

UCC: Under UCC §2-207, **additional or different terms** included in the acceptance of an offer generally **do not constitute a rejection unless** (1) **offer expressly limits** acceptance to the offer terms, (2) when between **non-merchants or a merchant and a non-merchant**, the **acceptance** is made **expressly conditional on the offeror's consent** to the additional or different terms, where these terms are a proposal for addition to the contract that is to be separately accepted or rejected, or (3) when **both parties are merchants**, the additional or different terms are **part of the contract unless** the terms **materially alter** the agreement **or the offeror objects within a reasonable time**.

Here,

Thus,

### <sup>19</sup>Revival

The offeror may revive a terminated offer.

Here,

Thus,

### Rejection

An offeree may reject an offer expressly. A rejection becomes effective when **received**.

Here,

---

<sup>16</sup> Counteroffer usually tested when common law contract.

<sup>17</sup> Once determine the governing law, apply the same law (Common Law or UCC), not both, throughout the answer.

<sup>18</sup> Not receipt.

<sup>19</sup> If a counteroffer terminates an offer, the offeror can revive the original offer.

Thus,

### Acceptance

Acceptance requires (1) **unequivocal** acceptance terms, (2) an offeree with **power to accept**, and (3) **communication** of acceptance.

<sup>20</sup>[Event 1]

Here,

Thus,

[Event 2]

Here,

Thus,

<sup>21</sup>Silence

Silence does not operate as an acceptance of an offer, unless (1) the offeree has reason to believe the offer could be accepted by silence, was silent, and **intended to accept** the offer **by silence**, or (2) due to **previous dealings**, it is reasonable to believe the offeree must notify the offeror if the offeree intends not to accept.

Here,

Thus,

### Action – Bilateral Contract

An offer requiring a **promise to accept** can be accepted with (1) **return promise** or (2) **act completion**. Starting performance is enough to accept an offer for a bilateral contract.

Here,

Thus,

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<sup>20</sup> Promise is the default acceptance. If there are multiple events, make headings for each event using the dates or facts. Analyze if each event constitutes acceptance. If one event, use one paragraph to analyze Acceptance. If the question tests Acceptance, there will be multiple events with the first few events not an acceptance because one or more elements are missing. Find the Acceptance before do Consideration.

<sup>21</sup> Silence triggered when offeror does something before the offeree communicates acceptance to offeror.

### Action – Unilateral Contract

An offer requiring **action to accept** can be accepted with offeree (1) **aware of the offer**, and (2) **act completion**.

Here,

Thus,

#### Mailbox Rule

Under the mailbox rule, acceptance by mail or similar means, properly addressed, stamped, and sent, is effective at **dispatch**. The <sup>22</sup>**mailbox rule applies only to acceptance**, and does not apply to other contract events.

Here,

Thus,

#### Consideration

<sup>23</sup>Consideration involves (1) a **bargain for exchange** (2) of **legal value**.

<sup>24</sup>Here, [insert dollar amount or value of good or service], something of **legal value**, motivated [Party1] to **exchange** to [Party2] [insert good or service Party1 gives to Party2], a **detriment** incurred by [Party1] for [Party2]'s **benefit**.

Thus,

#### <sup>25</sup>Bargain for Exchange

Here,

Thus,

#### Illusory Promise

An illusory promise, a promise to perform that leaves performance to the promising party's discretion, is not consideration.

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<sup>22</sup> Because mailbox rule applies only to acceptance, apply only to bilateral contracts.

<sup>23</sup> Show the benefit and detriment exchanged. When analyzing remedies (i.e. expectation damages, feasible enforcement for specific performance), refer to each bargain for exchange item.

<sup>24</sup> If little controversy on Consideration, use one paragraph to analyze. Match facts to each keyword from the rules.

<sup>25</sup> If many facts on Consideration (i.e. gift, bonus, working for free without reliance on getting something in return), use a different heading to prove each Bargain for Exchange and Legal Value with the facts.

Here,

Thus,

### Past Consideration

**Traditionally**, past performance before a promise is not bargained for, or done in reliance on the promise. **Modernly**, some courts enforce a promise to prevent unjust enrichment when the **plaintiff expected compensation**, and the **defendant** <sup>26</sup>**benefitted** from the plaintiff's actions.

Here,

Thus,

### Legal Value

Here,

Thus,

### Preexisting Legal Duty

Performing or promising to perform an existing legal duty is insufficient consideration.

Here,

Thus,

<sup>27</sup>In conclusion,

### <sup>28</sup>Output [Requirements] Contract

[In a **requirements contract**, the **buyer** agrees to **buy all it requires** of a product **from the seller**.] [In an **output contract**, the **seller** agrees to **sell all it manufactures** of a product **to the buyer**.] Consideration is from the promisor suffering a legal detriment.

Here,

Thus,

### <sup>29</sup>Promissory Estoppel

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<sup>26</sup> Example: Unrequested act during an emergency.

<sup>27</sup> Conclude on Consideration. After finish each element, conclude on the issue or answer the interrogatory.

<sup>28</sup> If no consideration, do consideration substitutes. Output or Requirements Contract triggered by facts involving goods and merchants. If the facts trigger only Output or only Requirements, do only that issue and provide that rule.

Promissory estoppel acts as consideration when a party's promise (1) **foreseeably induces** the other party's **reliance**, (2) the **other party relies** on the promise, and (3) **injustice** can be **avoided only by enforcing the promise**.

Here,

Thus,

### <sup>30</sup>No Formation Defenses

#### Undue Influence

Undue influence occurs when one party is dominant and the other party is dependent, due to lack of expertise, experience, or diminished mental capacity. Generally, the dominant party will be held to a higher fairness and disclosure standard than in a contract between arms-length parties.

Here,

Thus,

#### Duress

Duress means any wrongful act or threat that deprives a party of meaningful choice. When a party's agreement results from **physical duress**, the contract is **void**. When the duress is a **threat**, the contract is **voidable**.

Here,

Thus,

#### Unilateral Mistake

A unilateral mistake by one party is insufficient to make a contract voidable, unless the **non-mistaken party** (1) **knew or had reason to know** of the mistake, or (2) had a **duty to disclose** the fact about which the other party was mistaken.

Here,

Thus,

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<sup>29</sup> Promissory Estoppel, Quasi-contract, Restitution are similar concepts that occur at different contract stages. Promissory Estoppel is a consideration substitute. If there is no consideration, do promissory estoppel. Quasi-contract is a remedy for a failed contract, no contract, divisible contract (i.e. formation element not met). Order Quasi-contract after formation defenses. Restitution is a remedy for breach. Order Restitution after breach.

<sup>30</sup> U DUM MUSIC: **U**ndue Influence **D**uress **U**nilateral Mistake **M**utual Mistake **M**isrepresentation  
**U**nconscionability **S**tatute of Frauds **I**llegality **C**apacity

### <sup>31</sup>Mutual Mistake

Mutual mistake occurs when **both parties are mistaken** as to an essential contract element. There must be a substantial difference between the contemplated and actual deal, with no intent by the parties to take a risk on the contract element. The contract is generally **voidable by the party adversely affected** by the mistake.

Here,

Thus,

### Misrepresentation

If a party (1) **induces** another party to enter into a contract (2) asserting **fraudulent misrepresentation** (known untrue information), the contract is (3) **voidable** by the party who **justifiably relies** on the misrepresentation.

Here,

Thus,

### Unconscionability

A contract may be voidable where the provisions are **one-sided** as to be unconscionable at the time the contract is made. The defense is applied where one party has unequal and superior bargaining power over the other party.

<sup>32</sup>Here,

Thus,

### <sup>33</sup>Statute of Frauds

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<sup>31</sup> Do Mutual Mistake or Unilateral Mistake, whichever applies, not both.

<sup>32</sup> Evaluate whether contract provisions in facts are one-sided.

<sup>33</sup> Tailor the rules to the facts. These are example rules statements for different fact scenarios. 4 steps:

1. Does agreement fall within the Statute of Frauds (Marriage, Suretyship, Land, One year, UCC)? Give the category in the first part of the rules.
2. Is the Statute of Frauds satisfied? List the items the writing needs to include.
3. Who is sued? Examine whether the party charged signed. Look for facts where the party charged signs a writing containing the items (i.e. refund check with memo on subject matter).
4. Enforcement exceptions?

Scenario 1: [Under the UCC, to be enforceable, agreements for the **sale of goods for \$500 or more** must be in writing.] [The Statute of Frauds requires service contracts that **cannot be performed within** <sup>34</sup>**one year** to be in writing and signed by the party to be charged, unless an <sup>35</sup>exception applies.] [The Statute of Frauds requires contracts involving a **land** interest to be in writing and signed by the party to be charged, unless an exception applies.]

Scenario 2: [Under the UCC, to be enforceable, agreements for the sale of goods for \$500 or more must be in writing] containing <sup>36</sup>(1) **identity** of parties, (2) contract's **subject matter**, (3) **terms and conditions**, (4) **consideration** recital, and (5) **signature** of the party to be charged, **unless** both parties are **merchants**. The writing need not be an actual contract, or the terms be contained on one piece of paper. A series of correspondence between the parties may suffice.

Here,

Thus,

#### Part Payment

For a goods sale, when part of the purchase price has been paid, the contract is enforced and outside the Statute of Frauds to the extent of the purchase.

Here,

Thus,

#### Part Performance

A court may enforce a contract where there has been <sup>37</sup>part performance (acts by either party subsequent to contract formation) evidencing contract existence.

Here,

Thus,

#### Illegality

If the consideration or performance under a contract is illegal, the contract is illegal and **unenforceable**. If a contract contemplates illegal conduct, it is **void**. If a contract becomes illegal after formation, performance is **discharged**.

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<sup>34</sup> Lifetime contract not within Statute of Frauds since person can die any time so possible to complete within 1 year.

<sup>35</sup> When there is a rule – exceptions pairing, do not give the exceptions with the rule. Do the analysis on the rule. If the rule is not met, do the exceptions the facts trigger. Example: If Statute of Frauds met, no need to do exceptions. If not met, and facts trigger part payment, do only rules and analysis on part payment

<sup>36</sup> If there are facts on what the writing contains, match the facts to each item: (1) identity of parties, (2) contract's subject matter, etc. Tailor rules to the facts; this example is for UCC.

<sup>37</sup> Full or partial payment, not accompanied by possession, insufficient for part performance.

Here,

Thus,

### Capacity

Parties to a contract must have legal capacity to be held to contractual duties.

### Mental

If a party with mental illness or defect is **adjudicated mentally incompetent**, contracts made by the individual are **void**. If the party is **not adjudicated** mentally incompetent, contracts are **voidable** and may be **disaffirmed if** the person does **not understand the nature and consequences of the transaction, and the other party has reason to know** of this fact.

Here,

Thus,

### Minor

Traditionally, a <sup>38</sup> minor lacked capacity to enter into a contract. Modernly, a minor may enter into a contract, but the contract is voidable at the minor's option.

Here,

Thus,

### Quasi-contract

A court implies a quasi-contract when there is a **failed contract, no contract, or divisible contract** by implying a promise that requires the defendant to make restitution to the plaintiff. Elements: (1) plaintiff confers defendant a measureable <sup>39</sup> **benefit without gratuitous intent**, (2) **defendant knows or has reason to know of plaintiff's expectation** because defendant had **opportunity to decline the benefit**, but instead knowingly accepted it, and (3) defendant **unjustly enriched** if defendant retains the benefit without cost.

Here,

Thus,

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<sup>38</sup> Minor means person under age 18. Contract for necessities is voidable at minor's option, but other party may recover the reasonable value of goods and services in quasi-contract.

<sup>39</sup> Reasonably expected compensation.

## BarEssays.com Essay Attack Template Breach of Contract

### Breach

A contract breach occurs when a party fails to perform once (1) **conditions precedent** are **met or excused**, (2) **time to perform arrives**, and (3) **performance is not discharged**.

### Conditions Precedent

A condition precedent occurs before an absolute duty of performance arises.

Here,

Thus,

### Assurances of Performance

<sup>1</sup>Common Law: A non-breaching party may request adequate assurances of performance, and treat the failure to assure within a **reasonable time** as anticipatory repudiation. The requesting party may suspend performance until assurances are given.

UCC: Under the UCC, a request for adequate assurances of performance must be in **writing**. A non-breaching party may request adequate assurances of performance, and treat the failure to assure within **30 days** as anticipatory repudiation. The requesting party may suspend performance until assurances are given.

Here,

Thus,

### Anticipatory Repudiation

Anticipatory repudiation occurs where a promisor, **prior to the time to perform arrives**, **unequivocally indicates** s/he **will not perform** when the time occurs. Anticipatory repudiation gives the non-repudiating party **four** options: (1) treat the contract as **totally repudiated** and **sue immediately**, (2) **suspend own performance** and **wait until performance is due to sue**, (3) treat the repudiation as an offer to **rescind**, and the contract **discharged**, or (4) **ignore** the repudiation and **urge performance**.

Here,

Thus,

---

<sup>1</sup> Once determine the governing law, apply the same law (Common Law or UCC), not both, throughout the answer.

## <sup>2</sup>Substantial Performance

Where a party almost completely performs the duties, but breaches in a minor way, substantial performance avoids forfeiture of a return performance.

Here,

Thus,

### Time to Perform Arrives

Failure to perform by the time in the contract is generally not a material breach if performance is rendered within a reasonable time. However, if the contract makes timely performance essential, or expressly provides **time is of the essence**, failure to perform on time is a **material breach**.

Here,

Thus,

### Performance Discharged

#### Assignment

Contractual rights may be assigned so long as (1) **assignee has notice**, (2) **contract does not specifically say all attempted assignments will be void**, and (3) assignment does not materially **increase the obligor's duty or**, or materially **reduce the obligor's chance of obtaining performance**.

Here,

Thus,

### <sup>3</sup>Mutual Rescission

Mutual rescission may discharge executory contract duties.

Here,

Thus,

### Modification

Modification may partially discharge a duty if there is mutual assent to modifying the agreement.

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<sup>2</sup> No Substantial Performance for UCC contracts.

<sup>3</sup> Unilateral rescission can discharge performance, but order unilateral rescission as a remedy.

Common Law: At common law, contracts may not be modified without **consideration**, but courts may find consideration unnecessary where modification is a correction or the parties limit their rights to enforce the contract. At common law, a provision requiring **written modification** even though the modification is not within the Statute of Frauds will **not** be **enforceable**.

UCC: Under the UCC, contracts may be modified **without consideration**. Under the UCC, the **Statute of Frauds must be satisfied** if the contract as modified is within its provisions.

Here,

Thus,

#### Waiver

A party can waive a condition. A condition may be reinstated if (1) waiving party communicates a **retraction** before the condition is due, and (2) other party has **not suffered detrimental reliance**.

Here,

Thus,

#### Impossibility

Impossibility discharges performance **objectively** when an unforeseen circumstance makes **no one able to perform** the contract.

Here,

Thus,

#### Impracticability

Impracticability discharges performance **subjectively** when an unforeseen circumstance makes it **extremely difficult or expensive to perform**.

Here,

Thus,

#### Frustration of Purpose

Frustration of purpose discharges performance when an unforeseen circumstance **completely or almost completely destroys the contract purpose** understood by both parties.

Here,

Thus,

### Disclaimer

#### Express

Disclaimers that conflict with express warranties are ignored.

Here,

Thus,

#### Implied Warranty of Merchantability

An implied warranty of merchantability can be disclaimed by “as is,” “without faults,” or similar language that makes plain there is no implied warranty. The disclaimer must be **conspicuous if in writing**, and use the term “**merchantability**” **if oral**.

Here,

Thus,

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

An implied warranty of fitness for a particular purpose can be disclaimed by general language, including “as is.” The disclaimer **must be in writing and conspicuous**.

Here,

Thus,

### Accord and Satisfaction

Under an **accord** agreement, one party **accepts different performance** than what was promised in the existing contract from the other party. Generally, a valid accord requires **consideration**. **Satisfaction** (performance of the accord) **discharges the existing contract and the accord**.

Here,

Thus,

#### <sup>4</sup>Minor vs. Material Breach

Whether a breach is minor or material depends on whether the non-breaching party obtains the **substantial benefit of the bargain**. If the breach is **material**, the non-breaching party may (1) **treat the contract as ended** (counter-performance discharged), and (2) **immediately sue for breach**.

Here,

Thus,

#### <sup>5</sup>Perfect Tender Rule

The **UCC requires perfect tender**. If the goods or the tender of delivery fail to conform to the contract, the buyer may (1) <sup>6</sup>**reject the whole**, (2) **accept the whole**, or (3) **accept any commercial units and reject the rest**.

Here,

Thus,

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<sup>4</sup> Determine breach before analyzing if the breach is minor or material. Minor v. Material Breach for common law, not UCC contracts.

<sup>5</sup> . UCC § 2-601. Buyer's Rights on Improper Delivery. For UCC, discuss Perfect Tender Rule, not Minor v. Material Breach. Substantial performance does not suffice. The seller transfers ownership of the goods to the buyer and tenders goods in conformity with warranty obligations.

<sup>6</sup> Buyer has right to inspect goods before deciding whether to accept or reject.

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# BarEssays.com Essay Attack Template

## Contract Remedies

### <sup>1</sup>Legal

#### <sup>2</sup>Compensatory Damages

<sup>3</sup>Compensatory damages are split into two categories: (1) **expectation** and (2) **consequential**. Damages must be <sup>4</sup>**foreseeable, causal, and certain**.

#### Expectation

<sup>5</sup>Common Law: <sup>6</sup>Expectation damages are the damages sufficient to buy **substitute performance (benefit of the bargain)**.

UCC: **Cover** is the **market price less the contract price**.

Here, the expectation damages were [<sup>7</sup>\$ \_\_\_\_] because [market price – contract price/damages to buy substitute performance]. The damages were <sup>8</sup>**causal** because they resulted from [explain defendant's breach/anticipatory repudiation]. The damages were [**certain/uncertain**] because [\_\_\_\_]. The damages were [**foreseeable/not foreseeable**] because [\_\_\_\_]

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<sup>1</sup> Split the remedies into Legal and Equitable. For each remedy, know the defenses. In Contracts, punitive damages do not apply, and worth few or no points to mention they do not apply. Nominal damages worth few or no points because cannot have breach of contract action without damages.

<sup>2</sup> Usually it is not possible to claim both reliance and compensatory damages. 2 steps:

1. See if there are Compensatory Damages.
2. If no, do Reliance Damages. If yes, do not do Reliance Damages.

<sup>3</sup> 2 steps:

1. Damages Type: Expectation, Consequential. Calculate damages amount if numbers in facts.
2. Damages Limits: Causal, Certain, Foreseeable, Unavoidable. Do Unavoidable under Mitigation heading.

<sup>4</sup> FCC: **Foreseeable Causal Certain**

<sup>5</sup> Once determine the governing law, apply the same law (Common Law or UCC), not both, throughout the answer.

<sup>6</sup> Use the facts on the bargain for exchange in the analysis. If the bargain for exchange has several items, analyze each item with a heading. Example: Written contract for designer to install landscaping in exchange for \$30,000 and publicity. Use separate headings for \$15,000 and publicity.

<sup>7</sup> If the facts give a dollar amount as the bargain for exchange, insert the amount. If no dollar amount, and need to do a calculation, explain the calculation and insert the resulting dollar amount as the expectation damages. Example: M engages L for \$5,500. L repudiates. M hires D at \$7,500, which includes a \$2,000 premium rush order charge. Here, the expectation damages were \$0 because the benefit of the bargain was \$5,500, and D provided the services at the same price, \$5,500 (\$7,500 - \$2,000), as the contract price.

<sup>8</sup> Integrate the foreseeable, causal, certain analysis rather than use separate heading. Usually the damages are foreseeable and certain because the expectation damages is in the contract terms.

Thus, expectation damages were [\$\_\_\_\_\_].

### Consequential

Consequential damages are awarded if a reasonable person **foresees** at the time of contract formation such damages will result from breach.

[Item #1]

Here, <sup>9</sup>[Non-breaching Party] suffered [\_\_\_\_\_]. [Breaching Party]'s [breach/anticipatory repudiation] **caused** the damages. The damages were [**certain/not certain**] because [\_\_\_\_\_]. The damages were [**foreseeable/not foreseeable**] to [Breaching Party] at the time of contract formation because [\_\_\_\_\_].

[Item #2]

Here, [Non-breaching Party] suffered [\_\_\_\_\_]. [Breaching Party]'s [breach/anticipatory repudiation] **caused** the damages. The damages were [**certain/not certain**] because [\_\_\_\_\_]. The damages were [**foreseeable/not foreseeable**] to [Breaching Party] at the time of contract formation because [\_\_\_\_\_].

Thus, [Non-breaching Party] [could/could not] recover consequential damages.

### <sup>10</sup>Mitigation

A party to a contract has the obligation to <sup>11</sup>use **reasonable efforts to avoid damages**. Failure to mitigate damages **defeats** a claim for **consequential, not expectation, damages**.

Here,

Thus,

### <sup>12</sup>Reliance Damages

An alternative to compensatory damages is reliance damages, where a plaintiff may be awarded **monetary damages for expenses made in preparing to perform and performing** a contract

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<sup>9</sup> Explain the losses resulting from the breach suffered by the non-breaching party. Sometimes the facts indicate more than one loss item. Example: lost profits, reputation harm. Analyze each loss with a heading. Analyze if a breach or anticipatory repudiation caused the damages. The damages are certain and foreseeable if the breaching party knew of the damages at contract formation.

<sup>10</sup> Discuss if the damages are unavoidable in Mitigation.

<sup>11</sup> Take steps that do not involve undue risk, expense, or inconvenience.

<sup>12</sup> Reliance Damages usually tested with Promissory Estoppel or Rescission.

based on a <sup>13</sup>reliance interest. Generally reliance damages can only be recovered where a plaintiff <sup>14</sup>cannot prove a profit will be made on the contract, or the contract will produce a loss. Reliance damages cannot exceed the contract price.

Here,

Thus,

#### Incidental Damages

Incidental damages are expenses a non-breaching party incurs as a result of a breaching party's breach.

Here,

Thus,

#### Liquidated Damages

A liquidated damages provision will be enforced, and not construed as a penalty, if at the time a contract is entered into the (1) **damages amount is difficult to estimate** and (2) **amount stipulated is reasonable** in relation to the (a) **actual damages suffered** or (b) **damages anticipated**. Although a contract may fix the damages amount recoverable in the event of a breach, because a party may **not** be **penalized** for breach, penalty clauses are unenforceable.

Here,

Thus,

#### Restitution

If a non-breaching party transfers a **benefit** to a breaching party, while attempting to perform a contract, the non-breaching party is entitled to restitution for the benefit transferred.

Here,

Thus,

#### Defenses

##### Statute of Limitations

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<sup>13</sup> Puts plaintiff in the position s/he was in before the contract was entered or the promise made. Defendant does not need to benefit from plaintiff's expenses.

<sup>14</sup> Reliance damages triggered when damages speculative or compensatory damages unavailable.

The statute of limitations limits the **time** a plaintiff may bring a claim to encourage resolving claims within a reasonable time, and prevent stale claims from arising after evidence has been lost or facts become unclear through time passage, defective memory, death, or witness disappearance.

Here,

Thus,

### Equitable

#### <sup>15</sup>Specific Performance

See Specific Performance Template.

#### Temporary Restraining Order, Preliminary Injunction, Permanent Injunction

See Temporary Restraining Order, Preliminary Injunction, Permanent Injunction Templates.

### Reformation

When a writing that evidences an agreement fails to express the parties' **intent** because of [insert ground (**mistake/misrepresentation**)] as to the contents of the writing, the court may reform the writing to express the intent.

Here,

Thus,

#### [<sup>16</sup>Grounds - Mutual Mistake

Mutual mistake occurs when **both parties are mistaken** as to an essential contract element. There must be a substantial difference between the contemplated and actual deal, with no intent by the parties to take a risk on the contract element. The contract is generally **voidable by the party adversely affected** by the mistake.

Here,

Thus,]

### Defenses

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<sup>15</sup> Order the remedies based on number of elements. The more elements to prove, the more points.

<sup>16</sup> If there are facts to prove the elements for the ground, use a separate heading and discuss the ground as another issue. Example for Mutual Mistake.

### <sup>17</sup>Unclean Hands

The party seeking relief must not have been guilty of **wrongful conduct** with respect to the **transaction subject matter**.

Here,

Thus,

### Laches

<sup>18</sup>The right to equitable relief is cut off when there has been unreasonable **delay** in initiating the claim, and the delay **prejudices** the defendant.

Here,

Thus,

### Bona Fide Purchaser

Reformation is subject to the innocent third parties' rights. Sale to a bona fide purchaser who (1) pays **valuable consideration**, (2) with **no notice** of [insert ground (mistake/misrepresentation)] as to the contents of the writing prevents reformation.

Here,

Thus,

### Unilateral Rescission

A non-defaulting party can rescind a contract, which requires a return of benefit conferred on the other party. [<sup>19</sup>insert formation defense (i.e. misrepresentation, undue influence, duress)] is a ground for rescission. Equitable rescission requires an **inadequate legal remedy**.

Here,

Thus,

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<sup>17</sup> For unclean hands, the wrongful conduct has to relate to the parties' transaction. There may be facts on the plaintiff doing something wrongful such as putting assets in another person's name to hide assets from creditors. Unclean hands not a defense if wrongful conduct unrelated to the transaction.

<sup>18</sup> Laches is not a defense if there is delay without prejudice to the defendant.

<sup>19</sup> Tailor the grounds to the facts. The grounds are the same as the formation defenses. If the non-defaulting party wants to go ahead with the contract, Rescission may not be worth many points; order Rescission at the end when have time left to explain why it is not a remedy the non-defaulting party would pursue.

## Defenses

Laches and unclean hands are defenses to equitable rescission. [<sup>20</sup>There are no defenses to misrepresentation.]

### Unclean Hands

The party seeking relief must not have been guilty of **wrongful conduct** with respect to the **transaction subject matter**.

Here,

Thus,

### Laches

The right to equitable relief is cut off when there has been unreasonable **delay** in initiating the claim, and the delay **prejudices** the defendant.

Here,

Thus,

### Equitable Estoppel

Equitable estoppel may bar contract enforcement where one party **reasonably and justifiably relies to detriment on the other party's previous acts**.

Here,

Thus,

### Replevin

Under UCC 2-716(3), the buyer has the right to replevin <sup>21</sup>**identified goods**, where the buyer is **unable to effect cover**.

Here,

Thus,

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<sup>20</sup> Add this rule if misrepresentation is the ground for rescission.

<sup>21</sup> Buyer re-selected or seller set aside.

Equitable Lien

See Equitable Lien Template.

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