Taft Law School

Electronic Classroom

Baby Bar Mini‑Series

08/9/10/19 ‑ 6 ‑ 7 PM

>> INSTRUCTOR: Good evening, everybody, and welcome to tonight's baby bar mini series. We'll be starting in approximately five minutes. Thank you.

>> INSTRUCTOR: Good evening we'll be starting in approximately three minutes.

We'll be starting in approximately one minute.

Good evening, everybody, and welcome to tonight's baby bar mini series. Tonight our primary focus will be on contracts. I want to point out these sessions are recorded so if you want to go back and preview prior to your examination you're more than welcome to do that. The recordings as well as the transcript are on Taft's Web site in the student section once you sign in go to the baby bar mini series and everything's listed there for you. Also, if there's any handouts, those are posted online for you for your convenience.

If you have any questions, post it up there. I'll be more than happy to help you in any way I can.

Contracts. You love it or hate it. With contracts, I like it because I feel it's methodical, and you really do need to take your checklists in order. Doesn't mean everything's at issue but you want to start off with formation and do I have to form a contract and break it apart from there. If they tell you it's a valid written contract you wouldn't start with offer, acceptance, consideration; right? Doesn't mean I wouldn't look to defenses to formation. Start with your first point can work your way through. That's important.

Now, when you do see a contract question, you'll see I have posted I'd like you to ask yourself a set of questions. First look to the facts and see was a contract made between the parties? I want you to apply this to essay as well as multiple choice questions and break it apart and see if the facts support the offer, acceptance, and consideration. A lot of times especially on the multi states they'll say the party agreed we assume oh, there's a contract. If you go back and break it apart, there was none. Don't make the assumption; break it apart pursuant to the facts and make sure it does exist. If you form a contract, see if there's any reason to find it unenforceable. Any defense such as statute of frauds or parol evidence or mistake or ambiguity so we can not enforce the agreement between the parties. If you do find there's a contract look to see if there's any conditions under the terms of the contract and what are they? Make sure they've been complied with, or have they been excused? Number 4, look to see who's bringing the action. If it's a third party beneficiary ‑‑ Third party, obviously not the original contracting party. Are they bringing the action and how? Are they bringing it as an assignee or a third party beneficiary? Break that apart because that'll tell you, depending on which one it is ‑‑ and it could be both ‑‑ of how you're gonna set up your exam. That's important.

Ask yourself if there's a contract, has there been a breach? If so, what's the available remedies pursuant to that breach of contract?

That's the questions you're gonna ask yourselves and go through and the facts dictate.

The first thing you should have on your checklist ‑‑ remember, I have told you for baby bar you are responsible for the U.C.C. in baby bar. The first thing you're gonna start off under your formation of contract is are we dealing with the U.C.C.? The U.C.C. deals with a transaction of goods. So goods are identifiable with the formation of the contract. There are exceptions to that like unborn animals, unsevered crops. That is a rule. And you have goods versus services. They have tested this on the baby bar. Hasn't been tested in a while so I would be prepared for it. You need to determine if the U.C.C. applies or not. If you see this on an exam, you must apply both the majority rule and the minority. The majority rule's a predominant factor test, and the minority rule's the Graverman test. Look to the terms of the contract and determine what's the predominance of the contract? The good or the service? Versus the minority jurisdiction, the Graverman, what's the basis of the lawsuit? They didn't install it or supply the good. Looking to why you're here.

There's an example I posted for you. (reading from handout) at this point we don't know which was which. (reading from handout).

This is a good versus service contract. The issue now is does the U.C.C. apply? Because we got goods and service. Under the predominant factor, what are we saying? What's the predominance of the contract? The fining was $350 so that's the cost of the good. The installation is $150. Under the predominant factor, the U.C.C. would apply because the goods will apply. You will see based on when this is tested they have to kind of tell you. Generally you'll find out of these two tests the predominant factor and the Graverman, one will put you in U.C.C. and one won't. Of course you'll have to talk about common law and go to the U.C.C. aspect if it fails. Under the Graverman, we have to see what's the basis of why she's suing? Because you didn't bring the fencing at all and didn't install it? What's she upset about? We have to have more facts and determine what was the Graverman of the injury, the basis of her complaint?

That is U.C.C. when you're dealing with a goods versus services. Remember, the U.C.C. applies to a transaction of goods. Doesn't matter if it's a dollar or 500. A lot of you confused it with statute of frauds. That's just a statute of frauds issue. Doesn't deal with the U.C.C. So I buy something at a garage sale for a dollar, U.C.C. applies it's a transaction of goods. Does it meet all the rules? Depends on if I'm a merchant or not. I want to make sure you understand it doesn't matter if the cost is a dollar or what have you. The U.C.C. if it's a good transaction of goods will apply.

Next, if you find the U.C.C. is triggered, you're going to the issue of merchants. Merchants basically hold themselves out in special knowledge or skill, deal in goods of a kind. They could be something with special knowledge such as business colleges, beautician colleges. They would consider them a merchant because they're dealing those goods. They buy in bulk and volume so they should be aware of it. That could be a merchant as well.

Reason it's important to determine merchants, different rules. Between you and I as lay people we have different rules which apply which most likely common law versus in regards to the U.C.C. there's different specific rules for merchants because they feel they're more sophisticated based on business transactions. That can dictate as to whether or not a contract was formed or have an excuse for performance based on the U.C.C. versus common law.

If it is triggered, it is something you want to look at. I want to make sure you understand what's at issue. If I'm selling my car to you, technically the U.C.C. applies but neither of us are merchants so we'll fall back on common law principles aren't we? Versus if I'm telling you I'm a car dealer and you're buying a car, one of us is a merchant. There is different applicable rules such as firm offer. Because I'm a merchant, maybe I gave you a written offer keeping it open for a stated period of time for a car price. That could trigger firm offer so that would be applicable in that case even though you might be a layperson. So one party might be a merchant, or you might have both parties being a merchant, which opens up to more rules that could be applicable.

Now, the first thing I want you to always and yourself obviously is look to formation issues and say does the U.C.C. apply and look to the facts and see if it applies. If it doesn't, don't write about it. A lot of people have a caption does the U.C.C. apply versus common law and they have a canned two or three sentences and it's worth nothing. Spend your time to get your point value versus showing me why it doesn't apply. Waste of time so I don't recommend it.

Once you find whether it's U.C.C. or merchants look to see if there's an issue of preliminary negotiation. You'll know based on the facts. There's two areas I look for this in the exam. One, if I seen an advertisement, a reward, I'll say okay, this is a preliminary negotiation an invitation or deal or can I construe it as an actual offer? How do you tell? Look to the certainty of terms. If I can show based upon the preliminary negotiation that I had the quantity, the time, the identity of the parties, the price and subject matter, I'm gonna find that it is construed as an actual offer versus a preliminary negotiation.

The other thing I look for in a preliminary negotiation is a defense which we will go through parol evidence. Because usually if you see something happening prior to that we're negotiating before we enter into a written contract might trigger the parol evidence because I want to bring in that previous conversation. I see preliminary negotiation I look to two things to see if it's tested in the examination. That helps me so I don't miss the issue. Those are my points.

Next, if there's preliminary or not go to the issues of offer. Chronological order of the checklist. Do you have the intent, the [inaudible], the communication of the offeree. Is it an offer, is it an inquiry? Interested in selling your home? No certainty of terms there so I would find that to be an actual inquiry versus in regards to an offer itself because of the certainty of the actual terms. Once you find there's an actual offer you can terminate the offer. Based upon a counteroffer so you're rejecting the original offer; lapse of time ‑‑ remember, generally if the offer durability state a period of time we look to reasonable time ‑‑ you have a rejection which comes from the offeree; you have a revocation which comes from the offeror; or you can have an indirect revocation which you learn from a reliable source, a third party; then you have death or destruction of the subject matter. That would terminate the offer. As you can see based on termination offer it's at what stage? Prior to acceptance. If it's after acceptance, different issues because you've formed the contract itself. That would trick you on the multi states as well because they'll ask you a question was the contract formed? So you have to pay attention and break it apart so I don't miss it.

Next you have the issue before I jump into acceptance under termination or you can put it under sub issue of offers option contract and firm offer. An option contract is an offer supported for consideration and it's open for a stated period of time. The other offer is firm offer, and the offeror has to be a merchant, the stated period of time they're gonna keep the offer open cannot exceed 90 days and it must be in writing. Must be in writing. Now, the one area they like to test I guarantee for it to be open 120 days. Is that a valid firm offer? Well, I'm a merchant, it's in writing. You said 120 days. The courts would enforce it to the 90 days. Still a valid firm offer good to 90 days per the code. Firm offer would exist but the time would be shortened.

Now your issue of acceptance. With acceptance, you have your common law which is your mirror image. In regards to your unequivocal tans. Your method of acceptance. That's something the baby bar likes to test with Facebook, in regards to posting ads and they tell you to call me or send an e‑mail or text me. They're dictating the argument is of how I want you to accept. You want to pay attention to that because that's a good sub issue worth points. I want to make sure I get my points. You could have a grumbling acceptance or is it a conditional acceptance, or is it an inquiry? Look to the language yes but only if. Yes, looks like an unequivocal [inaudible] so that's a mirror image. You're actually creating a counteroffer. Gets a little tricky so you have to look at the language. Only if you give me $500 off. I would argue that as a counteroffer, not an inquiry. Or if I say something but would you more permissive or could you I might argue that more of an inquiry versus an actual counteroffer itself. Verbiage or language is important to how we can translate what the issues are based upon those facts.

Mary offers to sell her car to Pete for $5,500 (reading from handout). Is there a valid acceptance? When she offers say okay, we got the intent, the [inaudible] uncertain terms. He says I accept that's an unequivocal consent. I hope. It is not mandatory. It's not a counteroffer; he's not changing the terms. He's actually making an inquiry as to, well, would you detail it for me? That would be considered an acceptance with a mere inquiry and she can accept or not.

The other issue under acceptance they love to test is mailbox rule. You have to know the mailbox rule. Couple things. With the mailbox rule it's effective upon dispatch. If you and I contract to buy my car and I put ‑‑ you put in the mail that you accept today being the tenth and you call me on the 11th I don't want the car. Call of the question says is there a valid contract? On the tenth the contract was formed. You put that acceptance in the mail so we do have a valid contract. When you call me and said no, I don't want it, that's not effective 'cause the contract was already formed. Now I can change the facts on you and I rely on your rejection on the 11th. It's depending ‑‑ depictive on the facts. What's going on here? They will test that because they know they'll confuse you. Stay focused on here's the offer, when did the acceptance take effect, when was it dispatched, because that is a contract. Period. We're done. Can't go back up the chain unless you can show facts of some type of reliance to probably try to undo the agreement between the parties. You wanna be careful about that. That is very multistate oriented.

The other thing they're gonna play with you in regards to there was a rejection sent first then an acceptance. Well, the rejection's not effective until receipt. Let's say there was a revocation. Well, not effective until receipt. So if you reject but yet I place my acceptance in the mail, the contract was formed because the revocation's not effective until receipt. Understand the rules because they're tested on the multi states.

The other thing you want to understand with the issue of mailbox rule, an offer, contract, or firm offer it does not apply to so if you do find an offer on the table and of course you send an acceptance you cannot argue in regards to that acceptance being effective upon dispatch because it doesn't apply options or firm offers.

The [inaudible] U.C.C. Remember, with U.C.C., acceptance is based upon any reasonable matter. I can ship the goods right after you ordered them to you. I can unequivocally assent. Any reasonable manner.

What if I add or change a term? This is your battle of the forms. This is a good issue that you need to do, and you have an issue in regards to additional terms versus different terms what's the difference? Additional term is something that basically I add. So in essence if I contract with you to buy tires and you send over a confirmation you agree but if there's any dispute go to arbitration, you added a term. That wasn't in agreement between the parties. Does an arbitration clause ‑‑ a breach. What's the court gonna look at? Do I need to go to arbitration or can I go to the courts? Based upon battle of forms with additional terms, additional terms would (reading from handout) you object to it within ten days or if my acceptance was expressly conditional on those terms. You'll see that in the facts. Objection within ten days you should see it. Materiality is usually what they like to test. What you want to remember with material is if you're giving up a right, it's material. Giving up a right to go to court and go to arbitration, that's material. Giving up a remedy, that's material. Giving up my absolute light right to inspect, that's material. If that substantiates or affects your rights, that's term. If you argue and find it's material we have a contract but that term is gone and that's where you fill in the gap fillers. The courts will fill those in to look to the terms of the agreement and fill it in that way.

Versus different terms. We got a purchase order going to you and you send an acknowledgment back to me. Two documents. One says one thing, one says another. My contract I said the laws of California apply to this contract and you send back the laws of Kentucky. That's a different term. Do we apply California or Kentucky law? We proceeded as if we had a contract. You have dropout. So in regards to the dropout you look to the term of the acceptance so if it's different than the offer it drops out. It's California law. They're ‑‑ another minority's material alteration which is what law governs would be material because, again, a right you have under the contract.

So that's your issues in regards to additional and different terms. Under 2‑207. It is something that you need to know and it is highly testable, especially since they know you're not strong as to the U.C.C. Very code oriented. I sent out a handout of specific areas I want you to focus on. Those are the areas they love to test especially on the multi states.

Next, consideration. Remember, consideration's bargain for exchange of legal detriments. You give up something in exchange for me giving up something, and I'm getting a benefit from it. Where can they hurt me here? Well, pre‑existing duty rule. If you're agreeing to something you're already doing, pre‑existing duty. You haven't received anything in regards to you haven't given up anything, you've already been doing the actual performance.

Versus another area you can look for is requirements versus output contract. If I contract with you to sell me whatever I need for apples for my pie‑baking business, it looks illusory. Why? I'm not selling any pies. People don't like my pies. I got a bad recipe. That would look illusory and then you would look to the exercise of good faith. As long as the party's acting in good faith, then the courts will find there's consideration.

Also, the other thing I do want you to remember if you find consideration fails, what do I want you to do? Look far substitute. So I want you to look for substitute for consideration. See if you can show promissory estoppel or detrimental reliance. They're kinda interchangeable so it doesn't matter which one you find. It's based upon reliance. Could you foresee reliance and did you rely based upon your conduct?

Prime example that comes up in the multi states a woman's getting ready to retire and her pension plan they'll give her $1,000 a month. You've done such great service and built this company we're gonna add another $500 a month. They don't pay her. Now she sues. There's a problem with consideration. It's past consideration. She's already performed her services so we can't pay her for something she's already done; that's a lack of consideration. Then you want to look and see if you can save it through promissory estoppel. How could I do that? Well, let's say she went and rented a bigger apartment upon reliance on that extra 500 bucks. Otherwise I wouldn't have rented it out knowing I can't afford it. If you can show she did foresee reliance and you did rely, then the courts are more likely to enforce the agreement between the parties. That's how you can see promissory estoppel or detrimental reliance.

Next, once you go through offer, acceptance, consideration or any of the subissues, once a valid contract's been formed, now what do? You want to look to defenses to formation. What I want to point out to you is ‑‑ how do I know how far I have to go on the facts? Do I have to talk about offer? Acceptance? Consideration? The facts will dictate. If I tell you there's a written agreement between the parties I'll look and see if I can do offer acceptance and mutual assent. The more they spell out the terms, the long rout. If they tell you a valid written contract, woo hoo! They formed it for me. I don't have to do offer acceptance consideration. I basically had no valid written contract ‑‑ it helps me in the next issue coming up, but I don't have to break it apart. The facts will tell you and you want to pay attention because time's of the essence and I want to get my point value and get my points what are they looking for in the exam? Better get it in the book. Versus wasting time on non‑issues. That will hurt me.

Okay. Now, defenses to formation. Biggest one you need to watch out for is statute of frauds. They like to test it. For some reason you don't break it apart enough. The first step with the statute of frauds is you'll tell me how you get in. How are you gonna do that? Show me is it contract for the sale of goods? Marriage? Contract not performed within one year? And you use the facts to show me how it applies. Marriage, interest in land ‑‑ which is realty ‑‑ debt of another, your contract which by its terms not performable within one year of the making thereof, or a contract for sale of goods for over $500. If it fits into one of these five, show the reader how it applies. Headnote the statute of frauds, give me the rule and use the facts to apply it.

The next headnote should be the exception. When I see students snowball it together two problems: You haven't analyzed it properly ‑‑ statute of frauds and a couple sentences oh, she missed the exception. I don't want that to help. They read these quickly. I want it to my benefit. Headnote what the exception is. Is it the sufficient memo or full or part performance and let them know.

Generally, if there's facts in the fact pattern that tell me there's a writing, I will go through sufficient memo even if I know it's gonna fail because it's not signed by the party to be charged, that's okay. Go through it and then fall back and see if there's another way to show an exception such as full performance, part performance, whatever the case may be. Sale of goods I fax over to you a purchase order fortunately you send a acknowledgment. There's a dispute over price contract for the sale of goods for over $500 or more. We have two separate documents; right? So remember, the statute of frauds applies to incomplete writings as well as oral contracts that fit within the five categories. I'd argue incomplete writing and argue wait, there's sufficient memo you sent this over but it wasn't signed by the [inaudible] so it's not gonna work. I can argue written confirmation. Full or part performance ‑‑ based on their conduct.

They could make you go through two or three exceptions. If you miss them, that'll hurt you. Make sure you understand look, I have to go through these and break it apart. What I recommend match up marriage. Sufficient memo or estoppel. Interest in land. Full or part performance. Moving in's not enough. Pay taxes. Okay. Get it. Debt of another. Sufficient memo, main purpose doctrine. You want to match these up ‑‑ properly on the examination. Okay? So statute of frauds is a very big issue you want to understand it.

Another defense is mistake. That comes up all over the multi states so I want you to know it. You need to make sure do we have a mistake in regards to an assumption or mistake in price or something that effect because if it's a mistake in price, too bad. You're the one that set the price. Are both parties under a mistaken belief? That would be mutual mistake versus if it's unilateral ‑‑ one party ‑‑ and of course is the contract void or voidable? That's what they're going to test. So both of us are under the obviously a mistaken belief, it's voidable but the party it's gonna effect. Unilateral if one party's under mistaken belief, well, the contract can be enforced or it could be voided based on the other party didn't know of the mistake. If you knew or should have known, out of luck. That comes up a lot with bids. Computations. They test that on the multi states. I relied on your bid and placed my overall bid for construction of a building and your bid was offer $10,000, that would be argued as an actual unilateral mistake. But would the party that accepted the contract known or should have known? Based on the facts if I'm not that far off from the other bidders, sorry, I might be stuck with it.

Ambiguity could be multiple interpretations. The facts are gonna tell you the party knew and you have to have reliance. You've got parol evidence which is a big issue. But you have to have a written contract. If I see in the fact pattern there's a written contract could there be parol evidence? Like I said, if I see a preliminary negotiation happened prior to that written agreement, I'm probably going back looking at it and seeing are we trying to get in these terms? If I contract with you but orally I tell you I want my house painted by June 1st because I've been transferred for my job and I want to sell it and get it on the market, which summer's the hot market, and of course later we enter a contract and you say you'll get it done in a reasonable period of time and here it's done by August 1st I'm going to argue hey, we agreed to June 1st based on our preliminary negotiation previously. Now can you get it in which the general rule is it can't come in to change the four corners of the document unless I can show an exception such as fraud or mistake or something to effectuate try to get it in.

Illegality comes up not too much. Capacity minors does come up on the multi states. The contract's voidable unless it's necessary. It's like shelter, food, medicine. The other thing I notice a student asked the other day, look to the time period. It was a multistate dealing with him buying a car. He bought it two months before his 18th birthday. He made a year's worth of payments so he's had it for ten months after reaching the age of majority. Remember, you can revoke and void the contract but it has to be a reasonable period of time.

Also remember you've been using that car so maybe he can void the contract but doesn't mean I can't go after him for restitution. He's received benefits. That's another issue as well that would be something you could argue, especially on an essay so look to the disaffirmance and stuff like that. That is something they do like to test.

Third party beneficiary. When you see a third party suing under contract they're not mentioned into. (reading from handout). That's my can. Plug in the facts. The party's names. You'd see you and I enter into a contract for the benefit of Mary, and now Mary's suing. Mary, why are you suing us for? How'd she get in this contract? No privity. That triggers in regards to your third party beneficiary. With your third party beneficiary you'll see how it's set up, that's your setup so give me your can, show me privity ‑‑ pursuant to Lawrence Fox, you don't need privity ‑‑ you have to show the intent for the benefit at the formation stage of the contract we're complaining about. If you and I agree and later say why don't you pay Mary, uh‑uh, that's not at the formation stage of the contract. Then you classify the party. So is it a gift? So a donee. A creditor, it would be a creditor. Is it incidental? So you want to classify at common law. And then of course you're vesting. Vesting, majority rule, notice an assent for all of them you could show reliance or forbearance or for bringing a lawsuit which would show actual alliance as well.

What does that mean once I show a third party benny? If you and I contract for the purchase of a car and I'm not going to give you my car anymore but you entered into a ‑‑ it would benefit your daughter. Now she's suing me. What's that mean? She would step in your shoes. So any defense that she ‑‑ that you would have, she would have to assert against me as well and vice versa. Step in the shoes of the original contracting party ‑‑ the gave you the right ‑‑ and, again, any defenses the original parties can bring under the terms of the contract, fair game. So statute of frauds, or parol evidence, whatever the issue may be that could be brought up. That's only if what? The rights did vest. That's important for you to understand that the rights did vest. Okay?

Another issue is assignment delegation. They love this on the multi states because you guys don't do well. Couple things: With an assignment, what do you have to see? An assignment is a right under the existing terms of a contract so it has to be present existing rights such as money I'm going to get paid under the contract for my performance, something to that effect. We're looking to see if you assign your rights. Is it too personal in nature, printed by contract or by law. Is it a present valid assignment? Of course what's the effect? So you step in the shoes. The key thing there is to remember first of all, the courts like freedom of assignability so they're gonna allow you to assign. Even if the contract says can't assign guess what, yes, we can. So there's several multi states out there like with gardening services. We contract as long as basically you do a good job you're gonna be able to do my garden services. Then I sell my home and transfer the rights to the new homeowner. Now the gardener wants out of the contract because he feels he can make more money. Once you go through and show the actual assignment of rights versus the delegation in regards to the duty of payments is the court gonna enforce? The contract said you can't assign. The court says too bad. The only way the non assignment clause will work if it's made very clear between the parties. Very clear that if you sign we have no contract. So if you sign this contract, the contract will be null and void. I think that's quite clear you and I have a good understanding if I do it, we don't have a contract. So you want to that apart.

Next, look to see if there's a transfer of obligation. That's your delegation. Define it (reading from handout). Is it the duty delegable? Good. (speaking too quickly). Familiar language. Did you assume delegation? Was there a novation? Now, I want you to remember assignment is a right, a benefit. A delegation's an obligation under the terms of the contract. What I want you to pay attention to is on the multi states is they'll tell you Joe assigned. Was there an assignment or assignment and a delegation? They never use the term "delegation." They want to trick you. Take a step back and see can I argue based on these facts that there was a delegation? Again, what that means is you're turning over an obligation. The example with the gardener, my right was to get the gardening but I had an obligation because I have to pay for those services. That would be an assignment, not a delegation.

The other thing to watch out for and they have done this and I think it's mean on the baby bar and they've tested this way on multi states you have to pay attention. You have an assignment, delegation, third party exist all at once. What you're gonna see on an actual fact pattern it's something you want to play with on the MBEs because I want you to get it correct, and if you have a good understanding how it's tested, you won't miss it.

If I tell you A and B enter into a contract to build a swimming pool and B retains C to dig the hole. Now let's say C says not gonna do it. So now when A and B's the original contract when B assigned and delegated his obligations to C, that's a new contract; right? So if we have A suing because C wouldn't dig the hole, how can A sue? A's not in that contract. So A would have to prove the assignment delegation between B and C, then prove up how that assignment delegation ‑‑ which is a contract ‑‑ was entered into because of the benefit of A and sue as the third party beneficiary. See how that works?

If I change it on you and tell you A's not paying, now C's suing. C's not suing as a third party. They're suing as an assignee. So stepping shoes as to B and suing under terms of the original contract. I always diagram these to make sure I get them correct. That's something I want you do go over because they come up on the multi states. Might as well get them right. If I break it apart, not as bad as I think it is.

With conditions, type your condition. For some reason I find students have a hard time with conditions why is that? You want to tell me what type of condition it is first. Express or implied condition and break it apart. In regards to express, it's gonna be explicitly stated. Courts hate them. Why? They find they're very harsh. What's that mean I'm going to do? What's that mean see if I can argue as an express promise versus an express condition. That's one argument because if we find an express condition such as time of the essence, and you don't complete pursuant to the time, I'm in breach. That's harmful unless I can excuse my performance. If there's a way to get away from it, they're going to.

Once you type whether it's expressed or implied in law condition that you can argue precedent, concurrent, subsequent grab onto precedent because it's easier for me to talk about no matter who's suing what. Point out who had to go first just makes sense to me.  Once you type the condition ‑‑ let's say I see an express condition, time of the essence. Let's deal with painting of the house. Remember I told you June 1st and you get it done July 1st. It was rather rainy and stormy in the summer months. I would argue it's an express condition, time of the essence. I did state that I needed it done by June 1st and I looked to see any excuses. The key thing there is based on the language I'd like it painted by June 1st. Look to the language. I like it. Is that explicitly stated? They're playing with me. Fall back and imply it in law construct, condition, precedent, that I paint before you have to pay. I paint it now you have to pay. I didn't do it by June 1st so I'm gonna try and excuse myself impossibility, maybe impracticability, frustration of purpose, stuff like that because of unusual weights. Versus the implied in fact condition. Never can excuse it. That's workman‑like manner, good faith and cooperation. You're gonna know when this is at issue so it doesn't come up a lot but you'll know. You hired me to paint your house and now I got paint all over the plants, your shrubbery and spilled it all over your lawn. That really a workman‑like manner? Well, you didn't put in the contract to use dropcloths. That's implied in fact because you're going to do a good job. That would be an issue of implied in fact and you cannot excuse.

The key thing is once you find a condition, look to your excuses. I'll tell you with excuses you'll look for more than one. So you want to break it apart and look for more than one. Okay?

You have impossibility, substantial performance, wrongful prevention, impracticability, modification, frustration of purpose, occurrence of a condition subsequent, recision, divisibility, anticipatory repudiation, voluntary disablement, estoppel and waiver.

Now, I'm not gonna take it in that order. The first one to look at is substantial performance. Generally it stands on its own, but you could have other excuses. With substantial performance you need to show the contract was substantially performed 90 percent but never tell that to the reader. You look to did you get substantially what you bargained for? Can you be reimbursed for what you didn't receive? The deviation couldn't be willful. If I built the house exactly to your specifications but the orange is a little off should I be paid based on the doctrine of substantial performance? That's your argument there. Usually what they test there is was the deviation willful? If that you find ‑‑ trying make more profit that's a problem. Can't do that.

The others is [inaudible]. They come up together. If you see one, address the other. What are they? Anticipatory repudiation is repudiation by verbiage, words, express. You repudiate I'm not gonna do it. Versus voluntary disablement is by your conduct so in essence if I enter into a contract to sell you all my output, then I call you up and say, not going to do it because I sold it to Ted, that's anticipatory repudiation. That's also anticipatory repudiation because I sold it to someone else and I don't have any other goods. I sold my entire output. That would be an example of voluntary disablement. Those two go together so look for them together.

Another area that has a relationship is impossibility, impracticability, and frustration of purpose. With impossibility, it has to be objectively impossible that no one can perform. So to excuse your performance. If someone else can conform, it's not gonna excuse your actual performance. An example of that would be on the multi states that someone rents a hotel room from you and the hotel burns down. I don't have any other hotels. Kind of impossible for me to perform because I have no housing.

With impossibility, the key thing they test there is the objectivity. Has to be objective meaning no one can do it.

Impracticability, it's like what we call your ten times rule. It's in regards to it's ten times the value or too much. So break it apart and argue as to is it gonna be too much based on the terms of the contract? If I contract with you to repave the road for $100,000 and it's going to cost me $1,000,000, that's a contract they may not enforce. If it's $10,000 or $20,000 ‑‑

Your frustration of purpose. Unforeseen event but your purpose must be known at the formation stage of the contract. So I want to make sure you understand that. So your purpose must be known at the formation stage of the contract. If you and I contract and I contract for horseback riding lessons and you learn I'm taking horseback riding lessons because I'm going to be one of the people riding the horses in the Rose Bowl Parade. Did I make that clear in the contract stage? If the answer's no, then that's no, that's not gonna excuse my performance and I'm going to have to fulfill the obligation based on the terms of the contract.

Those three come up together. Possibility, impracticability, frustration of purpose.

Another one they like to test ‑‑ multistate orientated ‑‑ is divisibility. They trick you with the divisibility. With divisibility, I would say know your elements, know your rules. What do I mean? Well, with divisibility, you need to show the contract can be divided by price and divided by unit. You'll find a lot of contracts can be divided by price and divided by unit. This is the key element that you need to focus on: The contract was not bargained for as a whole. Multi states installment contract. I contract with you to serve ‑‑ deliver each week 5,000‑pound of beef in my restaurant. You're gonna sell me each week at a certain stated price. It's divided by unit 5,000 pounds each week. Was it bargained for? A year, it's bargained for as a whole. That contract is not divisible. So you want to make sure to pay attention and break that apart. Again, in contracts, based upon being divisible, you have to have divided by price, divided by unit which is generally easy to find, but the contract was not bargained for as a whole. Sorry. Can't do it.

Another one that comes up is wrongful prevention. You and I have an agreement but I prevent you from performing. It's not an area that you can really hide. You should see it based on the facts.

Modification. Also a defense to formation of a contract. You 589er the terms of an existing contract. If you and I contract for a specific floor tile, it's going to take six months to get because the manufacturer's out of supply here's a substitute yes, I'll take that. That could be a valid modification to excuse my performance to give you the specified tile you're looking for.

Next in regards to your issue in regards to rescission if we undue the contract. We rescinded the agreement between the parties.

Estoppel's based reliance.

Then the waiver would be you're waiving a right that you know about so it's a voluntarily relinquishment of that right. There's no way I really can hide that from you. You will know based on the facts.

With conditions, what do I want you to remember? I want you to remember type the condition first, then look to excuses. If you see multiple conditions, that's fine but type the first condition see if you can excuse that first, then go to the second condition and go from there. That's important.

I want to make sure you do understand that because this is an area students don't write well and it's worth some good points so I want to break it apart. If you remember the rule, look two or more ways to excuse performance. If you're seeing one, most likely you've made a mistake so you want to look for multiple ways to get out.

Learn 'em by cluster. So I did tell you like in anticipatory repudiation voluntary disablement go together then go look for the others. Those are the categories that tend to like each other. They come up most likely with each other. Pay attention to that.

Those are your conditions.

Now, the other thing before I jump into what we call our breach, is you have terms I want you to place just before breach and I call it U.C.C. terminology and you want to place it there because if you complied with it, that's gonna tell me the other party's in breach. What goes there? You have warranties that could be tested. With the U.C.C., we have warranties. Very similar to products so you do wanna look at that in regards to the U.C.C. So you have U.C.C. in regards to warranties of title and then you've got your express and implied merchantability and fitness, which we've learned in regards to tort, and then there's an issue A, B, and C. A basically's any foreseeable user of the product, B's a natural person if they're using it and C's all persons including a corporation. You want to know those. Risk of loss, that goes in there because that dictates when that issue comes up who's the breaching party? So I put it prior to the actual breach because that'll dictate as to who I'm putting in breach so if you are supposed to give me some goods and you put it let's say on your ship to ship it to my business and your ship sinks on the seas, right, you want me to pay for it? No. I'll argue the risk of loss is on you. You'll argue no, once I put it on my ship to ship to you, it's on me so now we have a dispute here so based on the risk of loss, it's on you because it hasn't reached its place of destination so you'd be the breaching party because you didn't get me the goods. That makes a difference so put it prior to the actual breach because that'll help you when you get to the breach discussion. I call that U.C.C. terminology. Terms in there include your warrants, risk of loss, destination and freight, shipment contracts. You do want to know those. I gave you a list of quite a few U.C.C. remedies prior to acceptance versus after acceptance of the goods. You're looking at the goods in regards to that term so you want to know those and break those apart. Then go to your breach. Okay?

Breach obviously you have your present breach, which goes to the essence of the contract. You failed to comply pursuant to the terms of the contract [inaudible]. Based on the facts versus you have what's called anticipatory breach. What is it? Telling you, it'll be a multistate so it's an area you do need to know. You see a party's contracting and then I sue now? Do I have to sit and wait and see what happens? Usually on the multi states I contract with a singer that's gonna perform on New Year's Eve and on December thirty‑first they call me they're not gonna show up. Can I sue now or do I have to wait and see in usually how it's tested. What do you have to look at? You have to have words of express repudiation. Next you need to show in regards to was the contract in executory stages? That's the key and that's what they test. What that means is neither of us is started performance or one might have started but the other party has not. Or neither of us have fully performed. If we both started performance it's not in executory stages or if one of us performed. I would have to wait and see in w that example I gave you whether or not you're going to perform. Versus if it's still in executory stages ‑‑ so you're supposed to perform by singing, I'm supposed to pay you I haven't paid you because you haven't sung because you told me you're not going to, that would be an example of executory stages so you could sue now versus wait and see.

It's a concept that's tested reality‑wise a little bit differently it is something that you need to know. The key thing they test is executory stages. They know students don't understand ha that means so if both parties start a performance, nope, gotta wait. Gotta wait. In essence if I sell you my car and you give me a down payment and then let's say I'm supposed to detail it and I fix the engine and all that, we both started performance. If I call and say I'm not gonna deliver it on October 1st, wait and see. The contract is no longer in executory stages. That's the trick so you want to make sure you understand that.

Remedies. The baby bar has been hitting them really hard for you guys. You don't have to know specific language that you will learn in your remedies class like what's the remedy of a building contract? Or a sale contract? So they're not that detailed but general damages, special damages, rescission, reformation (speaking too quickly) yeah. Know those terms. With your general damages whatever you expected. That's easy language. But you'll learn for the sale of goods we say basically you can cover. So you get the difference between the contract price and the current market value of the goods.

Just point out the expectation of the contract.

Special damages they like to test. We don't understand it. Why? Well, under Haley versus Baxondale, remember, you can get those damages which are reasonably foreseeable when? At the formation stage of the contract. That's important. If I'm contracting for you to build a well on my property and I basically say yeah, I want better tasting drinking water but I use it for irrigation of my crops and you didn't dig the well on time so I didn't have it for irrigation of my crops, can I sue you for special damages because my crops died and I couldn't sell 'em? Was it foreseeable they'd die without water? Sure. But was it foreseeable at the formation stage of the contract? I told you I wanted better tasting drinking water. I'm changing my mind later so special damages in that case would not be recoverable.

Another remedy you have is rescission. You're undoing the contract. Remember, with recision, you need grounds so fraud, mistake, or ambiguity, and you have to have some basis to rescind the contract to put us back in the original position we were, meaning we're not in contract.

Reformation's to contract a mistake. Typed in the contract like the price or the description of property so the courts will ask or you will ask for reformation from the courts to reflect the actual or the actual parties comes up once in a while.

Restitution looking for unjust enrichment. Restitution does come up. How? Again, in regards to how we contract and like a minor and then you can void it so you do, but yet it's ‑‑ a benefit's been conferred upon you so I'm gonna seek restitution say for a record player because you now like to play vinyl records. That's not a necessity. But then I'd argue wait a minute, he's received an unjust benefit because he's got this record player at this value even if I subtract my profit he's still got some value conferred upon him so you would argue in regards to restitution in that case.

The other big one you need to know now is specific performance. It's an equitable remedy. What does that mean? You go to equity court. Common law, there used to be a law court and an equity court. Obviously the courts have merged now. But you have to show a reason why money's not gonna make you whole. That's why you're in equity. You need to show the court, wait a minute, by him not delivering those goods, is money ‑‑ is he gonna compensate me money ‑‑ why wouldn't it make you whole? Go buy the goods somewhere else. Let's say they're unique goods. Oh. Can't get them. Very hard to get. Uniqueness in regards to the goods and point out since it's unique that money damages won't make you whole. We're within the same jurisdiction so you can enforce the decree against each other ‑‑ the parties ‑‑ and then demand under specific performance that the court enforce the terms of the contract. That's what your specific performance is.

That is something that's currently been tested on the baby bar so I want you to know it because it has down and students are foreign to it. It is something they have been testing so I want you to prepare. I don't want any surprises.

Okay. That's your contracts shall I say in a nutshell. Again, contracts is very methodical. Take it in the order of the checklist. Then from there, obviously see what's being at issue based upon the facts. Apply the checklist also to your multiple choice. That's important. Again, that's important.

Now, in regards to contracts what'll happen now? Done torts, reviewed contracts. You'll be sent out a contract essay question and 33 multiple choice question questions. Don't abandon torts. If you do, come October I don't know torts. So you have to start doing your rotation and look to the torts and spend some time there and then add your contracts. It's a building process.

The other thing I would like you to do is review your checklist and start plugging in how do I know when it's an option contract? Do I always talk about firm offer? If it's a sale of goods, probably would. How do I know when I talk about preliminary negotiation versus going to an offer? The more I can get you to apply it to exams and multiple choice question questions and plug it back into the checklist that's gonna help you twofold. One, gee, I understand the concept and your issue recognition is faster so the more you understand how the concepts are tested, that'll help you. I'm too slow. What am I gonna do? They get halfway through, that's a problem. Not gonna pass. The more you can go through I have to talk about this issue or this issue, your issue recognition's faster. The more you understand how that concept's tested, that'll help immensely. Work on that with your torts and then start doing that in regards to your actual contracts.

Anybody have any questions for me at this point? If anything does come up, shoot me an e‑mail at jolly@taftu.edu. Be I'll be more than happy to help you in any way I can. If you're looking for more questions to do, go to Taft's Web site and click on prior bar questions and there's quite a few baby bar questions with Taft model answers that's a good place to start. We will be going over in a couple weeks the last baby bar so that gives an idea in regards to how they test and how they're currently testing. It's important ‑‑ I tell students, too, if you go to the bar Web site and start practicing exams, start current and work your way backwards because that's how they're currently testing. And they do change their testing, unfortunately so if you look at older exams, probably never see performance tested because they didn't test that way, but they do now so that's important.

Any other questions at this point before I say goodnight? All right. Again, if anything comes up, let me know. Look for the e‑mails in regards to the questions. Please write the questions. I don't get enough of you guys writing. This gives us a good indication of am I articulating the issues, communicating them to the reader, and my timing. Those are the key three things I want you to look for. Wish you all a good night and see you next week.

[END TIME: 7:00 PM]