This package contains sample materials from my First Year Contracts course, which I first taught using group-based problem solving at the University of Toronto in 1996 and have taught since then at USC and University of California, Hastings Law Schools. It includes a Course Outline, the Self-Assessment Form I ask students to submit after each assignment, two sample team problems (Patrick & Sujit and Happy Cows Inc.) together with a sample group memo for Happy Cows (with comments from me that are posted for all students to read) and a sample final exam. The instructions on the final exam are the same as the instructions the students receive for the group problems they do during the semester. For the first two group assignments, we use a single fact scenario (such as Patrick & Sujit); in the first assignment, groups produce only an issue outline; in the second they choose an issue they judge to be important and analyze that one in detail.

You are free to use the case studies or exam.

Please contact me if you wish to use the memo that was originally written by students.
This is a course about a fundamental way in which legal relations are organized: through agreement. And it is a course about what happens when people change their minds about what they agreed to and about what happens when they never really agreed but the law treats them as if they did. We are going to read many cases, many pages of a treatise about contracts, many sections of the restatement of the law of contracts, and many sections of a statute governing contracts. Your goal is NOT to memorize all of this “law.” It is to figure out the basic principles of contract law, to recognize when a particular fact situation raises issues that these basic principles address, to learn how to work with them to make fact-specific and rhetorically rich arguments and counterarguments, and to develop your capacity for judging what, on balance, are good and bad arguments in order to predict what a court might do if it heard these arguments and had to resolve the issue you identified. It is very important to remember the goal is to learn a SKILL, not to become a walking contracts treatise. Farnsworth already wrote a pretty good one and you can look up what he wrote any time you need to, now and throughout your career as a lawyer. (Incidentally, Farnsworth on your shelf will be a good friend for many years to come.)

By the end of the course you should be able to write an outline that consists of no more than 1-2 pages of basic principles to encapsulate the key concepts of contract law. If it’s longer than that, you haven’t looked deeply enough into the basics and you’re more likely to be memorizing ‘law’ instead of becoming a competent analyzer of contracting problems. Remember this if you find yourself getting overwhelmed by the quantity of information coming at you. Come to me, early, for help with figuring out what the takeaway lesson is. Don’t take off-the-shelf outlines or outlines from other law school classes, here or elsewhere, as your guide. Most of these outlines treat the goal of a law school course as absorbing the names, facts and holdings of cases. We are going to do that but only on the path to our real goal: understanding the basic principles of contract law and learning how to really, really use them.

The goal of learning how to DO contracts in this course is accomplished in significant part through four problems that you will do during the course of the semester in a group with three other students. By working on these problems you will practice the skills you’re trying to learn and deepen your understanding of contract principles. These four problems (together with class participation) will count towards your final grade. We will
discuss each problem in class after you submit your memo analyzing the problem; memos will generally be due the day before we discuss them.

Here’s why we do group work and how it’s graded. There are several reasons that I use group work in almost all classes that I teach, and have done so since I began teaching contracts in 1990. First, the only real way to learn how to DO contracts is to raise arguments and counterarguments with other people. Law is a fundamentally interactive dialectical process; it is NOT a mechanical application of rules. We all see situations differently, and the most important thing that happens in the development of the analysis, argument and decision of case in law is the process by which different frameworks on situations are shifted through dialogue between a group of people all of whom are trained as lawyers. It is critical to hear how others see a situation, to learn how to frame the way you see it, and to recognize, objectively, which pieces of which perspective are those that are most likely to match up with the perspective of other lawyers (the other side, for example) and judges. You learn by problem-solving together in a group when you get good at a giving a strong presentation of your perspective, get it understood by the others in the group, understand their presentation of their analysis, and then step back and say, now which of those analyses is the one that is stronger, and in what way? Learning how to do this is critical to learning how to do law. I have taught using this method many times and it substantially increases the quality of legal analysis for all students.

Second, it’s more fun.

Third, it allows me to give you practice in doing exactly what I’m going to ask you to do on the final exam, and most importantly, for me to give you feedback throughout the semester on what you’re doing well and what you need to work on. I can do that because I can grade 20 group memos four times a semester; I can’t grade 80 individual memos four times a semester.

Fourth, the practice of law always involves working in groups. Learning how to work with other people is another important professional skill. Like it or not, the days of being a solo artist are over….This is part of your professional training and I take that part of legal education seriously. You should be developing professional habits of reliability, hard work, taking responsibility, respect for others, and timeliness.

Here’s how group work works. You will work in groups of 4, selecting your own group. I advise you to identify people who have a similar attitude and set of constraints as you. I will set a minimum standard that groups will meet in person twice for an hour for each assignment—once before significant work is started on the assignment and once after a first draft has been produced. You are welcome to work more than this, but you should find other students who are similarly minded and also have the flexibility that requires. (If you have kids or live off campus or have a job, for example, it’s harder to coordinate than if you live on campus, on your own and have no plans for any life outside of the law school for the next several months…) Additionally, I will set a minimum standard that emails asking for comments on a draft or input will be returned within 24 hours: no faster can be expected; no longer can be acceptable—unless you agree.
differently. For each memo, one person will be the point-person who will be responsible for coordinating the work on the memo and writing up the final draft. Another person will be the spokesperson for the group for the day we discuss the memo in class.

**Here’s how memos are graded.** Each memo is graded out of 15 points, and will be graded on the same distribution—half of the grades will be 12s and 11s; half will be 13s and 14s. For the rare extraordinary result, I may give a 15; for the rare inadequate result, I may give a 10. I will also distribute written feedback on the memos. The point-person gets the grade out of 15; the others in the group get a proportional grade out of 5. Thus at the end of the semester each of you will have a total grade out of 30 for the memos.

After submitting the memo, each group member will also submit to me, confidentially, an allocation of points for their group members (as well as any feedback anyone wants to give me about the assignment): 1 or 2 per person. These are ‘professionalism points’—for meeting as planned, for participating in the discussion, for contributing ideas and feedback, for timely responses to email, for respectful listening, etc. This will give a total possible points from your group members of between 3 and 6. To this I will add my own points out of 4 at the end of the semester based on my assessment of your efforts in class.

Finally, for each class, groups will be ‘on call.’ On those days, I will call on people in those groups for the discussion. The spokesperson for each group will be on call on the days we discuss memos.

We will stick to the outline shown below. It is most important to read the cases and Restatement or UCC sections before class; I will expect that you have done so and will be calling on people from time to time to discuss cases and Restatement or UCC sections. (Again, however, no need to memorize: you can have the case, the restatement, your notes with you.) The treatise sections will provide you with additional context and a way of understanding the scope of the topic we are covering. **You are not required to read the sections in Farnsworth.** They are there for those of you who want more background and context, or to test their understanding. If you do read Farnsworth, read it lightly and if you take any notes at all make them short ideas that help you with the material we’ve discussed in class. And it’s probably best to read anything in Farnsworth after we’ve had the class on that topic. There will come no point in the course when I will quiz you or expect you to have picked up some detail in the treatise that we have never discussed. On the other hand, since a key part of becoming a lawyer is absorbing the values and judgment of other lawyers (the accumulated ‘culture’ of law), the more you read about how Farnsworth discusses cases and the law of contracts the more you will develop your ‘feel’ for how lawyers and judges think about contract problems.

In the outline below, cases are found in Epstein, Markell and Ponoroff; I do not assign the text in the casebook but you may well find it helpful to ‘read around’ the cases, thinking about the questions after the case or some of the supplementary materials. The Restatement sections (R) and the UCC sections are found in “Rules of Contract Law.”
## Assignments [amendments in bold]

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Problem 3 due 5 pm Nov 16

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CONFIDENTIAL GROUP ASSESSMENT FORM
CONTRACTS
HADFIELD FALL USC 2009

Your Name ____________________________________________
Group Number _________________________________________
Problem Number ____________

List the members of your group, below, including yourself, identifying the ‘point person’ and the ‘spokesperson’ for this problem. Give each person, including yourself, either 1 or 2 points. These are ‘professionalism points’—for meeting as planned, for participating in the discussion, for contributing ideas and feedback, for timely responses to email, for respectful listening, etc.

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What did you find easy about this assignment?

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What did you find hard about this assignment?

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What do you feel you learned from this assignment?

What do you feel you still have to learn to do an assignment like this?

Is there anything you’d like me to know about how your group worked on this assignment or your understanding of it?
Sujit Ghosh and Patrick McAllister met in 1998 as freshmen at UC Irvine where Sujit was an economics major and Patrick majored in computer science and minored in economics. Every year, Sujit, who is not particularly mathematically inclined but who has great business ambitions, struggled with required courses in statistics and math for his major. Patrick, who is a math whiz, worked extensively with Sujit, tutoring him to help him through these courses. Indeed, in junior year, when Sujit was at risk of failing two required courses and losing the scholarship that made it possible for him to attend college, Patrick cancelled his plans with his girlfriend for Spring Break in San Diego (losing his non-refundable deposits) and stayed in the dorm with Sujit to get him ready for his finals. Sujit survived the finals, and held onto his scholarship. “I owe you,” said Sujit. “Big time. I promise. If you need something from me, just name it. I won’t forget.”

After graduation, Sujit went to work for his uncle in Los Angeles in a small but rapidly growing technology firm. A couple of shrewd (although some say lucky) decisions and stock options quickly made Sujit a rich man. Patrick, who looked on at this success with some envy, did not do so well. Superb in math and computer science, Patrick nonetheless found himself in a glut of similarly trained grads looking for work in 2002. Patrick moved around from job to job for a while and eventually decided to start up his own business, developing screening devices for the detection of explosive devices in airline baggage. Patrick developed some unique attributes in the software for the devices (which he has nicknamed “Gotchas”) and discussion of his plans for the product with security experts in the airline industry gave him great confidence that he was onto something big. What he needed, however, was capital to develop prototypes of the devices ready for testing and demonstration to potential buyers.

Patrick decided to call up Sujit and see if he might be interested in being an initial investor in Patrick’s new company. The two decided to meet for lunch at the Water Grill, Sujit pulling up rather noisily at the valet parking in his Porsche Boxster, and offering to pick up the hefty tab for their meal. At lunch, Patrick told Sujit all about his ideas for Gotcha. He had some diagrams with him and demonstrated the software in a simulation he had developed on his laptop. Sujit thought this was all pretty exciting. “Count me in, Pat. This is terrific. How would $50,000 do? When do you need it?” Patrick says, “Great. I knew I could count on you—not only as a friend but as a businessman who’s seen the potential out there. I really appreciate this.” They shook hands, Patrick saying he will call Sujit in a few days.
Patrick left the lunch and went straight to his real estate agents’ office; he signed a one-year lease for 3,000 square feet of office/commercial space near the USC campus at $5,000 a month. He spent the following day at Office Depot and online ordering equipment, office furniture, getting phones and high speed internet services hooked up. By day three he had run up $30,000, including his two-month deposit on the office space, on his credit cards.

Later that day he spoke to his sister Bonnie, a recent USC Law grad, about his plans. Bonnie, ever the older sister, scolded Patrick for not getting anything in writing to establish the terms of his deal with Sujit. “What if he doesn’t come through with the money? You can’t pay for all this stuff. And you’re not going to see revenues, you’re telling me, for six months at best. Get it in writing, Patrick.” Bonnie drafted a document, borrowing some language from contracts she had seen in her summer job in the legal department of a local bank. In part it read, “Lender hereby covenants to convey to Borrower $50,000, said funds to be delivered by certified check as of close of business August 1, 2005. Lender acknowledges that failure to deliver said funds as of above date will result in Borrower’s default on other financial obligations and will cause substantial and material harm to Borrower’s business and profitability now and in the future. In the event of default, Lender agrees to compensate borrower for all direct and consequential damages caused by said default.” The document established an interest rate of 5% but did not set a date by which the funds had to be repaid.

Patrick sent the document to Sujit and followed up with a phone call. Sujit took the call on his cellphone from a cruise ship in the Mediterranean. He told Patrick his assistant had received the document and that he had instructed his assistant to sign his name to it—although he hadn’t read it. When Patrick asked whether Sujit wanted him to fax the document to the ship, Sujit said, “No, no, no. It’s basic, you said. I’ve seen hundreds of these things. We’re on. Go make money, my man.”

The money has not arrived. Sujit has not called and his cellphone number is no longer in service. Patrick hasn’t yet tracked him down at his uncle’s business. What advice can you give Patrick about his legal position at this point?
Yo-Go International and the Happy Cows Collective

Yo-Go International is a successful manufacturer of yogurt and other dairy products operated out of Santa Barbara, California. It ships yogurt products throughout North America. It was founded by Tony Bach nearly forty years ago when he started making fresh yogurt in homemade yogurt boxes (Styrofoam boxes lined with foil and heated by a 100 watt bulb) in his kitchen, inspired by the health food craze of the late 1960s and early 1970s and books such as Adelle Davis’ “Let’s Eat Right to Keep Fit!” Today Yo-Go is a multi-million dollar family business, still headed by Tony with the help of a daughter, Elise.

In the past decade, Yo-Go has been at the forefront of the organic movement and has converted all of its production to organic products. The most important ingredient, of course, is organic milk. Tony has insisted on the strictest of organic standards, far beyond the industry norm and what is required for official USDA Organic certification. Tony proudly displays this on every Yo-Go label: “110% Organic—The Real Deal.” In his view—and he has made his views known through public lectures and a column he writes in a Santa Barbara dairy newsletter—the USDA standards are far too lenient, on everything from what feed they allow organic dairy farmers to feed their cows to how much time the cows spend in pasture as opposed to feedlots.

Yo-Go has changed milk suppliers a number of times in the past decade as a result of Tony’s dissatisfaction with the practices at the farms he has used, although all the milk has met USDA Organic standards. Last year, in frustration, he turned to a small dairy collective from Northern California, Happy Cows Collective. Happy Cows members—small dairy farms throughout Northern California—are committed to exclusively organic production at higher-than-industry standards. Happy Cows president, Alberto Hernandez, was anxious for Yo-Go’s business and spent many hours with Tony and his daughter Elise discussing the careful attention to organic production protocols to which all Happy Cow farms are required to adhere. Tony asked hundreds of detailed questions about how the farms were operated, including details of the living arrangements provided for the dairy cattle. Alberto assured Tony, “Our cows are completely babied. Practically free-range. I wish my kids would spend that much time outdoors instead of playing video games! All of our dairy farmers have been with us since the beginning 10 years ago and let me tell you, that beginning was forged in a collective commitment to going well above and beyond the requirements of the National Organics Program, which, we both agree, are a travesty.” The National Organics Program establishes the federal standards for obtaining USDA Organics certification. (See excerpt from regulations, attached.)
The more radical members of the organic industry—the true believers, as opposed to the ‘corporate wannabes’—believe that the regulations allow far too much leeway in how animals are housed and pastured. As Tony has been heard to sneer, “‘Access to pasture’---sounds like you can satisfy the USDA with one fifteen minute ‘recess’ a day. People in prison get more than that!”

Tony regaled Alberto with the litany of his disappointments with previous suppliers and Alberto was empathetic. “With us,” he told Tony, “you’re the boss. Anything you’re uncomfortable with, you let me know and I’ll fix it. Personally.” Tony felt as if he had finally found someone who ‘got it.’ “Sounds like the supplier for me,” Tony told Alberto as they shook hands, “Delighted to sign up with you on our usual terms. Just need to get out of my current contract and we can start deliveries in 30 days.” Alberto responded, “Fantastic. I’m sure you’ll be very happy. Happy cows, happy customers!” There was no need to discuss price as milk prices in California are regulated by the state. The usual arrangement for a regular milk supply contract is daily deliveries of whatever quantity the buyer needs for its production—known as a ‘requirements contract.’ These are usually long-term contracts that can be cancelled with, on average, 6 months notice.

A week or so after this meeting, Yo-Go’s purchasing manager sent the Happy Cows account manager a standard form “Terms of Agreement.” (See attached.) A similar form is sent to all Yo-Go suppliers. The Happy Cows account manager, who did not read the Yo-Go document (it was simply placed in the Yo-Go manila file folder), sent Yo-Go their “Supply Contract” a day later. (See attached.) Yo-Go’s purchasing manager glanced at the document and asked her assistant to scan it and enter into the Happy Cows database.

All went well at first. Then, six months into the relationship (as usual, Tony’s previous suppliers might observe), Tony started to find problems. He started calling Alberto weekly pestering him about one thing or another: whether Happy Cows farmers had taken a type of feed off their approved list, adjusted their manure management practices to take further steps to avoid contamination of water or crops, or adopted the latest suggested stress reduction practices for dairy cattle. All of these were organic practices that only the most ardent organic farmers followed; none were required to meet USDA organics standards. Alberto took it all in stride, reassuring Tony that Happy Cows farmers were up to date on all the latest organic practices. Tony began taking trips to visit the Happy Cows farms, dropping in unannounced to tour the barns, fields and pastures.

On one of these trips Tony parked his truck on an access road and spent a full day watching the Arden farm, one of the farms supplying him with milk through Happy Cows. He was outraged: the cows were confined to the barn the whole time. He called up Alberto that evening and told him that he considered this a “major breach of our agreement” and “you better fix this, immediately.” Alberto, now weary of Tony’s constant complaints and angry at what he considered to be Tony’s ‘stalking’ of his dairy farms, told Tony tersely “I’ll take care of it.” “I
want daily reports of time spent in pasture at all farms supplying Yo-Go with milk,” Tony insisted. Alberto responded through clenched teeth, “Yeah. Sure.”

Alberto did indeed start collecting daily reports from Happy Cows farms about time in pasture and sent these on to Tony—Yo-Go was a very important customer. Alberto had very unhappy farmers, however, who correctly complained that these reports and requirements were far in excess of USDA requirements. After a month of these reports (which showed that the cows were in pasture several hours a day at all of the Happy Cow farms), Alberto started collecting data and sending reports to Tony less and less frequently. Tony fumed. Alberto responded “we don’t have to give you these things; this is ridiculous. We exceed all the required standards by a wide margin.”

Tony met with Elise and told her that he wanted out of the Happy Cows contract. Elise urged him to try and fix the problem rather than dumping yet another supplier. But Tony insisted. “They were late with deliveries last week. And I have proof those Arden cows were locked up all day last month. They’re not sending me daily reports any more like I asked. And to top it off I just learned that the Arden farm was NOT with Happy Cows “from the beginning”—they just joined the collective three years ago! Alberto lied to me from the start! Call them and cancel.”

Elise reminded Tony that with the exception of last week all the deliveries had been on time and that heavy rains had probably slowed deliveries last week. But Tony insisted. Reluctantly Elise called Alberto and told him Yo-Go was cancelling because of the late deliveries and failure to give the cows several hours of pasture time every day. She followed up with a letter stating that “Yo-Go International will not accept any further deliveries from Happy Cows, effective 30 days from today.”

Needless to say, Alberto is furious. The market for milk in California has been glutted for the past year and Happy Cows will be unable to find a replacement buyer for the $4 million worth of milk that Yo-Go was purchasing monthly.

You have been contacted by Elise on behalf of Yo-Go International for legal advice. Prepare a brief outline of issues (no more than 2 pages) and choose one issue that you consider to be important to resolving the advice Yo-Go is seeking from you. Analyze that issue in depth, in no more than 1000 words. I will not be grading the outline of issues but will provide feedback on it.
§ 205.239 Livestock living conditions.

(a) The producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including:

(1) Access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment;

(2) Access to pasture for ruminants;

(3) Appropriate clean, dry bedding. If the bedding is typically consumed by the animal species, it must comply with the feed requirements of §205.237;

(4) Shelter designed to allow for:

   (i) Natural maintenance, comfort behaviors, and opportunity to exercise;

   (ii) Temperature level, ventilation, and air circulation suitable to the species; and

   (iii) Reduction of potential for livestock injury;

(b) The producer of an organic livestock operation may provide temporary confinement for an animal because of:

(1) Inclement weather;

(2) The animal's stage of production;

(3) Conditions under which the health, safety, or well being of the animal could be jeopardized; or

(4) Risk to soil or water quality.
Seller: Happy Cows Collective

Buyer: Yo-Go International

WHEREAS Seller is desirous of selling Grade “A” Organic milk to Buyer and Buyer is desirous of purchasing Grade “A” Organic milk from Seller;

NOW, THEREFORE, it is understood and agreed between the parties as follows:

1. **Contract amount** shall be all of the Grade “A” organic milk requirements of BUYER, the actual amount shall be agreed on a weekly basis on Thursday of the week prior to delivery.

2. **Price** shall be the component price for Class 2 milk as established by the California Department of Agriculture.

3. **Quality**. All milk purchased under this agreement shall meet the requirements of the appropriate health authority for use as Grade “A” milk for human consumption. All milk shall be supplied exclusively from dairy farms meeting all applicable National Organics Program standards, with current certification of USDA Organic compliance available at all times. FURTHER Seller agrees to adopt best practices in the organics industry EVEN WHEN SUCH PRACTICES EXCEED THOSE REQUIRED FOR USDA ORGANICS CERTIFICATION.

4. **Delivery**. All milk will be delivered no later than 9 am daily.

5. **Testing**. Milk shall be subject to testing using third-party tester to ensure compliance with required standards. FURTHER, Seller agrees to allow Buyer reasonable access to member dairy farms to ensure compliance with required organic practices.

6. **Payment**. Milk delivered from the 1st through the 15th will be paid for on the 28th of the month in which the milk was delivered. Milk delivered from the 16th through the last day of the month will be paid for on the 13th of the month following delivery.

7. **Termination**. The term of this agreement shall be five years unless either party terminates the agreement earlier. Termination may be accomplished by either party by delivering 6 months written notice to the other party. PROVIDED HOWEVER that BUYER retains full discretion to cancel this agreement immediately if SELLER is in breach of any provision of this agreement or in Buyer’s judgment has failed to follow BEST PRACTICES for Organic Production.

8. **Entire Agreement**. This agreement constitutes the entire agreement between the parties. Any modifications to this agreement must be in writing and signed by both parties.
Happy Cows Collective
Supply Agreement

Happy Cows agrees to supply Yo-Go International with Grade “A” Class 2 milk, USDA Certified Organic, on the following terms:

1. Price is as established by the California Department of Agriculture.
2. Quantity is Buyer’s daily requirements.
3. Delivery will be at Buyer’s facility daily by 9 a.m.
4. Payments must be made PROMPTLY on the 15th of each month. TIME IS OF THE ESSENCE.
5. Seller agrees to work with Buyer to achieve ongoing compliance with best practices in organic production at member dairy farms.
6. This agreement shall have a term of 5 years and be terminable by either party on 6 months written notice.
7. This is the entire agreement between the parties.

We are happy to have your business!

Happy Cows! Happy Customers!

http://www.realcalsforniamilk.com/happycows
Problem 3, Group 5
[deleted: students’ names indicating who is point person]

Assuming that "Seller agrees to work with Buyer to achieve ongoing compliance with best practices in organic production at member dairy farms" (see outline 1.a.i) is a term of the agreement between Happy Cows (HC) and Yo-Go, the issue is: whether Alberto ceasing to send Tony daily logs is a material breach releasing Tony from performance. We must weigh the factors in R§241 (Gibson).

First, to what extent was Yo-Go deprived of the benefit it reasonably expected?

Yo-Go has a reputation for going beyond the USDA Organic Certification standards, and HC claimed its farms are of the same mind. Yo-Go observed a failure on the Arden farm, so without the reports, it cannot be certain that the milk will meet its standards. The chief reason Yo-Go chose to contract with HC was due to its dissatisfaction with the conditions on other farms. HC was aware of this, as Tony had “regaled Alberto with the litany of his disappointments with previous suppliers” prior to their agreement and “asked hundreds of detailed questions” about the farms’ operations and living conditions of the cows. Since satisfying Tony's high standards was the purpose of contracting with HC, that purpose would be frustrated if Tony could not verify the quality of the milk through reports.

HC will argue that by providing daily reports for over a month, Yo-Go had benefited as much as possible through this procedure by establishing a stable history of compliance. Ongoing daily reports churned out over an indefinite period would serve no new purpose and would actually hinder HC from managing its operations and ensuring quality. Further, Alberto will assert that Tony was not significantly deprived of what he reasonably expected because HC generally abided by organic practices above the USDA requirements.

Second, to what extent can Yo-Go be adequately compensated?

Yo-Go will allege that from the date it stopped receiving reports, it could not be sure about the quality of the milk. Quality is Yo-Go's priority, and it could not produce any yogurt with milk of unconfirmed quality without compromising the integrity of its trademark. Additionally, Yo-Go will argue that it cannot be compensated because the daily reports are time-sensitive documents that were worthless if produced with any delay. Untimely notice of an inferior milk shipment serves no purpose if that product has been dispersed throughout Yo-Go’s yogurt supply.

HC will argue that Yo-Go suffered no economic loss from the lack of daily reports, as the only aspect of Yo-Go’s operations that was affected was Tony's own subjective self-satisfaction. Yo-Go incurred no damage if HC failed to continuously produce daily reports, particularly since it had already established a stable history of compliance. If HC concedes that Yo-Go suffered any economic losses, it will claim that it is possible to compensate for the deprivation through reimbursement for yogurt Yo-Go was unwilling to sell due to the unconfirmed quality of the milk.
Third, to what extent will HC suffer forfeiture if Yo-Go halts performance?

Yo-Go will argue that thirty days may be sufficient time to allow HC to adjust production levels to meet with reduced demand, negating the spoilage of excess unsold milk. Also, the milk glut may not affect HC as much as common producers because its organic milk fits into a unique niche.

HC will assert that it will be unable to find a replacement buyer for the $4 million worth of milk that Yo-Go was purchasing monthly due to the glut in the milk industry, regardless of quality. Also, HC may be unable to change production to meet with lower demand in such a short time period because of rigid daily production schedules.

Fourth, what is the likelihood failure will be cured?

Yo-Go will argue the daily reports were themselves intended to cure the failure at Arden Farms, and now that this cure has become its own failure. Tony cannot rely on Alberto’s assurances. This casts serious doubts on the value of such assurance in the future. Further, Yo-Go has given HC a chance to cure this breach, to which Alberto replied "we don't have to...this is ridiculous" demonstrating his unwillingness to cure. Even if HC does resume the daily reports, those documents will not attest to the quality of past shipments of milk.

Alberto will argue he complied with Tony’s demands and will continue to do so. The production of the daily reports themselves – although not an express provision of the contract – manifests HC’s willingness to work with its clients to ensure compliance. HC didn’t have the daily report apparatus integrated into their operations; a failure in the past does not preclude future remedy.

Fifth, the extent failure to perform comports with good faith & fair dealing?

Tony will allege that Alberto made misrepresentations about HC's close relationship with the farms in the collective, saying that all the farms "have been with us since the beginning," which Tony found to be untrue. The daily reports were supposed to cure HC’s apparent failure to comply with Yo-Go’s demands, and now HC has stated it has no intention of working with Yo-Go to find a satisfactory solution. Yo-Go will also argue that HC was aware that Yo-Go had stringent expectations and made frequent reassurances that it would meet those expectations.

HC will argue that it has always made an effort to comply with Yo-Go’s demands, and that the very fact that it produced daily reports illustrates its good faith in attempting to resolve any complaints.

Conclusion

We would advise Tony to retract his notice of repudiation (UCC 2-611) and continue to perform. Yo-Go's defense of material breach by HC is not strong enough to warrant the risk of being found in material breach itself, particularly in light of HC's potential for significant forfeiture and ability to cure.

Some very nice thinking here and clearly presented. Be sure you understand.
when an argument slips over to the issue of breach as distinct from the issue of materiality of a breach. Good judgment in focusing on material breach of a ‘quality’ provision that is most likely to be in—but it’s not necessary to limit the identification of breaching conduct to one thing—you could have strengthened this with a broader set of conduct (reports, Arden failure)

Formation:

1. Battle of the forms:
   a. If Yo-Go’s “Terms of Agreement” and Happy Cows Collective “Supply Agreement” were both confirmations of the oral agreement between the parties, did any terms [conflict](UCC 2-207(2)(c)), specifically the quality and termination clauses, making them not part of the contract?
      i. Whether both parties intended, at a minimum, to be bound to an agreement for the seller to work with the buyer to achieve ongoing compliance with best practices.
   b. Whether the Yo-Go “Terms of Agreement” was agreed to by Happy Cows, since they accepted it without objection after Tony said “delighted to sign up with you on our usual terms” and if so, whether Happy Cows’ “Supply Agreement” proposed terms that materially altered the terms of the party’s previous agreement (UCC 2.207(2)(c))?
      i. Quality Clause: HC’s does not include “Further seller agrees to adopt best practices in the organics industry even when such practices exceed those required for USDA organics certification.”
      ii. Termination Clause:
         1. Was this term illusory and thus not consideration because the language was too vague to be considered reasonable? A promise conditional on the satisfaction of one of the parties could fail as consideration unless there is some limitation on that party’s ability to claim dissatisfaction.
         2. Whether the contracts’ respective merger clauses supersede and discharge any prior or subsequent oral agreements? (R§210; UCC 2-202, 2-207 – no “mirror image” rule)

2. Whether Alberto induced Tony’s agreement through fraud by stating that “all our dairy farmers have been with us since the beginning 10 years ago,” making the agreement voidable? (R§162, §164)
   a. Whether this statement was essential to the formation of the agreement (R§163)?

Modification:

1. Whether the subsequent agreement to provide daily reports was a requirement of their oral agreement for Alberto to personally fix anything that Tony was uncomfortable with, or the contract term to “work with buyer to achieve... best practices” encompassed Tony’s request for daily reports?
2. Whether the subsequent agreement to provide daily reports was a modification of
the initial agreement despite the two merger clauses?
  a. Whether the daily agreements became an obligatory condition of supplying the milk to Yo-Go? (R§226)
  b. Was the modification the result of undue influence or duress since Tony said, “You better fix this immediately”?

3. Whether parol evidence is necessary and available to determine what “best practices in the organics industry” meant in the Yo-Go and Happy Cows contracts? (R§202, §203; UCC 1-205)
   a. Whether “best practices in the organics industry” is clarified by Tony’s course of dealing (making “his views known through public lectures and a column he writes in a Santa Barbara daily newsletter,” history of abandoning numerous other milk suppliers that had comported with USDA Organic standards) (R§222)?

**Breach:**

1. Whether Alberto's failure to provide Tony with daily reports of the cows' outdoor activity constituted a material breach based on Restatement §241?
2. Whether Tony gave Alberto sufficient opportunity to cure the supposed breach?
3. Whether Alberto saying "we don't have to give you these things, this is ridiculous," was a clear and equivocal statement of repudiation?
4. Whether Elise’s letter to Happy Cows was a notice of repudiation, and if so, whether it should be revoked if it is found that Alberto did not materially breach the contract?
INSTRUCTIONS

This is a three-hour open-book exam. You may use any books or materials you wish except that you may not submit any prepared notes or rough notes with your answer. You may not discuss cases, sections of the UCC or the Restatement that were not on the syllabus. You will have one hour to read the exam and think about your answer, making rough notes if you wish. During that hour you may not, however, write in your blue book or work on your computer. After the hour is over, you may begin composing your answer. The total number of points for this exam is 100 and your answer must consist of two parts. In the first part, you will outline the legal issues you identify in the fact scenario. You should break major issues into related sub-issues as much as you see you fit. If you have a factual question please note that explicitly. You should cite a case (briefly, just by name), Restatement or UCC section if that is necessary to make clear the legal basis for an issue you are raising; there is no need to cite any cases, Restatement or UCC sections for basic propositions about contract law. Do not include any analysis of the issues you identify in the outline. The issue spotting outline is worth 50 points. When you are finished with your outline, you must choose one issue that you judge to be important to the advice you are asked to give in the problem. This issue may involve sub-issues. Your choice of what issue to write about is worth 20 points. There is no need to explain or justify your choice of issue. You must then analyze that issue in depth and reach a final assessment of the strength of your client’s legal position with respect to that issue only. Your analysis is worth 30 points. In the event you change your mind about what issue to write about after you begin your analysis, do not change issues. Instead, you should explain at the end of your analysis why your judgment has changed and what other issue you would have written on had you recognized this sooner in the exam. I will take your explanation and proposal for an alternative issue for analysis into account when awarding points for the choice of issue. As a guideline, I suggest you spend equal time on the issue spotting section and the analysis section of the exam.

Good luck!

YOU MUST STOP WRITING WHEN INSTRUCTED TO DO SO BY THE PROCTOR.
FAILURE TO DO SO WILL BE CONSIDERED A BREACH OF ACADEMIC DUTY AND WILL BE REPORTED TO THE DEAN’S OFFICE BY THE PROCTOR.

DO NOT LIFT THIS COVER SHEET UNTIL INSTRUCTED TO DO SO BY THE PROCTOR.
Maggie Montrose owns a horse farm in the San Gabriel Mountains. An avid horsewoman since she was a child, Maggie boards and trains horses and, with her staff, teaches riding and offers guided trail rides. Maggie owns 35 horses, boards another 25 and knows each one like she knows her own family members.

Five years ago Maggie took out a mortgage on her farm—which she had originally inherited from her grandfather—in order to undertake substantial upgrades and expand the facility from its original 30 horse capacity to accommodate up to 60 horses. She obtained this mortgage by visiting her local bank, San Gabriel Savings and Loan (SG S&L), where she spoke with her long-time banker, Sid Thoms. Sid proposed an adjustable rate mortgage for a $2 million loan with a low introductory rate of 3% for the first five years; after that the interest rate would adjust every month to be equal to the current prime rate plus 1%. Maggie told him about her worry that she might be overextending herself given that there were some risks involved: if she didn’t get enough new business or if there was an outbreak of a virus among the horses that required her to close down under quarantine for a period (this had happened to her grandfather), she wouldn’t be able to keep up with the mortgage payments. Sid suggested that they include a ‘right of suspension’ clause in the mortgage, which, he explained, would give her the option to suspend payments for up to six months in the event that she ran into financial difficulties like the ones she had mentioned. Maggie agreed and signed the mortgage documents. (See last page for clauses.)

Since taking out this mortgage, Maggie’s business has had its ups and downs. She takes in revenues of about $50,000 a month on average with costs of $35,000 a month, leaving her $15,000 for her mortgage and all other living expenses. She has fallen behind on her payments a number of times, never by more than two months; each time she has called up Sid Thoms, explained the situation (unexpected cancellation of several boarding contracts, two short-term virus scares, problems in generating business after she fired her sales agent, etc.) Each time she has been able to scrounge up enough to pay what she owes. Sid has never mentioned any risk of foreclosure and neither has referred specifically to the suspension rights in the mortgage documents. She just calls and he says ‘No problem Maggie, I’m sure you’ll turn it around.’

A few months ago, Sid Thoms retired and was replaced by Radhika Marx. Radhika is one of a new breed of aggressive and effective bankers. SG S&L hired her just as the sub-prime mortgage crisis began to rock the banking industry, having heard from her previous employer that “Radhika knows where the bodies are buried and she gets the job done—let’s just say I’d never want to be looking down the desk at her if I were ever a deadbeat borrower.”

When Radhika arrived at SG S&L she began reviewing all of the files on outstanding mortgages. She was appalled. The bank had thousands of outstanding loans of the type that have sent the mortgage industry into a spiral: adjustable rate loans made at unrealistically low introductory rates to people who could not afford the loans once the rates adjusted to higher rates. Radhika advised SG that it should immediately foreclose on all loans that are in default so they can resell the properties before the housing market crashes. The SG executives are distressed by this advice—they know the bank is in serious financial difficulty, but this approach seems to them overly harsh and unfair. Instead, they compose a letter to all borrowers, discussing the sub-prime
mortgage crisis and the risks this has created that interest rates will increase substantially, home prices will fall significantly, and many borrowers will find themselves in default. The letter states that SG S&L “strongly encourages you to contact us to discuss the terms of your loan and the benefits of converting your existing loan to one that reduces your risk of default. For the next thirty days, we are offering to convert all existing adjustable rate mortgages to fixed rate mortgages at 6% with no prepayment penalties.” This letter was mailed to all borrowers on November 10; Maggie received her copy on November 12. Maggie gave some thought to the option of converting to a fixed rate mortgage but threw the letter away. She doesn’t pay much attention to the financial news and doesn’t think that interest rates will go up.

Radhika was disgusted by the weak action taken by the ‘lily-livered’ executives at SG S&L and began reviewing files again to identify loans on which she felt she should take independent action. Among the loans that caught her attention was Maggie Montrose’s. She noted that Maggie had been in default several times over the past five years, and was 40 days late on last month’s payment. Radhika reviewed the notes Sid had scribbled on the file: “quarantine” “virus” “sales rep fired” “boarding contracts cancelled.” “What hogwash” she thought. Radhika put in an immediate call to Maggie, leaving a voice mail message: “Ms. Montrose, this is Radhika Marx of San Gabriel Savings and Loan. Today is the 20th of November. I am the bank officer in charge of your mortgage and you are currently in default. You need to contact me immediately or I will be filing papers to begin foreclosure on your property.”

Maggie was stunned to receive the voicemail later that day. She called Radhika who told her that she should come in immediately. Maggie grabbed her somewhat haphazard business files and jumped in her truck. As she drove to the bank, she reviewed the problems the business had faced in the last few months: first the recent fires that had shut down access to the farm for a few weeks and then an expensive illness that had hit half of the horses and led many boarders to cancel. She rehearsed how she would explain the situation to Ms. Marx and why she thought she’d be back on track in a few months when her regular boarders returned.

When she arrived at the bank, Radhika was sitting at her desk, which was empty except for a copy of Maggie’s mortgage agreement, a draft of a new agreement, an official looking document titled “Petition for Foreclosure,” and a printout from an internet newsletter for the mortgage industry with a bold-faced headline “PRIME PREDICTED TO HIT 8% BY YEAR’S END.” It was this article, which Radhika read a month ago, that galvanized her into action. She knew that if the prime went to 8%, thousands of her adjustable rate mortgage customers would be completely unable to make their payments, now or ever. Radhika’s main goal was to get the adjustable rate mortgages off the books as quickly as possible, making her a star at SG S&L.

Maggie started to explain the troubles the farm had been having lately, pulling out papers that documented these difficulties and putting them on the desk in front of Radhika. Radhika interrupted Maggie after several minutes. “Ms. Montrose. I really don’t care about your problems. I’m a banker not a social worker. You are in default. That’s simply not subject to dispute. We have the right to foreclose and we intend to foreclose.” She waved the document that said “Petition to Foreclose” and continued “I have the paperwork ready, right here and I intend to file this with the court tomorrow unless we reach an agreement today. Here is what I am proposing. It is clear you are completely over-extended and this business of yours is a
disaster. You need to sell off half the property, including at least 15 horses. Sign here: this
document says you agree to transfer to us the right to put the western half of your property up for
sale and to keep up to $1 million of the proceeds from the sale of the property and the horses.
You will owe a $50,000 prepayment penalty, 5% of the amount being pre-paid, which is $1
million. We will then pay off your old mortgage and issue a new mortgage for $1 million at a
fixed rate of 6%.”

Maggie was stunned. “You’ve got to be kidding. Sid and I were always able to work this out.
He promised me when we did this mortgage, that I’d have the ability to suspend my payments if
I got into a tight spot. I’m sure it’s in the papers somewhere. You can’t do this.” Radhika
responded “I don’t give a hoot about your supposed suspension rights. I saw that in there and it’s
just another example of how Sid Thoms damaged this bank. We are not going to honor such a
mindless clause. You can try and fight it but that’s going to take months and thousands of
dollars in legal fees. Do you realize that your payments are soon going to hit 9%?” She handed
Maggie the internet newsletter. “9%!” Maggie exclaimed, “I’ll be bankrupt in a few months! I’d
lose the farm! The horses!” “This bank is doing everything it can to help you Ms. Montrose, “
Radhika replied, “but frankly I don’t care one way or the other what happens to you or your
horses. Not my problem. My problem is getting this bank into financial shape and that means
you either agree or we foreclose. Here are the documents. Sign them and drop them off by 9 am
when the bank opens in the morning otherwise I’m filing for foreclosure at 10 am. And here,
take this mess of papers back—I’m really not interested in your rather pathetic efforts to show
how hard you’ve been trying or how hard things are for you. Sid may have been interested but
I’m not. Good day m’am.”

Maggie left in tears with the new documents. When she got home, she remembered the letter she
had received from the bank. She called Radhika and told her she wanted to restructure her loan
as proposed in the letter without prepayment penalties. Radhika responded, “Ms. Montrose, we
have already discussed your situation, I have made you a proposal and that offer is no longer
open to you.” Maggie got off the phone and went down to talk to her stable manager, Zeus, who
reminded her that they had both projected significant growth in the business in the coming year
because of the closure of some key competitors; the recent fires and illness had just slowed them
down a few months in achieving that potential. “But,” Maggie told him, “that doesn’t matter
now because if I have to start paying 9% interest I’ll be bankrupt in months.” She signed the
papers and delivered them to the bank in the morning. Furious about what had happened, and to
get back at SG S&L, she sold off 15 of her horses in the next few days at give-away prices of
$1000 each. The horses are usually worth about $10,000 each.

That was almost a month ago. In the interim, the bank has listed half of the property for $1
million but it has not yet sold. Also in the interim, the internet newsletter that Radhika showed
Maggie has been exposed as the work of two high school students in a garage. No-one has been
or is now predicting the prime rate to go above 5% in the foreseeable future. And Maggie has
learned that one of the horses she sold was quickly resold as a potential racehorse for $100,000.
Others, to Maggie’s great distress, were resold to butchers as meat. Please advise Maggie on her
legal options. You should assume that at all times both Sid and Radhika are acting as authorized
agents of the bank (so ignore, had they occurred to you, any problems of agency) and that yes,
Radhika sincerely believed the internet newsletter was accurate.
Some clauses in the original mortgage agreement:

Right of suspension: Borrower shall take all reasonable steps to remain in good standing on this loan obligation. However, in exceptional circumstances, Borrower shall have the right, upon provision of notice and documentation sufficient to satisfy Lender as to Borrower’s efforts to remain in good standing and the exceptionality of circumstances, to suspend payments for a maximum of six (6) months.

Right of foreclosure: In the event Borrower is more than 30 days past due on any payment, Lender shall have the right to immediately foreclose on this loan and retain any proceeds from a sale of the property sufficient to repay the principal and accumulated interest owing.

Prepayment: Borrower may prepay amounts to reduce the principal on this loan for a penalty of 5% of the amount Borrower seeks to prepay.

Entire agreement: This Agreement contains the entire Agreement between Lender and Borrower.

Glossary of terms:

Mortgage: A mortgage is a loan which gives the lender a right of foreclosure.

Foreclosure: A right of foreclosure entitles the lender to take possession of the property and put it up for sale if the borrower fails to make his or her mortgage payments. The lender keeps all of the money from the sale.

Principal: The principal is the amount that is borrowed.

Prime rate: The prime rate is the rate at which banks lend to their best customers. It is published every week in the Wall Street Journal.

Mortgage payments

Assume that the monthly cost for a mortgage of **$2,000,000** is:

<table>
<thead>
<tr>
<th>Rate</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>3%</td>
<td>$8,000</td>
</tr>
<tr>
<td>6%</td>
<td>$12,000</td>
</tr>
<tr>
<td>9%</td>
<td>$16,000</td>
</tr>
</tbody>
</table>

Assume the monthly cost for a mortgage of **$1,000,000**

<table>
<thead>
<tr>
<th>Rate</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>6%</td>
<td>$6,000</td>
</tr>
</tbody>
</table>