A. Subject: Modifications, Accord and Satisfaction

1. The traditional common law rule, still effective in most jurisdictions, is that a contract can be modified only if there is consideration on both sides. Therefore a modification which only changes the legal obligations of one of the parties, will not be enforceable.
2. The traditional common law recognized that parties to a contract have the right to rescind the contract. Assuming that both sides still have performance obligations under the contract, they can agree to terminate the contract. That rescission is supported by consideration on both sides and is, therefore, valid and enforceable. Now suppose they made a new contract with one side's performance obligations identical to the previously existing contract and the other side's performance is less burdensome than in the previous contracts. Because this is a new contract and there is consideration on both sides, it will be an enforceable contract. This means, of course, that it this rescission rule makes it possible to circumvent rule 1 above.
3. The Uniform Commercial Code, section 2-209(1) changes rule 1 in sales of goods contracts. The UCC makes modifications of sales of goods contracts enforceable despite the absence of consideration on both sides, but the code's obligation to perform contracts in good faith extends to include modifications of contracts.
4. The Restatement of Contracts 2d, section 87a suggests that a court could, if it so desired, enforce a modification of a contract without consideration on both sides if the contracts is executory on both sides and the modification is made in response to unexpected developments after the contract was made and the modification is reasonable in the light of those developments. Some courts have adopted this change in legal doctrine.
5. An accord is an agreement to modify the obligations of one of the parties to a contract. It often occurs after one party has completed performance, or believes it has and the modification applies to the other party. Since it is a species of modification, it requires consideration on both sides to be enforceable.
6. Although a contract can not be modified without consideration on both sides, if the contract contains conditions, the conditions can be "waived" without consideration. Waiver is a knowing relinquishment of a right. Notice that this doctrine of waiver only applies to conditions, not to promises. Let's suppose that you had seen a weather forecast that said it is going to rain tomorrow. You said to me, I know you have an umbrella. If it rains tomorrow, I promise to buy your umbrella for $25. Tomorrow comes and it is not raining. You could say, I will buy the umbrella for $25 even though it is not raining. You would be said to have waived the condition of rain which the contract had included for your benefit and the contract between us is left with the mutual promises - I must sell you the umbrella and you must pay me $25. But if it did rain tomorrow and I tendered the umbrella to you and you said, $25 is entirely too much for an umbrella, I will pay you $10 and I accepted, that would be a modification of one of the promises of the contract and that would require consideration to be binding.

7. Let's take the same hypothetical and introduce an accord. I deliver the umbrella to you and you and you accept it, but then you say to me, I don't like this umbrella very much, I will only pay you $10 for it. Suppose that I accepted that change in price. This modification would be called an accord. But it would not be enforceable in the absence of consideration on your part (obviously there is consideration on my part because I am giving up my legal right to be paid $25, but on your side there would be no consideration at all).

B. Mutuality/Consideration

1. The word "mutuality" has been the source of considerable confusion in the study of the common law. The problem with the word is that some courts confused the word "mutuality" with the word "equality," that is, that some courts saw the absence of equal burdens in a contract as signifying a lack of "mutuality." In truth, all the word "mutuality" was intended to mean was that in order to be enforceable, there must be consideration on both sides and that the consideration was, in some sense, in exchange for the consideration offered by the other side. Where each side offers consideration in exchange for the consideration offered by the other side, there is "mutuality."

2. Although courts insist that equality is not required for consideration (or, if you insist, for mutuality), there are some instances in which the undertaking by one party is so lacking in substance that the courts will refuse to accept it as consideration at all. This is usually described as an "illusory promise." The promise is not actually illusory, it simply is not sufficient to be consideration. That does conflict with the often stated proposition that courts will not look into the adequacy of consideration. That is true - but they will observe and refuse to enforce, contracts where though there is a form of promise it is totally lacking in a legally cognizable burden. The traditional example is a promisor who says, "If I feel like doing it, I will mow your lawn tomorrow." Conditioning the promise to mow the law on how the promisor "feels like doing it" is not, in the view of courts, a sufficient legal burden to meet the definition of consideration. Rather than acknowledge that this deviates from the rule that courts will not inquire into the sufficiency of consideration, courts say that such a promise is an "illusory" promise." Another example is a contract which gives one party a right to terminate a contract at will. No matter how burdensome the undertaking in the promise may be, the inclusion of a way of having no obligation at all renders the promise inadequate as consideration, and the court's will refuse on the ground the "promise is illusory" and the contracts lacks "mutuality." Another way of saying that is, of course, that the promisor who reserves the right to terminate at will has not undertaken a sufficient legal detriment to constitute consideration.

3. Historically, many courts found output and requirements contracts to be unenforceable because the requirements buyer could escape all obligations simply by saying that it had no requirements and the output seller could escape all obligations simply by saying that it had no output. Some courts in such contracts found consideration in express exclusiveness of dealing (that is, the buyer said not only that it would buy its requirements from seller but that seller would be the exclusive source of

such purchases). Some courts found such an understanding to be implicit in the requirements or outputs setting. The drafters of the Uniform Commercial Code included, in 2-306 an entirely new set of criteria to determine whether or not a requirements or output contract would be enforceable - meet those standards, and the contract is enforceable. In this provision, as in 2-209, the UCC abandons consideration as a useful doctrine. While consideration remains a necessity for enforceability in most contracts, including sales of goods contracts, the UCC Article 2 has some rules that do not rest on consideration at all. 2-306 and 2-209 are the examples we have looked at this term.

Option Contracts

1. Option contracts are contracts in which an offeror agrees, for compensation, that its offer will not be revocable for a stated period of time. Normally, as we will learn next semester, offers can be revoked at any time by the offeror. An option contract requires consideration because the offeror is proposing to limit its legal choices (the right to revoke the offer at any time) and this would not be an enforceable promise without the offeree providing, in exchange, some legal detriment undertaken by the offeree. Usually that is the payment of money. So stated, there is no difference between an option contract and any other. However, the courts have held that payment of what would otherwise be dismissed as “nominal” consideration (and therefore not consideration at all) would be sufficient to support the enforceability of an option contract provided that the ultimate contract, anticipated by but not required by the option agreement, would be on reasonable terms. Option contracts are to be found in a wide variety of business dealings and are most commonly seen in large scale real property development arrangements were the developer must purchase the parcel of land from many different owners and doesn’t want any of the property unless the whole parcel can be acquired. To achieve this end, the developer attempts to obtain individual option agreements with each of the landowners but will not “execute” the option (that is, accept the offer) until it has options with every landowner. Then, with all of those options in hand, all will be executed and every part of the parcel will be purchased pursuant to the option contracts.

Reliance Damages

1. In the general run of cases, reliance damages simply require the defendant to reimburse the plaintiff for all expenses of the plaintiff made in reliance on the contract. These are “out-of-pocket” expenses and their calculation requires looking a records of actual expenditures. The only difficulties in computation arise where the defendant argues that a particular reimbursement requested by plaintiff was for an expense that was not in reliance on the contract or was not foreseeable by the defendant at the time the contract was made.

2. There are also, however, reliance cases where the plaintiff is arguing that it gave up an alternative course of action on the basis of having made the contract which defendant breached and that the alternative course of action would have been

profitable. That ungained profit is argued to be a “reliance cost,” or it is frequently described as an “opportunity cost.” Courts will award such losses as reliance losses if they are persuaded that there really was such an opportunity and that the profit earned from it can be proved beyond speculation. In a few instances, courts have looked at the possible profit to be made from the breached contract as a measure of what the alternative course of action would have realized for the plaintiff. This is distinctly not a reliance measure - it is an expectation measure. Sometimes courts get this wrong - as do law students, sometimes.

Expectation Damages - Common Law

1. We have looked at a variety of formulas used by courts in calculating expectation damages for breach of contract. You should be familiar with at least these:

Cost of Completion
Diminished Value
Price

2. Diminished Value is frequently justified by finding that “economic waste” would be involved in applying a “cost of completion” formula because the value of the “completed” work would be far less than the cost of completion. Diminished value is regarded as an expectation remedy because the plaintiff receiving such compensation would be placed in the same economic position as the economic position which full performance would have provided. On the other hand, courts sometimes recognize that despite the disproportion of damages to value, the appropriate expectation formula would be cost of completion and not diminished value.

Damages in Sales of Goods Cases - UCC Article 2

1. Buyer’s Remedies

a. Cover - aggrieved buyer makes, in good faith and without unreasonable delay a reasonable purchase in substitution for goods not delivered by the seller (2-712)

b. Market-Contract differential - aggrieved buyer is compensated by requiring defendant to pay the difference between the contract price and the market price when the buyer learned of the breach (2-713)

c. Consequential Damages (2-715(2)). Additional compensation for the buyer for losses caused by the breach which were foreseeable when the contract was made and which could not have been avoided by cover.

2. Seller’s Remedies

a. Resale - aggrieved seller can resell goods and demand difference between re-sale price and contract price (2-706)

b. Market-Contract differential - aggrieved seller is compensated by requiring defendant to pay the the difference between the contract price and the market price at the time and place of tender (2-708(1))

c. Lost Volume Seller Profit - if the seller is a lost volume seller, the seller may also (in addition to 2-706 or 2-708(1)) demand payment by the breaching buyer of a lost profit (assumes infinite supply of goods and limited number of buyers).