1. **Answer Problem 2 on p. 743 of the Epstein, Markell & Ponoroff casebook. Please explain your answer.**

If Ponoroff is going to Tuscaloosa to attend his nephew’s graduation, then this is a modern-day *Krell*. Unless the hotel specifically contracts around this point (and most hotels do contract around this point), it looks as though Ponoroff may claim frustration of purpose. The higher rates and harsh deposit policy of the hotel during graduation time supports the argument that the hotel, like *Krell*, understood the principal purpose of Ponoroff was, or was at least reasonably likely to be, to attend graduation. This problem differs from #1 in that Ponoroff paid the money as a deposit (as did Henry), whereas Bertha paid the money to purchase the ticket (a license to attend the concert). The hotel can argue that the deposit was, on its face, non-refundable -- no matter what Ponoroff’s principal purpose was for coming to Tuscaloosa -- and that, unlike Bertha who can get no value from a ticket to a cancelled contract, the tornado didn’t wipe out the hotel, so Ponoroff can still enjoy the luxury of two nights in Tuscaloosa. This dispute will hinge on the foreseeability to the hotel of Ponoroff’s principal purpose, and Ponoroff’s case is less “airtight” than Henry’s. And by the way, did Henry get his deposit back? No. He was just excused from paying the remaining rent. (But don’t get suckered. Henry didn’t get his deposit back because he dropped his claim for a refund before the court considered it. Besides, R2 § 265, if it applies, is better authority for Ponoroff than *Krell*.)

On the other hand, if Ponoroff was traveling to Tuscaloosa to talk with Epstein about a new textbook, there is now no joint purpose frustrated by the cancellation of the graduation, so there would be no basis for applying *Krell*. Ponoroff loses.

2. **Answer Problems 2 and 3 on pp. 803-04 of the Epstein, Markell & Ponoroff casebook. Please explain your answer.**

**Problem 2:** Yes (less any recoupment of damages). Here, it appears that the performance is divided into four separate performances on each side, with each side’s performance being matched up with something from the other side, and it appears that the performances are intended to be equivalent.

**Problem 3:** Probably not. Here, while there are four separate games, there is only one purchase price, and not a lot of evidence to divide the price evenly among them – it could be that one of the games involves more, or is the core game from which the others derive meaning (sequels).
3. On May 1, 2004, Shaggy agreed to purchase The Mystery Machine from Fred for $20,000. Shaggy and Fred further agreed that Shaggy would pay Fred the full $20,000 purchase price on or before July 1, 2004, and that Fred would, upon receipt of the full purchase price from Shaggy, transfer title to The Mystery Machine to Shaggy.

A. Which of the following statements or acts by Shaggy would constitute an anticipatory repudiation of his promise to Fred? Please explain your answer or answers.

(1) On June 1, 2004, Shaggy told Fred, “I recently lost my job at The Malt Shoppe, and I am not sure I’ll be able to pay you the entire $20,000 by July 1st.”

(2) On June 1, 2004, Shaggy told his friend Velma, “I know Fred is planning to use the money I promised to pay him for The Mystery Machine to travel to Europe with Daphne. I’m sick and tired of him ending up with the girl and me ending up with the dog. I’m not going to pay him anything. The Mystery Machine is a piece of junk anyway.”

(3) On June 1, 2004, Shaggy told Fred, “I have thought this over, and I am not going to pay you the money I promised you. How about a ‘Scooby Snack’ instead?”

(4) On June 1, 2004, Shaggy told Fred, “The more I think about, the more I am convinced that you are asking too much for The Mystery Machine. Would you agree to sell it to me for $15,000, instead of $20,000?”

In order to have repudiated his promise, Shaggy must have definitely and unconditionally manifested to Fred his inability to, or his intent not to, perform as and when promised. See UCC § 2-610 cmt. 1; see also R2 § 250 cmt. b. Only (3) is an anticipatory repudiation, because only in (3) does Shaggy clearly, unequivocally, and unconditionally tell Fred that he cannot or will not perform as and when promised. Cf. R2 § 250 illus. 1.

Shaggy’s statement to Fred in (1) is equivocal (“I am not sure …”). An equivocal statement is not definite, and therefore is not a repudiation. Cf. R2 § 250 cmt. b & illus. 3. Shaggy’s statement in (2) is clear, unequivocal, and unconditional, but was not made to Fred or to anyone acting as Fred’s agent so as to give him constructive notice of Shaggy’s repudiation. Cf. R2 § 250 cmt. b & illus. 4. Shaggy’s statement in (4) is not a repudiation because merely requesting more favorable terms or suggesting a modification to the terms of a contract does not repudiate the contract. Cf. Truman L. Flatt & Sons Co. v. Schupf, 649 N.E.2d 990 (Ill. App. Ct. 1995). On the other hand, refusing to perform unless the other party agrees to the more favorable terms does repudiate the contract. See UCC § 2-610 cmt. 2.
Statements (1), (2) (if it comes to Fred’s attention), and to a lesser extent (3), may well give Fred reasonable grounds for insecurity, so as to justify him requesting from Shaggy reasonable assurances that Shaggy will perform as and when promised. See UCC § 2-609(1) & cmts. 1-2. And, if Fred properly requests the assurances and Shaggy does not respond adequately, then Shaggy’s failure to provide adequate assurances in response to a reasonable and proper request – but not Shaggy’s original statements themselves – will constitute an anticipatory repudiation. See UCC § 2-609(4).

B. Assuming that Shaggy’s statement constituted an anticipatory repudiation of his promise to Fred, which of the following actions was Fred entitled to take in response to Shaggy’s repudiation? Please explain your answer or answers.

(1) Do nothing, hoping that Shaggy would, in fact, perform as and when promised.

(2) Urge Shaggy to reconsider and to perform as and when promised.

(3) Cancel the contract and retain The Mystery Machine.

(4) Sell The Mystery Machine on June 24th to Mr. Greeley for $15,000 and sue Shaggy for $5,000.

Fred can do all of the above. A promisee whose promisor has repudiated his obligation may elect to (1) cancel the contract, (2) bring suit against the promisor or otherwise act in reliance on the repudiation, or (3) do nothing, subject to the promisee’s obligation to mitigate damages, and await the promisor’s performance at the appointed time. See UCC § 2-610; see also, e.g., Truman L. Flatt & Sons Co. v. Schupf, 649 N.E.2d 990 (Ill. App. Ct. 1995). The promisee may also, without prejudicing his right to any other remedy for the promisor’s repudiation, urge the promisor to retract his repudiation or to perform in spite of it. See UCC § 2-611. If Fred elects to sell The Mystery Machine to Mr. Greeley in reliance on Shaggy’s repudiation, Fred may sue Shaggy for the difference between the contract price ($20,000) and the “cover” price – that is, the price at which Fred was able to sell to another buyer – ($15,000).

C. Suppose that, in order to sell The Mystery Machine to Shaggy “free and clear” of any liens or other impediments of title, Fred had to pay off the last $5,000 he owed Gomez and Morticia Addams, from whom Fred bought The Mystery Machine 18 months earlier, and to obtain a release of lien from the Addamse and file it in the county personal property records. In light of Shaggy’s statement, did Fred have to go ahead and pay off the loan that was not otherwise due to be paid off until December 31, 2004? Please explain.

No. Shaggy’s repudiation allows Fred to suspend his own performance, including any preparatory actions Fred had to take in order to perform his end of the contract to sell The Mystery Machine to Shaggy. UCC § 2-610(c).
D. Suppose, instead, that Fred telephoned Shaggy on June 3, 2004 and asked Shaggy for assurances, no later than June 10th, that Shaggy would have the $20,000 to purchase The Mystery Machine by July 1st. Assuming that Fred had reasonable grounds to demand adequate assurances from Shaggy that he would perform as and when promised, did Fred’s June 3, 2004 phone call constitute a proper request for assurances? Please explain.

Almost certainly not. Because this contract is governed by UCC Article 2, the plain language of UCC § 2-609(1) requires Fred to make his demand in writing. While a handful of courts have ignored the “in writing” requirement where the circumstances made it absurd or implausible to require a writing (I discuss a few of these in the article excerpt I gave you), we shouldn’t assume that this case would be an exception to the rule.

E. Suppose, instead, that Fred faxed Shaggy on June 3, 2004 and asked Shaggy for assurances, no later than June 10th, that Shaggy would have the $20,000 to purchase The Mystery Machine by July 1st. Assuming that (1) Fred had reasonable grounds to demand adequate assurances from Shaggy that he would perform as and when promised, and (2) Fred’s June 3, 2004 fax constituted a proper request for assurances, which of the following statements or acts by Shaggy, standing alone, would satisfy Fred’s request? Please explain your answer or answers.

(1) On June 3, 2004, when Fred called him to request assurances, Shaggy told Fred “I’ll do everything I can to make sure that I have the money by July 1st.”

(2) On June 10, 2004, Fred received a letter from First National Bank of Squaresville informing Fred that the Bank would guarantee Shaggy’s promise to pay Fred $20,000 on or before July 1, 2004, to purchase The Mystery Machine.

(3) On June 14, 2004, Shaggy called Fred to tell him “I just got off the phone with my financial adviser, who was on vacation all of last week, and I told her to sell some of the stocks I bought with the money I inherited from Uncle Bob. She said it would take a couple of days to get me a check, but I will have your $20,000 before July 1st.”

(4) On June 30, 2004, Shaggy showed up at Fred’s house with $20,000 in cash to purchase The Mystery Machine.

The bank’s guarantee that it will pay Fred the $20,000 if Shaggy fails to do so is surely adequate assurance that Fred will receive the $20,000 Shaggy promised him.

On the other hand, promising to “do everything I can to make sure that I have the money by July 1st” is no more (and probably less) assuring than promising to have the money by July 1st – which Shaggy has already promised. Cf: R2 § 251 illus. 6. Likewise, providing assurances
on June 14th when Fred asked for them no later than June 10th does not satisfy UCC § 2-609. The fact that Shaggy’s delay was due to his financial adviser being out of town should not excuse his delay. If Shaggy had a sufficient portfolio to enable him to satisfy Fred by selling off part of the portfolio, Shaggy could easily have formulated another strategy for providing assurances that did not require letting Fred’s deadline pass.

And, while $20,000 cash would likely have assured Fred under other circumstances, because Shaggy waited until the day performance was due to “show Fred the money,” Shaggy failed to “provide within a reasonable time ... such assurance of due performance as is adequate under the circumstances.” UCC § 2-609(4). The fact that Shaggy’s payment of $20,000 cash on July 1st would have constituted full performance of his contractual obligation to Fred in the absence of Fred’s reasonable grounds for insecurity ignores the fact that Fred properly requested assurances and that Shaggy did not give them in a timely fashion. Cf. R2 § 251 illus. 5.

4. **Eddie Cicotte was the star pitcher for the 1919 Chicago White Sox.** (Cicotte still holds the major league record for lowest career earned run average.) His contract for the 1919 season provided that the Sox would pay him a base salary of $15,000, plus another $10,000 if he won 30 or more games during the regular season, and $5,000 if the Sox won the World Series. Seeing his team was going to win the American League (they didn’t have divisions back then) by a comfortable margin, and wishing to avoid paying Cicotte the $10,000 bonus, Sox owner Charles Comiskey, a notorious tightwad, instructed manager Kid Gleason to bench Cicotte for two weeks late in the season, causing Cicotte to miss four or five starts. Cicotte finished the regular season with 29 wins. Thereafter, Comiskey refused to pay Cicotte the $10,000 bonus because Cicotte had not won 30 games. When Cicotte replied that the only reason he hadn’t won the extra game was Comiskey’s instructions to bench him, Comiskey said he had wanted Cicotte well rested for the post-season. Neither Cicotte nor Gleason believed that Cicotte required the additional rest.

As a threshold matter, all of the contracts at issue in Question Four are for the rendition of services, not the sale of goods. Therefore, they are outside the scope of the UCC and the CISG and are governed by common law.

**A. Did the Sox breach their contract with Cicotte by refusing to pay him the $10,000 bonus? If so, was that breach material or immaterial? Was it partial or total? Please explain.**

The Sox almost certainly breached their contract with Cicotte by refusing to pay him the $10,000 bonus even though, technically speaking, Cicotte did not earn the bonus. When parties enter into a contract, they owe each other a duty of good faith in their performance and enforcement of the contract. R2 § 205. When Comiskey instructed Sox manager Gleason not to let Cicotte pitch in order to keep Cicotte from winning 30 games, the Sox ceased being “faithful[] to an agreed common purpose and consisten[t] with [Cicotte’s] justified expectations.” Id. § 205 cmt. a. Moreover, a party granted an exclusive right, the exercise of which will benefit the other, impliedly promises to use “reasonable efforts” on the other’s behalf. *Wood v. Lucy,*
Lady Duff Gordon. Here, Cicotte agreed to pitch exclusively for the Sox, who agreed to pay Cicotte for doing so and to pay him a bonus for doing so well enough to win 30 games. When Comiskey instructed Sox manager Gleason not to let Cicotte pitch in order to keep Cicotte from winning 30 games, the Sox ceased using “reasonable efforts” on Cicotte’s behalf.

A breach is material when it deprives the non-breaching party of his reasonable contractual expectations. It “is so dominant or pervasive as … to frustrate the purpose of the contract.” Jacobs & Young, Inc. v. Kent. Factors to consider in determining whether a breach is material include (1) the extent to which the non-breaching party will be deprived of the benefit he reasonably expected; (2) the extent to which the non-breaching party can be adequately compensated for the part of the benefit of which she is deprived; (3) the extent to which the breaching party will suffer forfeiture if the non-breaching party is excused from her contractual obligations due to the breach; (4) the likelihood that the breaching party will cure, taking into account all of the circumstances, including any reasonable assurances by the breaching party; and (5) the extent to which the breaching party’s behavior comports with standards of good faith and fair dealing. R2 § 241. The Sox’s breach deprived Cicotte of his expectation of fair shot at pitching enough games to win 30 and earn his $10,000 bonus; but the real issue is whether Cicotte reasonably expected to win 30 games when he first entered into the contract. While 30-game winners were not unheard of before 1920, they were still rare, and Cicotte had never won 30 games in a season before 1919. This is similar to Locke v. Warner Brothers. Like Warner Brothers, the Sox paid Cicotte the “guaranteed” part of his contract; like Locke, Cicotte is arguing that he could have made more if the Sox had dealt with him in good faith. Unfortunately, Locke settled before a court ruled whether Warner Brothers had materially breached. As for the other R2 § 241 factors, Cicotte could only be adequately compensated by the Sox paying the bonus or damages in at least the amount of the bonus. The Sox might have suffered forfeiture if Cicotte had been excused from pitching any for the Sox after Comiskey ordered him benched; but, because he did not change his position in reliance on the Sox’s breach, Cicotte did pitch again when it suited Sox owner Comiskey – thus, no forfeiture. The Sox would suffer no forfeiture by excusing Cicotte after the fact because Cicotte was denied the ability to perform by the Sox’s breach – thus, any forfeiture was intentional on the Sox’s part. The Sox had no intention – and, once the regular season ended – no opportunity to cure. Benching Cicotte to avoid paying a promised bonus did not comport with good faith and fair dealing. So, if Cicotte reasonably expected at the time he entered into the contract that he would win 30 games, then the Sox’s breach was material. If Cicotte did not reasonably expect at the time he entered into the contract that he would win 30 games, then the other factors may be insufficient to make the Sox’s breach material.

A total breach is a material breach that the breaching party fails to cure (1) within a reasonable time or (2) within the time during which performance is possible. R2 § 242. If the Sox’s breach was material, the Sox failed to cure the breach before the end of the regular season. Therefore, even though the Sox paid Cicotte his entire base salary, the Sox’s breach with respect to the 30-win bonus was total. If the Sox’s breach was not material, it could only be partial, entitling Cicotte to sue for damages, but not discharging his remaining duties, if any, under the contract. R2 § 236(2).
B. Suppose that Comiskey told Gleason to put Cicotte back into the starting rotation before the end of the regular season and Cicotte refused to pitch because he was convinced that Comiskey had benched him to avoid paying the $10,000 bonus, would Cicotte’s refusal to pitch be a breach of his contract with the Sox? If so, would that breach have been material or immaterial? Would it have been partial or total? Please explain.

If the Sox benching Cicotte in order to prevent Cicotte from winning 30 games during the regular season was a total breach, Cicotte’s remaining contractual duties would be discharged unless (1) Cicotte had already fully performed or (2) Cicotte elected to fully perform and then sue for damages. R2 § 237. If the Sox benching Cicotte was a partial material breach, it would not discharge Cicotte’s duty to pitch for the rest of the regular season, though it would suspend Cicotte’s duty to perform until the Sox cured their material breach or failed to do so, at which point the Sox’s partial breach would become total. If the Sox benching Cicotte was not a material breach, Cicotte would still be obligated to perform, though he would be entitled to sue for damages. Cicotte’s refusal to pitch while still obligated to do so would be actionable, depending on the timing, as either an anticipatory repudiation, R2 § 250, or a material breach.

Furious at Comiskey’s refusal to pay him even part of his promised bonus, Cicotte agreed to join fellow players Chick Gandil, Swede Risberg, Fred McMullin, Hap Felsch, Lefty Williams, and, allegedly, Buck Weaver and Joe Jackson in a plot to intentionally lose the 1919 World Series to the Cincinnati Reds in exchange for $100,000 to be paid by a group of gamblers, including Arnold Rothstein, Joseph Sullivan, and “Sleepy Bill” Burns.

C. Did Cicotte and the other players breach their contracts with the Sox by promising the gamblers they would intentionally lose the World Series? Please explain.

Probably not, as nothing in the facts suggests that the players’ contracts forbade them from simply promising to do something that was contrary to the team’s best interest. However, they almost certainly would have breach their contract by intentionally losing any world series game, much less the entire series, because doing so would violate the duties of good faith and “reasonable efforts” they owed the Sox.

The 1919 World Series was scheduled as a best-of-nine series; therefore, losing the Series would require losing five games. Gandil, who instigated the plot, and the gamblers agreed that the players would receive $20,000 after each lost game. After losing the first two games, Gandil sought to collect the $40,000 due, but the gamblers only paid him $10,000. Upset over the gamblers’ refusal to pay as promised, the Sox handily won Game Three of the World Series.

D. Did the gamblers breach their contract with the players by refusing to pay the full $40,000 due for losing the first two games? If so, leaving evidentiary issues aside, could the players have successfully sued the gamblers for breach? Please explain.
Yes. The gamblers set this up as a divisible contract, *see* R2 § 240, by agreeing to pay the players $20,000 for each game they lost, rather than promising to pay them $100,000 to lose the entire series. (Why would the gamblers set it up that way? So they could win both single game and series bets.) Therefore, when the gamblers refused to pay as promised, they breached their contract with the players. However, assuming that it was illegal for the players to contract with the gamblers to intentionally lose games, the players would likely not be able to enforce the contract against a defense of illegality. *See* R2 § 178(1).

E. **Did the players breach their contract with the gamblers by failing to lose Game Three? If so, leaving evidentiary issues aside, could the gamblers have successfully sued the players for breach? Please explain.**

Probably not. The players’ contract with the gamblers required the players to lose five games. It did not specify *which* five games. Therefore, because failing to lose Game Three would not have made it impossible for the players to lose the agreed number of games, the players did not breach by winning Game Three. Because the players did not breach, the gamblers would have no claim. And, even if the gamblers could prove the players breached, the gamblers could not enforce the contract against a defense of illegality. *See* R2 § 178(1).

F. **Assuming that the players and the gamblers had an enforceable contract, would either party have been entitled to rescind the contract based on the others’ failure to fully perform as of the end of Game Three?**

As of the end of Game Three, the gamblers were in breach and the players were not. The gamblers’ breach was not total, however, because they still had time to cure. Therefore, as explained above, the players’ remaining duties under the contract were not discharged by the gamblers’ partial breach, only suspended until the gamblers cured or failed to cure. If the players knew or should have known that the gamblers expected them to lose each of the first five games and that the gamblers were betting on accordingly, the gamblers might be able to rescind the contract based on failure of consideration. If the players did not intend to lose the series, or if the gamblers did not intend to pay the full amount promised but said they did, with the purpose of inducing the other party to reasonably rely to their detriment on the other’s false promise, then the other should be able to avoid/rescind the contract based on fraud.

After the players refused to lay down for Game Three, the gamblers paid Gandil another $20,000, and the Sox lost Game Four, due to several key errors by Cicotte, and Game Five. However, no additional money was forthcoming. Having lost four games, the players were due $80,000, but the gamblers had only paid $40,000 (including the $10,000 up front Cicotte had demanded to participate in the plot). Realizing the gamblers were not going to keep their end of the bargain, the Sox won Games Six and Seven, and had 23-game winner Lefty Williams scheduled to start Game Eight. Shortly before the start of Game Eight, one of Rothstein’s henchmen told Williams that, if the Sox won, Williams’s wife would be killed. Williams pitched poorly, and the Sox lost Game Eight and the Series.
G. If the Sox has sued Williams for intentionally dumping Game Eight, could he have successfully defended the claim on the basis of duress? Please explain.

Probably not. Duress is typically a formation defense, if the court would entertain duress as a performance defense, the fact that a third party exercised the duress would not matter. See R2 § 175(2). If Williams had to rely on impracticability or frustration of purpose, the problem he would run into would be establishing that the threat to his wife’s life was “an event the non-occurrence of which was a basic assumption on which” he made his contract with the Sox. See R2 §§ 261 & 265. This is unlikely.

Following a lengthy grand jury investigation and an acquittal of all criminal charges against the players, newly-installed Baseball Commissioner Kennesaw Mountain Landis banned Cicotte, Gandil, Risberg, McMullin, Felsch, Williams, and – despite no evidence that either had taken any money from the gamblers or played anything less than their best during the World Series – Weaver and Jackson from playing major league baseball for the rest of their lives.

H. Assuming that the Sox had long-term contracts with any of the banned players that extended beyond the effective date of their ban, would the Sox have been obligated to pay those players any or all of their salaries after their banishment? Please explain.

Almost certainly not. Unless the players had what are commonly referred to as “personal services contracts,” which would require them to serve the Sox in whatever capacity the Sox chose (e.g., requiring an aging pitcher to retire from playing and to act as a pitching coach instead), their contracts with the Sox presumed their ability to play for the Sox. Once they were disabled from playing by Commissioner Landis’s ruling, the Sox could avoid the remaining years of the contracts based on frustration of purpose. Certainly, a player’s ability to play baseball during each of the years of their contract was a basic assumption on which the Sox contracted with them. The players’ banishment was an event the non-occurrence of which was a basic assumption of their contracts with the Sox and which frustrated the Sox’s purpose in contracting for the players’ services. R2 § 265.

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Question 4 is based on the 1919 “Black Sox” scandal. See James R. Devine, Baseball’s Labor Wars in Historical Context: The 1919 Chicago White Sox as a Case-Study in Owner-Player Relations, 5 Marq. Sports L.J. 1 (1994). Despite being denied their chance at baseball immortality – enshrinement in the National Baseball Hall of Fame – because of Commissioner Landis’s ruling, the members of the 1919 White Sox have achieved a different kind of immortality on film and in print as the subjects of Eight Men Out (Orion Pictures 1988), based on Eliot Asinof, Eight Men Out: The Black Sox and the 1919 World Series (1963), and the supporting cast of Field of Dreams (Universal Studios 1989), based on W.P. Kinsella, Shoeless Joe (1982).