Pumped, Inc. manufactures exercise equipment and sells it primarily to retailers and fitness centers. They also occasionally sell directly to college and professional sports programs. On November 17, 2005, Pumped received a purchase order from Get Fit!, Inc., a regional fitness center chain, to buy a dozen 8000EZ elliptical cross-training machines for current shipment. Later that same day, Pumped sent Get Fit! an acknowledgement form, confirming the description, quantity, and price of the goods set forth in Get Fit!’s purchase order. Pumped’s acknowledgement included a term requiring that all disputes be subject to binding arbitration. Get Fit!’s purchase order says nothing about dispute resolution. Today is November 25, 2005. Pumped has not yet shipped the machines to Get Fit!

A. Yesterday, Pumped’s sales manager, Anita Byrne, had a phone conversation with a friend in the industry who strongly advised Anita not to do business with Get Fit! “They’re more trouble than they’re worth,” her friend had told her. “They make your life miserable by complaining about problems with the orders that don’t even exist.” Anita wants to know whether it is too late to get Pumped out of this contract. Please explain.

It is probably too late for Anita to avoid this deal. Had Anita been operating under the common law’s “mirror image rule,” there probably would still not be a contract because her acknowledgement form contained an additional term and thus was not a mirror image of the offer. Under § 2-207(1), her acknowledgement was an acceptance “even though it states terms additional to or different from those offered or agreed upon....”

Under § 2-207(1), there are only two ways in which an acknowledgement form such as Anita’s would not constitute a valid acceptance, and neither of those seems present here. First, the form would not be an acceptance if it was not a “definite and seasonable expression of acceptance.” That might be the case if the purchase order said “apples” and the acknowledgement form said “oranges,” but any divergence in terms short of that probably would not be enough to prevent the acknowledgement form from being a valid acceptance under § 2-207(1). Alternatively, if the acknowledgment form was not sent until long after the purchase order was received, the late sending of the acknowledgment form would probably not count as a “seasonable” expression of acceptance. Second, if the acknowledgement form was “expressly made conditional on assent to the additional or different terms,” then that would prevent the form from constituting an acceptance. However, the question mentions no such clause in the acknowledgement form.
B. Same facts as subpart “A,” except that Pumped’s acknowledgement includes the following term: “THIS ACCEPTANCE IS EXPRESSLY MADE CONDITIONAL ON BUYER’S ASSENT TO ANY ADDITIONAL OR DIFFERENT TERMS CONTAINED IN THIS FORM.” Before Pumped ships, is there a contract at all?

This represents the second way in which a purported written acceptance might not count as an acceptance under § 2-207(1). Courts tend to be strict about what language qualifies for the “unless” clause of § 2-207(1) (thus preventing the writing from constituting an acceptance), but the language here virtually mirrors the words found in the relevant clause of § 2-207(1). Thus, there should be no contract by the writings at this point and Anita can still avoid this deal unless Get Fit! has otherwise assented to Pumped’s additional term.

C. Same facts as subpart “A,” except that Pumped’s acknowledgement conspicuously states “THIS ACCEPTANCE IS EXPRESSLY MADE CONDITIONAL ON BUYER’S ASSENT TO ANY ADDITIONAL OR DIFFERENT TERMS CONTAINED IN THIS FORM,” Pumped has shipped twelve 8000EZ elliptical cross-training machines to Get Fit!, and Pumped accepted Get Fit!’s payment. Now is there a contract? If so, will disputes be subject to arbitration?

This is an example of where § 2-207(3) fits in: where the parties’ writings fail to establish a contract (due to the “expressly conditional” clause in the acknowledgement form) but the conduct of the parties establishes a contract. Under § 2-207(3), the contract by conduct then consists of those terms on which the written offer and purported acceptance agree, plus UCC gap-fillers. Since the offer and acceptance do not agree on the subject of arbitration, the UCC will “fill” the gap with judicial dispute resolution.

D. Same facts as subpart “A,” except that Pumped’s acknowledgement purported to confirm Get Fit!’s offer to buy a dozen 8100EZ stationary bikes rather than a dozen 8000EZ elliptical cross-trainers. Before Pumped ships, is there a contract at all?

No. This is apples-vs.-oranges. The terms of the offer and acceptance are so fundamentally at odds with one another that it cannot be said that there has been a “definite and seasonable expression of acceptance.” The parties don’t have to agree on much to satisfy Article 2’s formation rules, but they must agree on the subject matter of the contract and the quantity of goods to be bought and sold (subject to the special rules governing output and requirements contracts, see § 2-306). Thus, there is no contract yet under § 2-207(1), and Anita is still free to avoid this deal.

2. Joe White and Irma Sanchez cohabited for approximately three years. One year into the relationship, Sanchez bore a child, Estrella. All parties stipulate that White is Estrella’s father.

Shortly after Estrella’s birth, White and Sanchez jointly purchased a house in Albuquerque, New Mexico. White and Sanchez jointly executed (1) a written
purchase agreement, by which they agreed to pay $60,000 cash and the balance of the purchase price and closing costs with funds borrowed from a mortgage lender, and (2) a mortgage loan agreement, by which the mortgage lender agreed to pay the house seller $180,000 in exchange for White and Sanchez’s joint promise to repay the mortgage lender in equal monthly installments over 20 years (collectively, the “House Agreement”). Two years later, when their relationship dissolved, White signed a writing in which he promised to pay Sanchez $5,000 per month to support her and Estrella (the “Support Agreement”).

The Support Agreement, written and signed by White, is simply a promise to pay Sanchez $5,000 per month (i.e., an “IOU”). It makes no mention of any return promise made or performance rendered by Sanchez, nor does it address the duration of White’s promise. In the trial court, Sanchez alleged that, in exchange for the Support Agreement, she promised to live with Estrella in Albuquerque (despite the fact that Sanchez was in the U.S. illegally) and to remain home with Estrella rather than seek employment. As for the duration of the agreement, Sanchez alleged that White promised to make the monthly payments to Sanchez until Estrella turned 18, got married, or died, whichever happened first, so that Sanchez would raise Estrella in Albuquerque, where White could visit her. White did not contradict either of these allegations, and the trial court found Sanchez’s promise to keep Estrella in Albuquerque (i.e., near White) and to devote herself to Estrella’s welfare to be sufficient consideration to support White’s written promise to pay $5,000 per month (despite the writing’s silence on the issue of consideration).

The House Agreement, signed by White and Sanchez, as well as the mortgage lender, reflects their collective undertaking to purchase a house in Albuquerque. In the trial court, Sanchez alleged that she and White orally agreed that she would pay $60,000 down for the house, that White would pay the balance of the monthly payments due on the mortgage loan, and that, in the event Sanchez and White broke up, Sanchez would get the use of the house for herself and Estrella. Sanchez further alleged that she paid the $60,000 up front, but that White stopped making monthly mortgage payments after less than two years. The mortgage lender has since foreclosed. Again, White did not contest Sanchez’s allegations in the trial court, which found Sanchez’s testimony sufficiently credible, in the face of no opposition, to hold White in breach of his remaining obligations under the House Agreement.

On appeal, White argues that any promise Sanchez may have made was illusory because, as an illegal alien, Sanchez was subject to deportation at any time. White also argues that, to the extent that he and Sanchez formed one or more valid contracts, any such contract was unenforceable for failing to satisfy the applicable statute of frauds. Finally, White argues that the trial court erred by reading additional obligations into both agreements based on Sanchez’s self-serving oral testimony.
A. Assuming offer, acceptance, and the absence of any formation defense, did the trial court err by finding that Sanchez’s promise to keep Estrella in Albuquerque and to devote herself to Estrella’s welfare was sufficient consideration to support White’s written promise to pay $5,000 per month? Please explain.

No. Sanchez’s promise to keep Estrella in Albuquerque was sufficient consideration as long as keeping Estrella in Albuquerque would have been sufficient consideration. R2 § 75. To constitute consideration, a promisee’s return promise or performance must be “bargained for.” R2 § 71(1). The promisee’s return promise or performance is “bargained for” if (1) the promisor sought it in exchange for his promise, and (2) the promisee gave it in exchange for that promise. R2 § 71(2). Sanchez alleged that White sought Sanchez’s promise to keep Estrella in Albuquerque and to care for her and that she promised to keep Estrella in Albuquerque and to care for her in exchange for White’s promise to pay her $5,000 per month. Because White did not dispute any of these allegations, the trial court did not err by finding that Sanchez’s promise to keep Estrella in Albuquerque and to care for her was sufficient consideration to support White’s written promise to pay Sanchez $5,000 per month.

White’s argument that Sanchez’s promise to stay in Albuquerque was illusory because she was subject to deportation is without merit. A promise the performance of which is entirely at the discretion of the promisor is not consideration. See R2 § 77 cmt. a. Sanchez did not promise to stay in Albuquerque and care for Estrella if she felt like it, she promised to stay in Albuquerque and care for Estrella. The fact that a third party might interfere with her ability to do so does not make her promise illusory.

Furthermore, Sanchez is not promising to perform a pre-existing duty owed to White. R2 § 73. Any “duty” she might have would be to Estrella, not White; and Sanchez could satisfy that “duty” by hiring someone to care for Estrella while Sanchez worked outside the home.

Finally, were one so inclined as to apply the antiquated “benefit-detriment” test (see, e.g., Hamer v. Sidway) to this agreement, despite R2 § 79’s clear statement that the benefit-detriment test is not a substitute for the bargained-for test of R2 § 71, Sanchez’s promise to keep Estrella in Albuquerque and to devote herself to Estrella’s welfare would cause her to forbear from making other choices and would provide White with easy access to his daughter. Thus, White would benefit and Sanchez would suffer a detriment.

B. Assuming offer, acceptance, and the absence of any formation defense, did the trial court err by finding that Sanchez’s down payment of $60,000 cash toward the purchase price of the house was sufficient consideration to support White’s oral promise to make the monthly mortgage payments on the balance of the purchase price? Please explain.

No. Sanchez’s downpayment of $60,000 was sufficient consideration for White’s promise to make the monthly mortgage payments. Sanchez made the downpayment in exchange for White’s promise to make the monthly mortgage payments and White sought Sanchez’s downpayment in exchange for his promise to make the monthly mortgage payments. See R2
§ 71. Because White did not dispute Sanchez’s allegations that White asked her to make the downpayment and that she did so in exchange for his promise to make the monthly mortgage payments, the trial court did not err by finding that Sanchez’s payment of $60,000 toward the purchase price of the house was sufficient consideration to support White’s oral promise to make the monthly mortgage payments on the balance of the purchase price.

Again, Sanchez’s down payment would satisfy the benefit-detriment test: Sanchez suffered the detriment of paying $60,000 and White got the benefit of not having to make a down payment.

C. Assuming offer, acceptance, consideration, and the absence of any formation defense, did the trial court err by finding that White’s promise to pay Sanchez $5,000 per month was enforceable, despite the statute of frauds, even though Sanchez did not put her promise to stay in Albuquerque and care for Estrella in writing? Please explain.

No. As a threshold matter, the Support Agreement involved the exchange of money for services, not the sale of goods; therefore, common law governs.

Assuming that Sanchez and White formed a contract whereby Sanchez agreed to care for Estrella in Albuquerque and White promised to pay Sanchez $5,000 per month for doing so, Sanchez could fully perform the contract in less than one year, because Estrella could die in less than one year. See R2 § 130(1) & cmt. a. The Support Agreement does not involve any of the other types of contracts that R2 § 110(1) requires to be evidenced by a signed writing. And, in any event, the IOU White – the party against whom enforcement is sought – signed probably satisfies R2 § 131, even though it does not expressly state Sanchez’s duties, because the parties established a course of performance prior to White’s breach. See R2 § 131 cmt. g & illus. 15.

D. Assuming offer, acceptance, consideration, and the absence of any formation defense, did the trial court err by finding that White’s promise to make all monthly mortgage payments on the house he jointly purchased with Sanchez was enforceable, despite the statute of frauds, even though White’s and Sanchez’s agreement about who would make the down payment and who would make the monthly payments was not in writing? Please explain.

No. As a threshold matter, the House Agreement, depending on how one construes it, involved either the exchange of money for an interest in real property or the exchange of money for a promise to pay a debt. In either case, it was not for the sale of goods; therefore, common law governs.

If Sanchez and White formed a side contract whereby Sanchez agreed to make the $60,000 downpayment and White promised to make the monthly mortgage payments, Sanchez could enforce the side agreement against White despite the lack of a signed writing evidencing the side agreement.
If Sanchez and White formed the side agreement after they jointly signed the House Agreement, then the side agreement would be for the payment of an antecedent debt, not for the transfer of an interest in real property, and would fall outside the scope of R2 § 110(1)(d). The only SOF issue then would be whether White could fully perform in one year or less. R2 § 110(1)(e). Because nothing in the facts indicates that he could not have paid the outstanding balance sooner than required, he could have done so within one year. Therefore, R2 § 110(1)(e) does not require a writing.

If Sanchez and White formed the side agreement before or at the time they jointly signed the House Agreement, then the side agreement would be for the transfer of an interest in real property, and would fall within the scope of R2 § 110(1)(d); however, because Sanchez detrimentally relied on White’s oral promise when she made the $60,000 downpayment, she should be able to enforce White’s oral promise under R2 § 129.

Moreover, though not quite as clearly as was the case in subpart (C), we arguably have one or more writing(s) evidencing the agreement: White and Sanchez each signed the House Agreement; Sanchez signed the check for the downpayment, got a receipt from the seller, mortgage lender, or title company, or both; and White wrote and actually or constructively signed monthly checks, which were probably accompanied by some form or payment coupon from the mortgage lender or for which he received some form of receipt showing the purpose for which he was writing the check. In the event we were to find that one or more writing(s), at least one of which White signed, was/were required to enforce the agreement against White, the composite document rule, R2 § 132 (recall also Crabtree v. Elizabeth Arden), would allow Sanchez to compile the aforementioned writings to satisfy R2 § 131.

E. Assuming offer, acceptance, the absence of any formation defense, and no viable statute of frauds defense, did the trial court err by allowing Sanchez to present parol evidence regarding the consideration she gave to support White’s promise to pay Sanchez $5,000 per month? Please explain, using your own words and reasoning and not those of the court in the real-life case on which this problem is based.

No. The Support Agreement does not appear on its face to be fully integrated; and, even if it did, this being a R2 jurisdiction, the trial court should consider evidence of the circumstances surrounding its formation in deciding whether and to what extent the writing is integrated. R2 § 210(3) & cmt. b. Only if the writing is fully integrated would the parol evidence rule contemplate preventing Sanchez from offering evidence of an additional term to the jury. See R2 § 213(2). Regardless of the extent to which the Support Agreement is integrated or whether it is unambiguous, the trial court should always consider evidence of consideration. R2 § 218(2).
F. Assuming offer, acceptance, the absence of any formation defense, and no viable statute of frauds defense, did the trial court err by allowing Sanchez to present parol evidence regarding her agreement with White about who would make the downpayment and who would make the monthly payments on the house? Please explain as above.

No. While the House Agreement is written, what is at issue here is an oral side agreement between Sanchez and White regarding who would be responsible for what part of the House Agreement the two of them signed with the bank. The parol evidence rule does not bar the admissibility of any evidence offered to explain, supplement, contradict, or modify an oral agreement. See R2 §§ 209 & 213. Nor does it bar evidence of consistent additional oral terms to a written agreement. See R2 § 216. Nor does it bar evidence of a subsequent oral modification to a written agreement. And, as before, it does not bar evidence of consideration. R2 § 218(2).

3. On March 1, 2004, Jonathan borrowed $50,000 from Vlad and signed a promissory note stating that Jonathan would pay Vlad $10,000 per month, due on the first day of each month, beginning April 1, 2004 and ending September 1, 2004. Because Jonathan was a questionable credit risk, owing to extreme anemia, Vlad insisted that a financially responsible third party guarantee the loan. Jonathan’s fiancée, Mina, who was present when Jonathan signed the note, agreed to guarantee its repayment. Vlad, being a true gentleman, took Mina at her word, knowing that she had considerable personal and family wealth. If Jonathan defaults on his promise to repay Vlad as agreed, may Vlad enforce Mina’s promise to guarantee repayment? Please explain.

Vlad may be able to use R2 § 139 to enforce Mina’s promise. Vlad may not enforce Mina’s promise as a contract because Mina’s promise is one “to answer for the duty of another,” R2 §§ 110(1)(b) & 112, and Vlad can produce no writing signed by Mina. The exceptions set forth in R2 §§ 112 & 116 do not relieve Vlad of the need for a writing signed by Mina. Absent such a writing, the statute of frauds bars Vlad’s breach-of-contract claim. However, he may find refuge in R2 § 139, which would require Vlad to prove that (1) Mina should reasonably have expected Vlad to act or forbear based on Mina’s promise to personally guarantee Jonathan’s promissory note; (2) Vlad did, in fact, act or forbear based on Mina’s promise; (3) Vlad suffered a detriment because of his reliance on Mina’s promise; and (4) injustice can be prevented only by enforcing Mina’s promise, notwithstanding the statute of frauds, because (a) Vlad has no other legal remedy (assuming Jonathan has insufficient money to pay a judgment against him in the amount of the note plus interest); (b) Vlad’s action or forbearance – loaning Jonathan $50,000 – was “definite and substantial”; (c) Vlad’s action or forbearance was a reasonable response to Mina’s promise; or (d) Vlad’s action or forbearance was a reasonably foreseeable response to Mina’s promise.
4. Following the meteoric rise up the charts in the spring of 2004 of his debut single, “Like a Shepherd,” celtic-techno-goth sensation Wallace Williams decided the time had come to rid himself of the second-hand Hyundai he had been driving to and from home, local gigs, and the recording studio, and to replace it with something more befitting his elevated status and income. On May 1, 2004, Wallace purchased a 2002 Vermicelli Testosterosa from Momo’s Imports in Bensonhurst, New Jersey. The M.S.R.P. for the car was $265,000, but Wallace managed to negotiate the salesperson, Ray Barboni, down to an even $250,000 and to throw in the 36-speaker Blaupunk’d THX-certified media center at no extra charge. Barboni said “You’re taking food off my kids’ plates, but I’ll make this deal for you because you are their favorite musician and I hope you’ll remember how well I treated you the next time you are shopping for a new car.” The two shook hands on the deal, then Wallace signed an installment purchase contract, obligating him to pay $12,500 down and monthly payments of $5,000 for 48 months. Wallace wrote a check for the $12,500, took the keys, and drove the car off the lot.

Early in the morning of May 22, 2004, Wallace collided with another car while trying to enter the Holland Tunnel on his way back to Manhattan from celebrating his 18th birthday in Atlantic City. The driver’s side airbag did not properly deploy, and Wallace banged his head on the fine cabretta leather-wrapped steering wheel of his Testosterosa, causing him to momentarily lose consciousness. When he came to, he was almost immediately approached by Vincent Gambini, who told Wallace that he was a claims agent and attorney for Wallace’s automobile insurance company, Good Hands Insurance, and that, having spoken briefly with the police, the other driver, and what witnesses could be found, Gambini strongly advised Wallace to sign the “Settlement, Release, and Indemnification Agreement” Gambini had taken the liberty to fill out for him. Wallace protested that he felt woozy, it was the middle of the night, and that he never signed anything without having either an attorney from his recording label, Vestal Records, or his own agent, Angus “Catfish Buck” McKinney, read it first. Wallace added that his eyesight was blurry and he was unable to read anything but the largest fonts on the form. Gambini insisted that, if Wallace didn’t sign the agreement quickly, the other driver might learn Wallace’s identity and no longer be willing to accept the cash settlement set forth in the Agreement because Wallace was clearly at fault for the accident and the other driver, the other driver’s lawyer, or both, might use Wallace’s fault and wealth as grounds for seeking substantial monetary damages. When Wallace continued to balk, Gambini called over Lisa Vito, who Gambini introduced as his accident investigator, she explained in great detail to Wallace, who by this time had taken a seat on the pavement because his head was still spinning from the sudden force of the collision, that all of the physical evidence indicated the accident was Wallace’s fault, and none of the witnesses would say otherwise. Together, Gambini and Vito eventually convinced Wallace to sign the Agreement. Then, and only then, did they allow him to receive medical attention.
While the paramedics were attending to Wallace, Earnest Forthright, introduced himself to Wallace, explained that he was the Good Hands Insurance claims agent assigned to the accident, and that he had arranged to have both Wallace’s and the other driver’s cars towed to a nearby repair shop. Having consulted with the paramedics and with his files, Forthright called McKinney and suggested he meet Wallace at St. Judas of the Purple Toe Hospital. Forthright then accompanied Wallace to the hospital where he waited for McKinney while the doctors and medical staff attended to Wallace. After examining Wallace, one of the doctors told Forthright and McKinney that Wallace had suffered a concussion, as well as a cracked sternum (breast bone), some bruised ribs, and assorted bumps, bruises, and apparently minor internal injuries. The doctor said, among other things, that Wallace should not make any important financial or legal decisions for the next two to three days. When Forthright asked the doctor whether Wallace’s concussion would have affected him in the same way immediately following the accident as it was affecting him when the doctor examined him and as the doctor expected it to affect him for the next two to three days, the doctor replied, without hesitation, “Yes.” The doctor told McKinney and Forthright that Wallace was sedated and resting comfortably and that he wanted to keep Wallace in the hospital for 24 to 48 hours for observation. What the doctor did not tell Forthright or McKinney (or the police, for that matter, because they had not asked and the doctor felt bound by physician-patient confidentiality) was that Wallace’s blood alcohol level when he was admitted to the hospital was 0.15% – nearly twice the legal limit of 0.08%.

Wallace was released from the hospital on May 28, 2004, exactly one week after his 18th birthday. The legal age of majority both in New York, where Wallace lives, and New Jersey, where the accident occurred, is 18.

A. **What law should govern Wallace’s purchase of the Testosterosa from Momo’s Imports? Please explain.**

As a threshold matter, the Testosterosa was both existing and identified, § 2-105(2), and was movable at the time it was identified to the contract, § 2-105(1). Therefore, it is a good, and Article 2 governs its sale. § 2-102. Because Article 2 is silent on most of the formation defenses discussed in the answers to the next three subparts, we may look to common law. See § R1-103(b) (“Unless displaced by the particular provisions of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.”).

B. **On what legal basis or bases might Wallace be able to avoid his contract to purchase the Testosterosa? Please explain.**

Minors are permitted to enter into any contract an adult can, provided that the contract is not one the law prohibits for minors (e.g., an agreement to purchase cigarettes or alcohol). Subject to certain limitations (three of which are discussed below), a minor has the right before, or shortly after, achieving the age of majority to avoid a contract he entered into as a minor. See
R2 § 14. In order for a minor to avoid a contract, he need only manifest his intention not to be bound by it. The minor may manifest his intent to avoid (or “disaffirm”) the contract by words or actions. A minor who fails to timely disaffirm will have constructively affirmed the contract. A minor may also reaffirm or ratify a contract he would otherwise be able to avoid.

A minor who enters into a contract to purchase food, shelter, clothing, medical attention, or other goods or services necessary to maintain his well-being may, technically speaking, avoid the contract, but he will generally be liable for the reasonable value of those goods and services. See R2 § 12 cmt. f. Wallace’s contract with Bruce was not for food, shelter, clothing, medical attention, or other goods or services necessary to maintain his well-being.

A minor who affirmatively misrepresents his age when he enters into a contract may not be able to avoid the contract, depending on the law of the state whose law governs the contract. Some states permit disaffirmance even if the minor misrepresented his age when entering into the agreement. Some jurisdictions prohibit disaffirmance in all cases where the minor misrepresented his age. Some jurisdictions prohibit disaffirmance in cases where the minor is legally emancipated or has otherwise engaged in business as an adult. Some states permit disaffirmance, but subject the minor to tort liability for his misrepresentation. See, e.g., Kiefer v. Fred Howe Motors, Inc. There are no facts in this Question suggesting that Wallace affirmatively misrepresented his age to Bruce.

So, (1) because he lacked the capacity to be bound by the May 15th contract at the time he entered into it, (2) because the May 15th contract was not for food, clothing, shelter, medical attention, or other goods or services necessary to maintain his well-being, (3) because Wallace did not affirmatively deceive Barboni or Momo’s Imports about his age when he signed the May 15th agreement, and (4) as long as Wallace did not subsequently ratify or reaffirm the contract after reaching the age of majority, he was entitled, at his discretion, to disaffirm it before or shortly after reaching the age of majority.

C. Assuming Wallace has one or more ground(s) to avoid his contract to purchase the Testosterosa, would Momo’s have to refund the entire amount Wallace had paid to date? Please explain.

Even if the court were to find Wallace was incapacitated, R2 § 15(2) precludes Wallace from avoiding the contract “to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.” Courts typically apply one of two tests to measure the relief to which the non-minor is entitled: the “use” test and the “benefit” test.

Upon disaffirmance, the minor (1) must return any goods or other consideration in his possession, and (2) may have to restore the adult to the position he was in prior to entering the contract by requiring the minor to compensate the adult either (a) for any deterioration in value of the consideration caused by the minor’s use (the “use” rule), or (b) for any benefit the minor derived from his use of the consideration (the “benefit” rule). See, e.g., Dodson v. Schrader (“[W]here the minor has not been overreached in any way, and there has been no undue influence, and the contract is a fair and reasonable one, and the minor has actually paid money
on the purchase price, and taken and used the article purchased, ... he ought not to be permitted to recover the amount actually paid, without allowing the vender of the goods reasonable compensation for the use of, depreciation, and willful or negligent damage to the article purchased, while in his hands. If there has been any fraud or imposition on the part of the seller or if the contract is unfair, or any unfair advantage has been taken of the minor inducing him to make the purchase, then the rule does not apply.”).

D. Suppose, instead, that Barboni failed to tell Wallace that Momo’s Imports had rolled the Testosterosa’s odometer back 5,000 miles and that one of the many documents comprising the installment sales agreement Wallace signed was an Odometer Disclosure form in which Barboni represented that the odometer had not been tampered with and that the 185 miles on the odometer accurately reflected the number of miles the vehicle had been driven prior to Wallace purchasing it. Would these additional facts give Wallace one or more additional ground(s) to avoid his contract to purchase the Testosterosa? Please explain.

Now Wallace has additional defenses of illegality, misrepresentation, and unilateral mistake.

A contract made illegally or for an illegal purpose is unenforceable as contrary to public policy. R2 § 178(1). Every jurisdiction has laws prohibiting the seller of an automobile from altering the odometer. (Hence, the odometer disclosure form that Momo’s falsified.) If both Momo’s and Wallace knew the odometer had been rolled back, then Wallace would not be entitled to avoid the contract on this basis because he would be in pari delicto (equally at fault). However, if Wallace (1) justifiably neither knew nor had reason to know the odometer had been altered, (2) was a member of a class of people (car buyer’s) that the odometer tampering law was deigned to protect, or (3) was induced to purchase the tainted car through fraud, he should be entitled to avoid the contract and be returned to his pre-contract state.

An innocent party may usually avoid a contract he entered into based on a material misrepresentation because he did not genuinely assent. R2 § 164(1). A misrepresentation is a factual assertion that is not in accord with the facts. R2 § 159. A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce this particular person to do so. R2 § 162(2). The materiality of a misrepresentation is determined from the viewpoint of the maker, while the justification of reliance is determined from the viewpoint of the recipient. R2 § 162 cmt. c. The party seeking to avoid the contract based on the other party’s material misrepresentation must have acted based on (although not necessarily solely based on) the misrepresentation. R2 § 163. Moreover, in some jurisdictions, the innocent party’s reliance on the misrepresentation must have been reasonable. Here, Momo’s asserted that the Testosterosa had 185 miles on it; when, if fact, it had 5,185 miles on it. Momo’s affirmatively misrepresented this fact by presenting Wallace with an odometer disclosure form containing the misstated mileage. While knowing that the car had 5,185 miles on it, rather than 185, might not have prevented Wallace from buying the car, it almost certainly would have prevented him from agreeing to pay the price Momo’s was asking for a car with allegedly only 185 miles on it. Wallace reasonably and justifiably relied on the...
misrepresentation – as Momo’s intended him to – by reasonably and justifiably relying on the odometer disclosure form.

A mistake is a belief, not in accord with the facts, relating to a basic assumption on which the contract was made. R2 §§ 151-153. Here, the mistake was solely on Wallace’s part. He believed that he was purchasing a car with 185 miles on it; when, in fact, he was purchasing a car with 5,185 miles on it. Generally, a mistake made by only one of the parties will not excuse her performance of the contract unless (1) the other party to the contract knew or should have known of the mistake, (2) enforcing the contract despite the mistake would be unconscionable, or (3) the mistake is one of mathematics only. And, even then, her performance will only be excused if she does not bear the risk of mistake. Here Momo’s knew or should have known that the odometer disclosure statement was false and Wallace did not bear the risk of the mistake because nothing in the sales contract would have allocated to Wallace the risk that Momo’s was illegally misstating the car’s mileage, Wallace did not purchase the car knowing that he did not know its mileage, and no court would assign the risk to Wallace, after the fact, because doing so would be reasonable under the circumstance. R2 § 154. Wallace is clearly less at fault, and enforcing the contract against him would be far more unconscionable, than was true of RRL in *Donovan v. RRL Corp.* Therefore, he should be able to avoid the contract on the ground of unilateral mistake.

E. What law should govern the Settlement, Release, and Indemnification Agreement Wallace signed? Please explain.

As a threshold matter, the Settlement, Release, and Indemnification Agreement (“SRIA”) was not a contract for the sale of goods, it was – or, at least, purported to be – Wallace’s surrender of his legal right to recover and disclaimer of liability for any personal injury or property damage resulting from the accident in exchange for a promise of money. Therefore, it is governed by common law.

F. On what legal basis or bases might Wallace be able to avoid the Settlement, Release, and Indemnification Agreement he signed, at Gambini and Vito’s insistence, after the accident and before receiving medical attention? Please explain.

Wallace may be able to avoid the SRIA on the grounds of intoxication, mental incapacity, and undue influence.

If Wallace was intoxicated at the time he entered into the SRIA as to either be cognitively or volitionally incompetent and Gambini, Vito, or both knew or had reason to know of his condition, then Wallace may avoid the contract, even if Wallace’s intoxication was purely voluntary. See R2 § 16. Most courts will look for objective indications that the allegedly intoxicated party possessed or lacked the necessary capacity – e.g., negotiating the terms of the contract, committing it to writing, etc. If a party is entitled to avoid her contract due to intoxication, she may disaffirm it, in the same way as a minor. However, unlike minors in some jurisdictions, she will likely be required to make full restitution to the other party before being allowed to disaffirm. The facts indicate that Wallace’s blood alcohol level significantly
exceeded the legal limit. They also indicate that – due to his intoxication, his injuries, or both – he manifested objective indications that he lacked the capacity to reasonably understand the nature of the SRIA, R2 § 16(a), or to act reasonably in relation to the SRIA, R2 § 16(b).

If Wallace’s mental state at the time he entered into the SRIA was such that to either be cognitively or volitionally incompetent, then he may avoid the contract. See R2 § 15(1). Unlike intoxication, Wallace need not establish that Gambini, Vito, or both knew or should have known of Wallace’s cognitive incapacity. Compare R2 § 15(1)(a) with R2 § 16. However, if neither Gambini nor Vito knew or should have known of Wallace’s cognitive incapacity, and the SRIA was made on fair terms, a court may limit Wallace’s ability to avoid the SRIA to the extent of partial performance or in the interests of justice. R2 § 15(2). Here, there has been no performance, so R2 § 15(2) should not be in play. And, even if it were, the facts indicate that – due to his intoxication, his injuries, or both – Wallace manifested objective indications that he lacked the capacity to act reasonably in relation to the SRIA, R2 § 15(1)(b).

Undue influence involves taking unfair advantage of another’s weakness of mind or taking an oppressive and unfair advantage of another’s necessity or distress. See, e.g., Odorizzi v. Bloomfield School District. Like duress, undue influence involves coercing a promisor into acting against his free will. Unlike duress, undue influence requires no threat, nor does it require that the party exercising the influence left the promisor with no other reasonable alternative than that sought. See R2 § 177. There is evidence that Gambini and Vito attempted to exercise undue influence over Wallace and that Wallace was susceptible to undue influence due to both his youth and his impaired condition following the accident. All or virtually all of the Odorizzi factors apply here: (1) Gambini and Vito discussed the SRIA with Wallace discussion of transaction at an inappropriate time, immediately following an accident and in the wee of the night; (2) Gambini and Vito insisted that Wallace sign the SRIA right then and there, on a curbside, not at home or in a lawyer’s or insurance adjuster’s office; (3) Gambini and Vito insisted that Wallace sign before he received medical care and before the other driver found out who he was, (4) emphasizing that Wallace’s failure to sign immediately might expose him to significantly greater liability than if he waited; (5) Gambini and Vito “double teamed” Wallace, (6) who was not accompanied by any third-party adviser, and (7) insisted that Wallace did not have time to consult any third-party adviser.

G. Suppose that neither Gambini nor Vito worked for Good Hands Insurance at the time of the accident. That, in fact, they worked for the other driver’s insurer, Camper Mutual. Suppose, further, that the police were unable to determine who was at fault in the accident involving Wallace and the other driver, but that most indications pointed to it being the other driver’s fault. Would these additional facts give Wallace one or more additional ground(s) to avoid the Settlement, Release, and Indemnification Agreement? Please explain.

Gambini’s and Vito’s deceit may permit Wallace to avoid the Agreement based on misrepresentation, mistake, or unconscionability.
Much as Wallace would have grounds to avoid his contract to purchase the Testosterosa based on Momo’s material misrepresentation regarding the car’s mileage (discussed in subpart “C” above) and on Wallace’s justifiable unilateral mistake in believing that the odometer disclosure statement was correct (ditto), Wallace would have grounds to avoid the SRIA based on Gambini’s and Vito’s material misrepresentations that they worked for Wallace’s insurer and on Wallace’s justifiable unilateral mistake that they did. Additionally, to the extent that both Wallace and Gambini and Vito were mistaken about the cause of the accident, there might also be a mutual mistake defense. See R2 § 152(1).

Unconscionability can arise where disparate bargaining power between the parties to an agreement (1) deprives the party asserting unconscionability of any meaningful choice as to the terms of the agreement (procedural unconscionability) or (2) results in one or more terms that are so one-sided, under the circumstances existing at the time of the making of the contract, as to be oppressive or manifestly unfair (substantive unconscionability). R2 § 208. Some courts seem willing to find a term unconscionable when only the substantive prong of the test has been satisfied. See, e.g., Donovan v. RRL Corp. Most courts, however, will require a showing of both procedural and substantive unconscionability. See, e.g., Williams v. Walker-Thomas Furniture Co. Here, Gambini’s and Vito’s duplicity satisfy the procedural prong; but, without knowing more, we cannot be certain whether the terms of the SRIA were sufficiently one-sided as to satisfy the substantive prong.

H. Suppose, instead, that, while Gambini and Vito worked for Camper Mutual, the police were fairly certain even before making a thorough investigation that Wallace was primarily at fault in the accident and the Settlement, Release, and Indemnification Agreement obligated Wallace to pay the other driver significantly less money to settle and release all present and future claims against Wallace than the other driver might have been able to recover had she sued Wallace and won. If Camper Mutual found out that Wallace was legally incapacitated when he signed the Settlement, Release, and Indemnification Agreement, could Camper Mutual use that fact to avoid the Settlement, Release, and Indemnification Agreement? Please explain.

No. Only the party with diminished capacity may use his incapacity to avoid a contract. See R2 §§ 7 & 14.

5. Read the Nevada Supreme Court’s opinions in Sandy Valley Associates v. Sky Ranch Estate Owners Ass’n, 35 P.3d 964 (Nev. 2001), Kaldi v. Farmers Insurance Exchange, 21 P.3d 16 (Nev. 2001), and All Star Bonding v. State, 62 P.3d 1124 (Nev. 2003) – copies of which are attached – and answer the following questions, referring in your answer to one or more of the opinions that support or call into question each of your answers.
A. Are the degree of integration and the existence of ambiguity questions of fact or of law?

Based on the statement in *All Star Bonding* that “[c]ontract interpretation is a question of law” to be reviewed de novo, coupled with *Kaldi*’s affirming the trial court’s pre-trial dismissal of Kaldi’s claim, strongly suggest that the degree of integration and the existence of ambiguity are questions of law – notwithstanding the language in *Sandy Valley* referring to the “substantial evidence” supporting the trial court’s decision to consider extrinsic evidence in construing the parties’ agreement.

B. Must a Nevada court find that a written contract is less than fully integrated in order to consider extrinsic evidence in order to construe and interpret the parties’ agreement?

Apparently not. At least with respect to the easterly 150 feet of Lot 39, the *Sandy Valley* court condones the trial court’s resort to extrinsic evidence “to determine the true intent of the parties when a contract is ambiguous.” It says nothing about whether and to what extent the ambiguous contract is integrated. The *Kaldi* court seems to place some weight on provision “J” of the subject contract, which “specifically prohibits separate oral contracts and requires that all changes, alteration or modifications to the Agreement be in writing and signed by all parties.” However, the court does not suggest that, absent such a provision, the existence of ambiguity alone would be insufficient to warrant a trial court considering extrinsic evidence.

C. Must a Nevada court find that a written contract is not unambiguous in order to consider extrinsic evidence in order to construe and interpret the parties’ agreement?

Apparently not. At least with respect to the five triangular lots, *Sandy Valley* condones the trial court’s resort to the recorded tentative plat map – a document clearly outside the “four corners” of the contract at issue – to determine[e] the intent of the parties.” It says nothing about whether the contract was ambiguous with respect to those five triangular lots. Likewise, in *Kaldi*, the court recognizes that Nevada law permits the admission of extrinsic evidence to prove “[t]he existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms.” *All Star Bonding* seems far more concerned with ambiguity than integration.

D. What evidence may a Nevada court consider in deciding whether a written agreement is less than fully integrated or not unambiguous?

*Sandy Valley* appears to permit, at a minimum, evidence of “the circumstances surrounding the execution of a contract and the subsequent acts or declarations of the parties.” *Kaldi*, again, recognizes that Nevada law permits the admission of extrinsic evidence to prove “[t]he existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms.” Otherwise, *Kaldi* and *All Star Bonding* seem to focus on the “four corners” for the threshold determinations of integration and ambiguity.