EXAMINERS' ANALYSIS OF QUESTION NO. 4

(1) Is Katy entitled to a refund?

Katy contends that she is entitled to a refund based on the DDR representative's statement to her prior to signing the contract. The parol evidence rule precludes consideration of this statement.

"[T]he prerequisite to the application of the parol evidence rule" is "that the parties intended the written instrument to be a complete expression of their agreement as to the matters covered." *NAG Enters v All State Indus,* 407 Mich 407, 410 (1979) (footnote omitted); *see also Hamade v Sunoco, Inc,* 271 Mich App 145, 167 (2006). DDR's contract explicitly states that it "constitutes the entire agreement between the parties." "Where the parties have included an express integration or merger clause within the agreement, it is conclusive . . . ." *Id.* at 169 (quotation marks omitted). Consequently, the parol evidence rule applies to the contract.

Under the rule, "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Barclae v Zarb,* 300 Mich App 455, 480 (2013) (quotation marks omitted). Instead, "if the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning." *Zahn v Kroger Co,* 483 Mich 34, 41 (2009). *See also Goodwin, Inc v Orson E Coe Pontiac, Inc,* 392 Mich 195, 210 (1974) ("'Previous negotiations cannot give to an integrated agreement a meaning completely alien to anything its words can possibly express.'" (quoting Restatement of Contracts § 242)); *Universal Underwriters Ins Co v. Kneeland,* 464 Mich 491, 496 (2001) ("Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement.").

The guarantee provision in DDR's contract unambiguously provides the remedy if a student's score does not improve: "student may repeat the course for free." An agreement allowing a student to receive a refund instead or in addition would "contradict or vary" this contract, which explicitly states that

it "constitutes the entire agreement between the parties." Consequently, parol evidence of such an agreement is inadmissible, and Katy is not entitled to a refund.

(2) Is Katy entitled to repeat the course for free?

This question raises two issues: the effect of Katy's failure to pay the full tuition, and the question of whether Katy's score "improved."

1. Katy's failure to pay the full tuition.

Breach Analysis:

"[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Alpha Capital* Mgmt *v Rentenbach,* 287 Mich App 589, 613 (2010) (quotation marks omitted); *see also Able Demolition, Inc v City of Pontiac,* 275 Mich App 577, 585 (2007). "However, the rule only applies if the initial breach was substantial." *Id.*

"There is no single touchstone" for determining whether an initial breach was substantial; "[m]any factors are involved." *Walker & Co v Harrison,* 347 Mich 630, 635 (1957). These factors are:

> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
> (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
> (d) The greater or less hardship on the party failing to perform in terminating the contract;
> (e) The willful, negligent or innocent behavior of the party failing to perform;
> (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

Id. (citing Restatement (First) of Contracts § 275). Courts have emphasized the first factor: whether the nonbreaching party obtained the benefit she reasonably expected to receive;

see Able, 275 Mich App at 285; *Omnicom of Mich v Gianetti Inv Co*, 221 Mich App 341, 348 (1997).

Applying these factors, one should conclude that Katy's failure to make the final tuition payment was not a substantial breach. As the nonbreaching party, DDR obtained "the substantial benefit which [it] could have reasonably anticipated" under the contract—$975 of the $1,000 owed by Katy—and it "may be adequately compensated in damages for lack of complete performance" by recovering the remaining $25. Katy has performed almost fully by paying $975; being denied the opportunity to repeat the course for free would presumably impose a significant hardship on her; her failure to make the last payment was not willful or negligent, since she mailed the payment but it was lost in the mail and she was unaware of this fact; and the court could ensure her performance of the remainder of her contractual obligations by ordering her to pay DDR $25.

Because Katy's breach was not substantial, it would not preclude her from bringing an action for breach of contract against DDR, and it would not relieve DDR of its obligations under the contract. Assuming Katy's score did not "improve" (discussed below), DDR must allow Katy to repeat the course for free.

Condition Analysis:

Alternatively, the contract language "To qualify for this guarantee, student must have paid the full $1,000 tuition by the last class" can be interpreted as a condition precedent to DDR's obligation to perform. "Whether a provision in a contract is a condition . . . depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." *Knox v Knox*, 337 Mich 109, 118 (1953) (citations omitted) . One can reasonably argue that the guarantee clause was intended to be a condition.

"If the condition is not fulfilled, the right to enforce the contract does not come into existence." *Id.* If strictly applied, this would indicate that Katy's failure to pay the last $25 means her right to enforce DDR's guarantee "does not come into existence."

However, Section 229 of the Restatement (Second) of Contracts provides: "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." *See Wade v Merchants Bonding Co & Quicken Loans,* 392 B.R. 302 (ED Mich. 2008) (citing § 229). This supports an argument that Katy's failure to pay the last $25 should be excused. Because Katy paid $975 out of $1,000 owed, she would suffer a disproportionate forfeiture if the condition were strictly enforced. In addition, the remaining $25 Katy owes is likely not "a material part of the agreed exchange" (and she is clearly willing to pay it).

Moreover, by failing to notify Katy of the missing payment, DDR may have waived its right to enforce the condition. "Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event . . . and where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability." *Mehling v Evening News Ass'n,* 374 Mich 349, 352 (1965) (quotation marks omitted). If DDR's failure to notify Katy of the missing payment prevented her from fulfilling the condition, then DDR waived its right to enforce the condition. *See id.* ("[T]he performance of a condition precedent is discharged or excused, and the conditional promise made an absolute one, where the promisor himself * * * waives the performance." (quotation marks omitted)). Assuming Katy's score did not "improve" (discussed below), DDR should allow Katy to repeat the course for free.

2. *Did Katy's score "improve"?*

"A contract is ambiguous if its provisions may reasonably be understood in different ways." *Universal Underwriters Ins Co v. Kneeland,* 464 Mich 491, 496 (2001); *see also Raska v Farm* Bureau *Mut Ins Co,* 412 Mich 355, 362 (1982). "[I]f a contract . . . fairly admits of but one interpretation it may not be said to be ambiguous," id., and a court "will not create ambiguity where none exists," *Smith v Physicians Health Plan,* 444 Mich 743, 759 (1994).

Because the contract does not define "improve" and the parties reasonably have different understandings about what it

means, the term *is* ambiguous. Parol evidence is therefore admissible to interpret it. "The law is clear that where the language of the contract is ambiguous, the court can look to . . . extrinsic evidence." *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 470 (2003) (quotation marks omitted). "[A] written instrument is open to explanation by parol or extrinsic evidence . . . where the language employed is vague, uncertain, . . . or ambiguous, and where the words of the contract must be applied to facts ascertainable only by extrinsic evidence, a resort to such evidence is necessarily permitted." *Id.* (quotation marks omitted). In such a case, "[l]ooking at relevant extrinsic evidence . . . does not violate the parol evidence rule." *Id. See also Goodwin,* 392 Mich at 205, 209-10. Extrinsic evidence regarding Katy's and DDR's understanding of the meaning of "improve" is consequently admissible.

However, the parol evidence here does not resolve the ambiguity because both parties' interpretations were reasonable. In such circumstances, "it is . . . well established that ambiguous language should be construed against the drafter . . ." *Wilkie v Auto-Owners Ins Co,* 469 Mich 41, 62 (2003). *See also Klapp,* 468 Mich at 472 ("[I]f the language of a contract is ambiguous, and the [factfinder] remains unable to determine what the parties intended after considering all relevant extrinsic evidence, the [factfinder] should . . . find in favor of the nondrafter . . . ."). Under this rule, the term "improve" should be construed against DDR, the drafter of the contract. A court should therefore find that Katy's score did not "improve" and she is entitled to repeat the course for free.

(3) Is Katy's duress argument valid?

"Duress exists when one by the unlawful act of another is induced to make a contract . . . under circumstances which deprive him of the exercise of free will." *Lafayette Dramatic Prods, Inc v Ferentz,* 305 Mich 193, 216 (1943) (quotation marks omitted). "To succeed with respect to a claim of duress, they defendants must establish that were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes." *Allard v Allard,* 308 Mich 551 App 536, (2014) (brackets and quotation marks omitted).

There is no indication that DDR acted unlawfully, deprived Katy "of the exercise of free will" or threatened "serious

injury" to her "person[], reputation[], or fOrtune[]." Katy's duress argument will fail.