QUESTION #1

You have been called upon to represent Large LIMO, a health maintenance organization (the "HMO"), in connection with a contract dispute with Large Medical Group, a multi-specialty physician group (the "Medical Group"). The dispute arises from the termination of an agreement relating to medical services for patients enrolled in the HMO (the "Covered Persons"). The termination brings to an end a relationship that has lasted since 1980 when the parties entered into the first agreement. The agreements were entered into for four year terms and renewed by mutual agreement up until this year when the parties could not agree upon terms for renewal of the agreement.

In 1989, following a 9 year mutually satisfactory relationship, the Medical Group and the HMO agreed to contract on a mutually exclusive basis. Pursuant to this mutual exclusivity, the Medical Group was the sole provider of medical services for the Covered Persons in San Antonio and the Medical Group agreed not to be a provider for any other health maintenance organizations or other managed care systems. The effect of the mutual exclusivity provision was that by 1994, the agreement accounted for 75% of the Medical Group’s revenues.

The dispute involves the obligations of the parties following termination of the agreement. The agreement provides that it may be terminated by either party upon twenty-four (24) months notice. The agreement also provides as follows:

The parties agree that, in the event of termination of this Agreement, the obligations of the Medical Group and the HMO under this Agreement shall continue in full force and effect with respect to existing Covered Persons for a period not to exceed twenty-four (24) months from the date of notice of contract termination. The parties may, however, agree to an earlier termination date.

A separate provision in the agreement provides that: In the event that this agreement is terminated, the mutual exclusivity shall terminate at the date of notice or termination effective date, whichever occurs first.

The dispute involves the interpretation of the above referenced provisions and reconciliation of the early termination of mutual exclusivity (upon notice of termination) with the continued obligations of both parties with respect to "existing Covered Persons." The Medical Group contends that the two year notice period was intended to be a wind-down transition period which allowed both parties an opportunity to enter into new contractual arrangements with third parties for the future, while at the same time assuring continued care for two years for the Covered Persons that were existing patients at the date of notice of
Unless the manner in which Frank attempted to accept the offer was valid, it is possible that the offer has terminated. Chad has died. This operates to terminate any offer, unless the offer was kept open by some type of option. In addition, Frank received indirect information through a reliable third party (Ivania) that Chad was taking a definite action inconsistent with an intention to enter into the proposed contract when she related that Chad was going to tear Frank a new one. Frank also received a direct communication of revocation when Chad attacked him at the wedding rehearsal dinner. In addition Frank’s own actions may have terminated the offer. First of all his return promise could be seen as a counteroffer and hence a rejection of Chad’s request that Frank always keep Ivana happy. Frank’s tryst with Morgana likewise could be interpreted as a rejection of Chad’s offer.

Chad’s offer may have been kept open past his death and the supposed revocation of his offer if some type of option had been created. An option could have been created under section 45 of the Restatement Second of Contracts, if Chad’s offer could be construed as inviting acceptance by only performance and not a promise. If such was the case, Frank’s beginning performance by procuring the insurance policy and making the payment to defray Chad’s lost wages could have created such an option. Chad’s obligation would be conditional upon Frank’s tender of completion of the requested performance in accordance with Chad’s offer. The problem is that it is difficult to argue that it is clear that Chad’s offer only invites acceptance by performance and in construing such ambiguous offers, acceptance is invited in any manner reasonable under the circumstances. Therefore, section 45 may not have created an option for Frank. In addition, once Frank engaged in the tryst with Morgana, it became impossible to complete performance of the request to always keep Ivana happy.

Under section 87 (2) of the Restatement, if Chad’s offer would reasonably be expected to induce action or forbearance of a substantial character on Frank’s part and such action or forbearance did occur, Chad’s offer could be binding as an option contract to the extent necessary to avoid an injustice. It could be argued that Chad should have reasonably expected that Frank would withdraw his name from the registry in light of Chad’s offer to donate a kidney. It could also be argued that in light of the forbearance by Frank, Chad’s offer should be treated as an option in order to prevent an injustice (Frank remaining on a dialysis machine or dying). On the other hand, the hospital might argue that there was no injustice because Frank’s infidelity put him in the position that he finds himself in now and his actions terminated the offer (infidelity and causing Chad’s death).

It is possible that Frank does not have a contract based on consideration, mutual assent and offer and acceptance. This means that he may have to rely on promissory estoppel (section 90) of the Restatement. Again, however this raises the same issue with respect to whether it is necessary to enforce Chad’s promise to prevent an injustice. Frank’s infidelity put him in the position that he is in.

Frank might make a claim for restitution in order to receive a return of the benefits that he conferred on Chad (the insurance policy and the $5,000). This probably wouldn’t be satisfactory to Frank. In addition, it might be possible that it would not be unjust for Chad’s estate to retain the benefits conferred by Frank under the situation, given Frank’s behavior in respect to Morgana
and his causing Chad’s death.

In the event that Frank overcomes all of the hurdles listed above, you would be able to obtain specific performance if you could show that Frank has no other adequate remedy at law; the deal was fair; and that this is not a personal services contract. There is obviously no adequate remedy at law. All the money in the world cannot make Frank whole. It is also clear that this is not a personal services contract, although it would be if Chad were still alive. The problems usually associated with specific performance of personal services contracts -- qualms about involuntary servitude and the difficulty of judging performance -- are not present in this situation because Chad is dead. There would be some problem with the fairness of the transaction that might prevent a court from specifically enforcing Chad’s offer. The fact that he cheated on Ivana, lied to her and caused Chad’s death would probably make a court less inclined to grant Frank an equitable remedy. Even though the fairness is to be judged prospectively these factors would no doubt influence a court. The fact that Frank’s counter promise (“I’ll keep her happy for as long as I can afford it”) may have been at least quasi-illusory from a prospective basis would add to the uphill struggle that he faces.

I don’t think that I would bet the farm on Frank obtaining any form of relief, by way of damages or otherwise.

**Bonus Question (3 points): Gil Scott-Heron**
termination. On the other hand, the your client contends that it is entitled to move the "existing Covered Persons" to a different provider at any time without cause and with no further notice to the Medical Group.

Your client indicates that prior to 1989, the agreements contained a provision that would allow either party to terminate the agreement prior to expiration of the four year term. Such party would need to give 12 months notice of termination and would have to pay the other party $3,000,000.00. This provision was negotiated out of the 1989 agreement.

The Medical Group has indicated that when the parties discussed the removal of the $3,000,000.00 payment, the HMO verbally agreed that the Medical Group would have the assurance of the continued revenue to be paid for the existing Covered Persons for the two year period.

The agreement contains the following clause:

This Agreement contains the entire understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, expressed or implied, oral or written.

Your client also informs you that it had anticipated that contract negotiations would break down, therefore it has negotiated with another multi-specialty physician group to assume the Medical Group's obligations. These negotiations were concluded prior to your client's sending notice of termination to the Medical Group.

What arguments do you anticipate that the Medical Group will employ to convince the court that its interpretation of the termination provision is correct? What type of evidence will it present? How do you intend to counter those arguments? What additional information do you need from the HMO in order to better prepare an effective argument for its interpretation of the termination provision?

QUESTION #2

Although you lost the lawsuit arising out of the dispute between the HMO and the Medical Group in Question #1, your performance gained you a solid reputation in the health care community in San Antonio. A local physician has requested your input on a dispute that she is having with a preferred provider organization, Pennywise. (A preferred provider organization ("PPO") is a broker of medical services. It obtains agreements with physicians to provide medical services for certain designated patients at a discounted fee schedule. It also makes arrangements with health insurance companies pursuant to which the companies agree to encourage their clients to utilize the services of the physicians who have agreed to the discounted fee schedule. In essence the physician agrees to discount the physician's fee schedule in exchange for an expected volume of patients referred to the physician by the PPO. These arrangements are authorized under state law provided that the physician does not pay the PPO a fee for referring patients to the physician.)
This dispute arises from certain payments that your client has not received pursuant to the provider contract with Pennywise. In accordance with the contract, payments will not be made for services rendered by the physician unless Pennywise determines that such services are "Medically Necessary." The Contract defines "Medically Necessary" as services which Pennywise determines are:

(1) provided for the diagnosis or care and treatment of a medical condition;
(2) appropriate and necessary for the symptoms, diagnosis or treatment of a medical condition;
(3) within generally accepted standards of medical practice;
(4) not primarily for the convenience of the patient, the patient's family, or the physician; and
(5) performed in the most cost effective setting and manner available to treat the patient.

In addition, the agreement prohibits the physician from billing the patient for services that Pennywise determines are not Medically Necessary.

The physician has records that indicate that pursuant to this provision Pennywise has retroactively refused payment for $15,000.00 worth of services that the physician has rendered during the past year. The physician believes that Pennywise's personnel who make these decisions are not licensed physicians. She has requested that Pennywise provide her with the opportunity to appeal its decision to a neutral medical expert. However, Pennywise has pointed to the above referenced language as an indication that Pennywise's determination is final and binding. Your client wants to pursue collection of the $15,000.00.

The agreement also requires the physician to obtain approval from Pennywise prior to referring the patient to a specialist or admitting the patient into a hospital for elective surgery. The contract provides:

As a condition precedent to obtaining full benefits under the insurance program, the physician needs to obtain Pennywise's pre-approval for referrals to specialists or admitting a patient to a hospital for inpatient services. In the event that the physician fails to obtain Pennywise's pre-approval for a referral to a specialist or the patient's admission to a hospital for inpatient services, Pennywise shall reduce the percentage of the costs that it will pay and the physician will need to collect the additional amount directly from the patient.

The effect of this provision is that if the physician follows the pre-approval procedures Pennywise will cover 90% of the charges and the physician will need to collect the remaining 10% from the patient. However, if the physician does not follow the pre-approval provisions, Pennywise will only pay 70% of the charges and the physician will need to collect the remaining 30% from the patient. This increases the possibility that the physician will not be able to collect the entire fee.

Your client's records indicate that over the past year Pennywise has deducted another $15,000.00 from pursuant to this provision. She is upset because in her opinion that fact
whether the referral to a specialist or admission for inpatient treatment was pre-approved rarely makes a difference with respect to the medical necessity of the services she renders. In her view, the agreement allows Pennywise to avoid payment for medically necessary services just because she failed to follow Pennywise’s "nitpicky" procedures. She wants to pursue collection of the $15,000.00 for such services that she can prove were medically necessary.

In addition, your client is concerned about payments that she is making to Pennywise under the agreement. The agreement requires her to pay Pennywise a monthly administrative fee equal to the greater of $5,000.00 or 5% of the fees that she collects for services rendered to patients covered by the Pennywise agreement during the month. Due to the fact that Pennywise has added many physicians to the PPO, she finds that the during the past few months her services to Pennywise patients have barely generated sufficient revenues to cover the $5,000.00 payments. She wants to stop making these payments.

How do you advise her with respect to her claims against Pennywise?

QUESTION #3

Your client, Hope Architectural Products ("Hope"), a company that manufactures and installs custom window fixtures, has come to you for advice regarding a dispute that it currently is having with Lundy’s Construction ("Lundy’s"). Hope is a subcontractor on a contract that Lundy’s has for a school remodeling project. According to Hope, it contracted with Lundy’s to manufacture and install 93 custom windows for the remodeling project. The contract price, including the cost of labor and materials for the windows, is $55,000.00. The payment terms under the contract are:

On the 10th of each month, payment covering 90% of the total value of materials delivered and installation performed during the previous month with final payment upon completion of Hope’s work.”

In addition, the contract provides that

This Agreement and the obligations hereunder, shall not be changed by subsequent oral modifications. No modifications shall be binding unless adopted in a writing executed by each party.

Pursuant to the contract, Hope was obligated to deliver the windows and begin installation no later than October 24th. Hope indicates that through no fault of its own production of the windows was delayed. Hope indicates that on August 24th it advised Lundy’s about this delay and Lundy’s verbally agreed to extend the date for delivery and initiation of installation to November 4th. Hope indicates that the Lundy’s representative indicated that a written confirmation of the extension would be forthcoming. No such written confirmation ever materialized.

On September 27th, Hope received a letter from Lundy’s requesting that installation of the windows begin on October 19th and be completed by October 26th. On October 14th, Lundy’s again wrote to Hope threatening to withhold an unspecified amount of "liquidated damages" from the contract price if Hope did not comply with these deadlines. There was no
provision in the contract for "liquidated damages." Hope did not respond to the October 14th letter.

Hope had the windows ready for shipment on October 28th with an expected delivery date for the beginning of installation on November 4th. Yesterday, November 1st, Hope received a telephone call from Lundy's. Lundy's indicated that it intends to deduct an unspecified amount of money from the contract price as "damages" for Hope's late delivery of the windows.

In order to protect itself from Lundy's unilateral decision to withhold a portion of payments under the contract, Hope wants to make demand upon Lundy's to either:

1. Make prepayment of the full contract price by cashier's check;
2. Place the full contract price in escrow until the windows are installed; or
3. Deliver the full contract price to the architect until the windows are installed.

Hope also wants Lundy's to execute an agreement which indicates that Hope will not be held responsible for liquidated damages, delay charges or any extra costs on account of time of delivery of the windows. Hope also wants to suspend delivery of the windows until Lundy's complies with its demands.

Hope wants to know whether this course of action is advisable and what it should do if Lundy's fails to comply with its request. It is now November 2nd and an Hope needs an answer by the end of the business day on November 3rd. How do you advise Hope? (Is there any hope for Hope?)

QUESTION #4.

You have been approached by the Barney Agency regarding a lawsuit against it arising out of a performance contract. The contract related to a birthday party for the 5 year old daughter of a prominent San Antonio contracts law professor, Mr. Al Rip U. Tushreds. Mr. I. M. Wekindenees, the agency's representative, indicates that Mr. Tushreds contacted the Agency about a year ago concerning his daughter Savannah's birthday party. Mr. Tushreds wanted to have "Barney" appear at Savannah's birthday party. As any parent knows Barney is a 6 and a half foot tall purple, talking (and unfortunately, singing) dinosaur. Kids really love him and Mr. Tushreds informed the Barney Agency during the initial phone conversation that Savannah was, as he put it "a Barney groupie."

The Agency forwarded Mr. Tushreds its standard contract which he promptly executed and returned to the Agency (without revision!) with the required $500.00 fee.

According to the Agency's contract:
The Agency makes no express or implied warranties regarding the "Barney" character to be supplied under this Agreement. The client is responsible for previewing the Barney performance of the designated Agency performer via a live presentation or on videotape. The Agency maintains a videotape of the performer's latest presentation for the client's convenience. In the event that the client is not satisfied that the performance will be satisfactory to the client, the client may at the client's option: (1) cancel this Agreement and obtain a full refund or (2) request the performance by another of the Agency's performers.

In no event shall the Agency be liable for any consequential damages arising out of or in connection with this Agreement.

Mr. Wekindenees indicates that the Agency assigned Ms. LaToya Jackson, a rookie Barney, to the birthday party, because the more experienced Barneys were booked solid. Despite being a rookie and having a reputation as a flake, Ms. Jackson had a substantial entertainment pedigree. Apparently, her videotaped performance met with Mr. Tushreds' approval.

Mr. Tushreds has filed suit against the Barney Agency based on breach of contract. Mr. Tushreds' complaint alleges that Ms. Jackson's live Barney performance deviated from the videotaped performance in the following material respects:

1) She wore an orange Barney costume, not the customary purple one;
2) She was apparently intoxicated or on drugs the at party;
3) She refused to sing the "Barney Song" ("I love you. You love me. We're a happy family.") and instead substituted her rendition of "Satisfaction."

(Ms. Jackson's response to all of this was that she was having "a bad hair day.")

Mr. Tushreds' complaint alleges that as a consequence of these discrepancies, the party was a complete disaster. He is seeking damages in the amount of $1500 for breach of contract. Mr. Tushreds' petition also alleges that Savannah is not a happy camper. She became the butt of all of the jokes from the children in the neighborhood. This has caused her to suffer a clinical depression which has required extensive psychotherapy sessions and medications to bring back her smile. Therefore, he is also seeking consequential damages of $50,000.00 for her medical treatment. Also, Mr. Tushreds is requesting damages arising from the fact that the kids ran amok and destroyed a valuable piece of art when Ms. Jackson refused to take off the orange Barney costume, which in their minds was a very offensive imitation and a rip-off. The pieces of art was a Salvador Dali with an estimated value of $1 million which the children attacked with crayons. Mr. Tushreds seeks $1 million from the Agency as additional consequential damages for the destruction of the painting.

An expert has opined that the crayon can be removed without damage to the painting and that there will be no discernible difference after the crayon is removed.

Mr. Wekindenees is ready to settle this lawsuit for $100,000.00. Is this a settlement offer that you would advise him to make to Mr. Tushreds? Should Mr. Tushreds accept this offer?
The Medical Group will be seeking to bring in evidence about the prior oral agreement. The HMO will need to argue that the agreement is totally integrated so that parole evidence cannot be admitted to contradict or supplement the written agreement. The HMO will argue that the merger clause indicates that the parties intended the written agreement to be a final and exclusive expression of the parties intention. The Medical Group will argue that at most the merger clause merely permits a rebuttable presumption on the issue of whether the written agreement was intended to be a final and exclusive expression of the parties agreement and that the evidence of the prior negotiations can be introduced for the purpose of determining whether the agreement is integrated, and if integrated, whether it is totally integrated or partially integrated. The Medical Group will argue that parol evidence rule does not apply when the contract provision is ambiguous and parole evidence will be allowed in order to aid in the interpretation of the agreement. The HMO will need to argue that the provision is not ambiguous but is clear on its face and that this requires the court to exclude any extrinsic evidence. The Medical Group will also argue that notwithstanding the ambiguity of the language the parol evidence rule does not apply to bar parole evidence on the issue of fraud.

The Medical Groups will also argue, even of the parole evidence rule bars them from bringing in evidence of the prior agreement, that because the agreement is an exclusive arrangement, the parties have an obligation of good faith and fair dealing. It will argue that the interpretation urged by the HMO would be in violation of this obligation of good faith and fair dealing. This obligation of good faith and fair dealing would be hard to reconcile with an interpretation which allowed the HMO to begin to immediately move patients. The fact that the HMO began negotiations with another medical group would indicate the LIMO acted in bad faith. This evidence of bad faith would allow the court to interpret the effect of the termination provision in a manner which allow the Medical Group a reasonable time to make alternative arrangements. It would not seem reasonable to have a 24 month termination provision if the patients can be taken away immediately. This would in effect amount to an immediate termination without cause. Although parties can contract for such a right, the courts will not imply such a right in a contract. The court would apply an analysis that would (1) allow the party enough time to recoup their investment and (2) allow the party time to make adequate arrangements to substitute the revenues that would be lost.

The HMO will need to argue, that the termination provision is not implied, it is explicit in the agreement and therefore the HMO should be allowed to begin to move patients. It would argue that given the length of time that the Medical Group has enjoyed the benefits of the agreement it has recouped any investment a long time ago. The HMO will argue that the clause is designed for the patients' protection and not the Medical Group's protection. It will argue that it was not bad faith for the HMO to begin negotiations with another provider prior to notice of termination of
the existing agreement.

The Medical Group may also try to argue for usage of trade and attempt to put on expert testimony regarding what is the industry standard with respect to termination of exclusive agreements. In this regard the additional information that the attorney for the HMO will need is what is the standard in the industry (if any) for termination of exclusive arrangements.

Question 2.

Pennywise's satisfaction about the medical necessity of the services is a condition precedent to payment. By which standard should Pennywise's satisfaction be judged? Pennywise is arguing that the good faith standard should apply because the contract provides that the determination of medical necessity is to be determined by Pennywise. There is a problem with this interpretation. There is a presumption against the fulfillment of medical necessity being conditioned on Pennywise's good faith determination, unless the contract is explicit and this one is not. It does not state that the determination is to be within Pennywise's "sole discretion".

In addition, even if the determination is subject to Pennywise's sole good faith discretion, Pennywise needs some basis for making a good faith determination. If Pennywise is indeed using nonmedical personnel to overrule a physician on medical issues it is hard to see how this could be in good faith.

The standard that you will argue for is that of reasonableness. This seems to be appropriate here because the definition of medical necessity appears capable of being objectively evaluated.

Pennywise's approval of the inpatient services and the use of specialists is a condition precedent to payment. Parties can be as nitpick as they want to regarding preconditions to performance. However, you will want to argue the exception to this rule which is when the precondition operates as a forfeiture. The finding of a forfeiture may be greatest when the party alleging the nonoccurrence of the condition precedent has already received the benefit of the bargain. This may be the case here. In addition, your client may have a claim for unjust enrichment. An alternative theory might be to argue that the precondition operates as a penalty for breach of contract and should not be enforced on that basis.

Illegality is also an issue here because it could be determined that the administrative fees are really payments for referring patients to the physician. If the physician wants to withhold payment based on the illegality of the agreement, she stands a good chance of invoking the doctrine of "in part delicto" and having the entire contract declared void. However, what does this do to her other claims for payments? Would she also lose her rights to secure such payments because they are based on an alleged illegal contract. Is there a possibility that the court will not hold her in part delicto with the PPO, due to the PPO's experience?

Even if the contract is not illegal, there is the possibility that the PPO has an obligation to use good faith or best efforts to obtain clients for the physician and that the PPO has violated this obligation provision by adding too many physicians to the network to enable her to meet the minimum monthly payments.
Question 3.

Hope is requesting that you evaluate whether it is appropriate for Hope to make demand for adequate assurance under these circumstances and whether the items that Hope is requesting would constitute a reasonable demand for adequate assurance.

Whether Hope may request adequate assurance might depend on the effect of the alleged oral modification of the agreement. If the modification is invalid Hope is in breach and has no right to request reasonable assurance of payment.

Because the contract prohibited oral modifications, the validity of the alleged oral modification depends on whether it represented an attempt at modification so as to constitute a waiver or whether Hope can prove that it relied to its detriment on the oral modification. The representative's promise to send a written modification is probably not enough evidence of an attempt at modification. Also because Hope was already behind schedule at the time of the oral modification it is hard to argue that it relied to its detriment on the oral modification. Perhaps Hope would have stopped work on the windows, in which case it has only relied to the extent of the additional expenses after it received the oral extension. Note also Lundy's was entitled to retract the modification unless that would be unjust in light of a substantial change in Hope's position in reliance on the modification.

It seems that the status of the contract is rather uncertain at this point. Hope's hope depends on how a court would characterize Hope's change in position. Does this seem a reasonable basis upon which to demand adequate assurance of performance by Lundy's. Probably not.

Even if Hope is not in breach there needs to be an examination of whether Lundy's actions make Hope's demands reasonable. Lundy's first letter demanded a performance that was not due under the contract and contained an assertion that it was going to deduct liquidated damages from the contract price for late delivery. Lundy's was not entitled to deduct liquidated damages because such were not provided for in the agreement. If the matter had been left at this point, perhaps Hope's demands for adequate assurance would be reasonable in light of Lundy's actions. Because both parts of the bargain still needed to be performed, Lundy's acts may have constituted anticipatory repudiation. However, Hope did not respond to this threat by Lundy's and Lundy's subsequent communications to Hope would constitute a retraction of the threat to do something that was not provided for under the agreement. The issue is whether Lundy's is now only asserting a contract remedy for Hope's breach and whether this remedy is available under the UCC. Lundy's is not saying that it will not pay Hope but that it will deduct damages to which it is entitled.

Given the uncertainty of Hope's situation with regard to the oral modification, Hope's demand for adequate assurance may not be reasonable. It is requesting payment when payment is not due under the agreement. It is also requesting that Lundy's waive its claims for contract damages. This could amount to a repudiation of the agreement, which could precipitate additional actions by Lundy's. Lundy's could terminate the agreement. Then Hope would lose everything that it
put into the agreement. Would not the better course of action on Hope's part be to perform its part of the bargain and take its lumps for any damages claimed by Lundy's for its late performance.

Question #4

Whether or not the settlement offer of $100,000.00 makes sense depends on the (1) effect of the Agency's provisions which attempted to disclaim warranties and bar consequential damages and (2) whether the damages claimed by Mr. Tushred's would be appropriate consequential damages.

The UCC does not apply to this contract because the contract does not involve the sale of goods. However, it may be possible to reason by analogy.

The agreement attempts to disclaim any warranties. This is okay under the UCC, if done in accordance with its provisions and if the disclaimer is not unconscionable.

The agreement attempts to limit remedies for breach of contract by disavowing consequential damages. Under the UCC the limitation of damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not. Therefore, if a court would reason by analogy, this limitation would be prima facia unconscionable with respect to Savannah's alleged injuries but would not be prima facia invalid with respect to the damages to the painting.

Another problem with the limitation of remedies is that this is a situation where the circumstances cause the remedy to fail of its essential purpose. The fact that the customer can review a tape or live performance does not provide the customer with any meaningful remedies.

In addition, the manner in which the Agency's contract provides that the customer may review the performance before hand, indicates that there is an implied warranty that the performance in the tape or the live performance will be of the same essential quality as the actual performance.

The consequential damages depend on their foreseeability. Mr. Tushred's can argue that the Agency was put on notice that the breach could lead to psychological problems for Savannah because he informed the agency that she was a "Barney groupie."

On the other hand, the damage to the Dali painting was probably not foreseeable. In addition, with respect to the painting, Mr. Tushred's has an obligation to mitigate damages. Because the painting can be restored with no diminution in value, if he doesn't restore the painting he will probably not be entitled to damages based on the unrestored painting. One possible point that Mr. Tushred's may raise would be that the value to him is sentimental in nature and that the Agency should compensate him for damages due to the diminished sentimental value of an untouched painting.

$100,000 is too high a figure from which to begin settlement negotiations because that the consequential limitation clause is probably effective with respect to the damages that Tushreds is
claiming for the painting.