



Slides with Podcast
Recorded July 2018

Sales Lightning Review

Eric E. Johnson
ericejohnson.com



Konomark
Most rights sharable

- You can listen to the audio without looking at the slides!
- You can look at the slides later as notes.

Here's what I'm going to do ...

- I'm going to try to refresh your recollection about as much sales law doctrine as I can in a very short amount of time.
- I'm particularly hopeful this will be useful to students who've taken contracts already, or sales already, to help them "interrupt the forgetting process."
- If you don't come back to course content you've learned, it will evaporate. If you come back to it periodically, you'll retain it better.
- I also hope this will be useful for studying for the bar, although (obviously!) this is not a substitute for a bar prep program!

- If you want more on sales law, there are handouts, slideshows, problems with answers, an open-source casebook, and old exams on my website: ericejohnson.com

General

- 3

General

Who counts as a merchant?

"a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

§2-104(1)

General

About the UCC and its sales law ...

- UCC is the "Uniform Commercial Code"
- It was created by the ULC and ALI.
- It derives legal authority from being enacted by the legislature in a given jurisdiction.
- UCC Article 1 is definitions and generally applicable provisions.
- UCC Article 2 is sales of goods.
- UCC Article 2 has been adopted in 49 states, DC, and various territories and tribal jurisdictions.
- There are many variations in the provision among the jurisdictions. (*It's not "uniform"!*)

General

- It's statute - not common law - so if you have questions about the meaning or words or what the law requires, you must first look at the statutory language! (... including Article 1)
- The UCC is supplemented by the common law and equitable principles. If something's not covered by the statute, then think about common law and equity.
- The UCC cares about "freedom of contract," and many of its provisions can be altered by agreement. (Although some things can't be contracted around; e.g., the statute of frauds.)

General

UCC Article 2 applicability

- Applies to sales of goods.
 - **Includes:** food served in a restaurant, industrial gases, wide-body aircraft, pencils, iron ore
 - **Does not include:** services, real property, stocks and bonds, leases (Article 2A)
- For mixed goods/services contracts, courts must choose to use the UCC or the common law. Courts can either use:
 - Predominant purpose test
 - Gravamen test

General

The hierarchy of rules concerning disputes about a transaction (from highest to lowest):

- Express terms of the contract
 - (but some provisions of law can't be contracted around)
- Provisions of the UCC
- Common law and equity



Formation

Initial observations:

- Don't get freaked out by the "battle of the forms."
Most of contract formation under the UCC is logical and obeys broad principles that are easy to learn.
- The strange stuff is pretty limited (e.g., 2-207(2)).
- Don't jump to employing the strange stuff when the circumstances don't call for it!
- There's lots of ways to teach and learn this. For instance, concentrating on the language of 2-204 to 2-207. But I'm going to take a non-text-based/ principles approach ... (because, you know, it's audio).

Formation

Broad principles, key points:

- The UCC wants deals to happen.
- The UCC sees a distinction between what sales executives and business people do (make deals) and what lawyers do (focus on legalese).
- The UCC thinks deals can and should happen when the business people want to have a deal and think they have a deal, even if the lawyers would be caught up on legalese.
- But the UCC also cares about "freedom of contract," and it will let people insist on particular legalese if they want to.
- The UCC got rid of the common-law mirror-image rule for contract formation.
- An effect of the common-law mirror-image rule in practice is the "last shot rule" (probably better called "last shot effect").



Formation

Some ways the deal can happen ...

- One document signed by both parties.
 - That's a contract; those are the terms.
- Offer and acceptance writings match.
 - That's a contract; those are the terms.
- The agreement is reached orally on the phone; no writings.
 - That's a contract; those are the terms.

Formation

- **A written offer for purchase is sent; it's accepted by shipment of the goods.**
 - That's a contract; the terms are the ones in the offer.
- **Any written offer is sent, and it's accepted by conduct.**
 - That's a contract; the terms are the ones in the offer.

Formation

- **A written offer for purchase is sent. An "order acknowledgement" is sent back, but it has differences in the writing from the offer.**
 - *Now we have something that requires more thought ...*

Purchase Order OFFER

The Moped Store

PURCHASE ORDER

ISSUED BY: THE MOPED STORE, 2398 Downtown Plaza, Spokattle WO 99502

Date: September 1, 2015 Order no.: 834564

Vendor: Rhodock Resources, 7700B Westside Hwy, Spokattle WO 99503
Item: Swivelmax Office Chair model no. SVX-280

Color: Teal
Quantity: 5
Item price: \$110
Line total: \$550
Order total: \$550

Authorized signature: *[Signature]* Polly Pembler, Vice President, The Moped Store

STANDARD TERMS AND CONDITIONS

Low-price guarantee: Vendor guarantees all items are sold at the lowest price that vendor has charged within the past three years. Dispute resolution: Any controversy, claim, or dispute arising out of or relating to this purchase order and any resulting contract/transaction shall be settled by binding arbitration administered by the American Moped Lawyers Arbitration Organization according to its rules and procedures, with such arbitration taking place within 100 miles of The Moped Store's world headquarters in Orlando, Florida. The Moped Store's remedies: The Moped Store shall have all remedies available under law and/or equity. Vendor's remedies: Vendor's remedies are limited to resale damages under UCC 2-706, except that Vendor shall not be entitled to incidental damages. In no event shall Vendor be entitled to any other remedy, including, without limitation, injunction, specific performance, consequential damages, incidental damages, or damages measured by lost profits.

Order Acknowledgment ACCEPTANCE

**Flammer
Flooring**

ORDER ACKNOWLEDGEMENT

8374 Commercial Row, Suite 2300, Mill City, Minnesconsin 51823

Customer: orange orange store no.003

Acknowledgment of Order no.: 303-15-P5671

Date: November 3, 2015

Item: High Energy Series residential-grade linoleum tile flooring

Model no.: RGH730

Style: Cosmic Blue

Quantity: 2000 square feet

Item price: \$4.00

Price includes installation

Item total: \$8000.00

Total: \$8000.00

Authorized signature: *[Signature]* Lily Littenfeld, General Sales Manager and Executive Vice President

TERMS AND CONDITIONS: These terms and conditions apply to the dealings between Flammer Flooring ("Seller") and Customer (identified above). Dispute resolution: Any claim or dispute pertaining or relating to or arising out of the order acknowledged herein and the accompanying transaction may be brought in any competent court in the State of Minnesconsin, and Minnesconsin law shall apply. Remedies: Seller's remedies shall not be limited. Notwithstanding anything to the contrary contained in the parties' agreement, SELLER SHALL NOT BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES OF ANY KIND OR NATURE WHATSOEVER, even if Seller is advised of the possibility of certain loss or damage or if such certain loss or damage could have been reasonably foreseen and/or avoided; notwithstanding the foregoing, consequential damages are not waived to the extent they are not permitted to be waived under law, in which case consequential damages will be allowed only to the extent required by law. Warranties and disclaimer of warranties: Seller makes no warranty other than warranty of good title. Goods are supplied with no warranty as to quality other than any manufacturer warranty provided by manufacturer to customer. Without limiting the foregoing, Seller specifically disclaims the implied warranty of merchantability and any implied warranty of fitness for a particular purpose.

Purchase Order OFFER

The Moped Store

PURCHASE ORDER

ISSUED BY: THE MOPED STORE, 2398 Downtown Plaza, Spokattle WO 99502

Date: September 1, 2015 Order no.: 834564

Vendor: Rhodock Resources, 7700B Westside Hwy, Spokattle WO 99503

Item: Swivelmax Office Chair model no. SVX-280

Color: Teal
Quantity: 5
Item price: \$110
Line total: \$550
Order total: \$550

Authorized signature: *[Signature]* Polly Pembler, Vice President, The Moped Store

STANDARD TERMS AND CONDITIONS

Low-price guarantee: Vendor guarantees all items are sold at the lowest price that vendor has charged within the past three years. Dispute resolution: Any controversy, claim, or dispute arising out of or relating to this purchase order and any resulting contract/transaction shall be settled by binding arbitration administered by the American Moped Lawyers Arbitration Organization according to its rules and procedures, with such arbitration taking place within 100 miles of The Moped Store's world headquarters in Orlando, Florida. The Moped Store's remedies: The Moped Store shall have all remedies available under law and/or equity. Vendor's remedies: Vendor's remedies are limited to resale damages under UCC 2-706, except that Vendor shall not be entitled to incidental damages. In no event shall Vendor be entitled to any other remedy, including, without limitation, injunction, specific performance, consequential damages, incidental damages, or damages measured by lost profits.

Order Acknowledgment ACCEPTANCE

**Flammer
Flooring**

ORDER ACKNOWLEDGEMENT

8374 Commercial Row, Suite 2300, Mill City, Minnesconsin 51823

Customer: orange orange store no.003

Acknowledgment of Order no.: 303-15-P5671

Date: November 3, 2015

Item: High Energy Series residential-grade linoleum tile flooring

Model no.: RGH730

Style: Cosmic Blue

Quantity: 2000 square feet

Item price: \$4.00

Price includes installation

Item total: \$8000.00

Total: \$8000.00

Authorized signature: *[Signature]* Lily Littenfeld, General Sales Manager and Executive Vice President

TERMS AND CONDITIONS: These terms and conditions apply to the dealings between Flammer Flooring ("Seller") and Customer (identified above). Dispute resolution: Any claim or dispute pertaining or relating to or arising out of the order acknowledged herein and the accompanying transaction may be brought in any competent court in the State of Minnesconsin, and Minnesconsin law shall apply. Remedies: Seller's remedies shall not be limited. Notwithstanding anything to the contrary contained in the parties' agreement, SELLER SHALL NOT BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES OF ANY KIND OR NATURE WHATSOEVER, even if Seller is advised of the possibility of certain loss or damage or if such certain loss or damage could have been reasonably foreseen and/or avoided; notwithstanding the foregoing, consequential damages are not waived to the extent they are not permitted to be waived under law, in which case consequential damages will be allowed only to the extent required by law. Warranties and disclaimer of warranties: Seller makes no warranty other than warranty of good title. Goods are supplied with no warranty as to quality other than any manufacturer warranty provided by manufacturer to customer. Without limiting the foregoing, Seller specifically disclaims the implied warranty of merchantability and any implied warranty of fitness for a particular purpose.

Formation

- **A written offer for purchase is sent. An "order acknowledgement" is sent back, but it has differences in the writing from the offer.**
 - We must determine whether the order acknowledgement counts as an acceptance.
 - We ask: Does it count as a "definite and seasonable expression of acceptance"?
 - If it doesn't, we don't have a contract.
 - If it does, then it's a contract.
 - Then we'll have to figure out the terms of the contract.

Formation

- **A written offer for purchase is sent. An "order acknowledgement" is sent back, but it has differences in the writing from the offer.**
- ◆ Does the order acknowledgement count as a "definite and seasonable expression of acceptance"?
 - It can still be an acceptance if the writings differ, but it's got to be close enough that it counts as an acceptance.
 - One way to think about it: Do the executives think they have a deal? (Even if the lawyers wouldn't?)

Purchase Order
OFFER

Order
Acknowledgment
ACCEPTANCE

The Moped Store
PURCHASE ORDER

REUSE ID: THE MOPED STORE, 2398 Downtown Plaza, Spokane WA 99202

Date: September 1, 2015 Order no.: 834564

Vendor: Rhodock Resources, 77000 Westside Hwy, Spokane WA
Harris: Swivemax Office Chair model no. SVX-280

Color: Teal
Quantity: 5
Item price: \$110
Line total: \$550
Order total: \$550

Authorized signature: *[Signature]* Kelly Hendrick, Vice President, The Moped Store

DIFFERENT PRICE

Flammer Flooring
ORDER ACKNOWLEDGEMENT

8174 Commercial Row, Suite 2300, Mill City, Minnesota 55123

Customer: orange orange store no. 003

Order Acknowledgment of Order no.: 303-25-15671

Order date: September 3, 2015

Product: Energy Series residential grade linoleum tile flooring

Color: Blue


Material: 18" x 18" x 2mm

Area: 1000 square feet

Price: \$1000.00

Order total: \$1000.00

Authorized signature: *[Signature]* Lily Loftholm, General Sales Manager and Executive Vice President



No deal!

Purchase Order
OFFER

Order
Acknowledgment
ACCEPTANCE

The Moped Store
PURCHASE ORDER

REUSE ID: THE MOPED STORE, 2398 Downtown Plaza, Spokane WA 99202

Date: September 1, 2015 Order no.: 834564

Vendor: Rhodock Resources, 77000 Westside Hwy, Spokane WA
Harris: Swivemax Office Chair model no. SVX-280

Color: Teal
Quantity: 5
Item price: \$110
Line total: \$550
Order total: \$550

Authorized signature: *[Signature]* Kelly Hendrick, Vice President, The Moped Store

DIFFERENT ITEM

Flammer Flooring
ORDER ACKNOWLEDGEMENT

8174 Commercial Row, Suite 2300, Mill City, Minnesota 55123

Customer: orange orange store no. 003

Order Acknowledgment of Order no.: 303-25-15671

Order date: September 3, 2015

Product: Energy Series residential grade linoleum tile flooring

Color: Blue


Material: 18" x 18" x 2mm

Area: 1000 square feet

Price: \$1000.00

Order total: \$1000.00

Authorized signature: *[Signature]* Lily Loftholm, General Sales Manager and Executive Vice President



No deal!

Formation

So what are the terms of the contract in cases where there are different or additional terms in the acceptance?

- ◆ That depends - are the terms "different" or "additional"?

Formation

So what are the terms of the contract in cases where there are different or additional terms in the acceptance?

- ◆ That depends - are the terms "different" or "additional"?

if **DIFFERENT**, then the differing terms knock each other out, and the terms are filled by the UCC (course of performance, course of dealing, usage of trade, gap fillers).

This is the "knock-out rule."

So what are the terms of the contract in cases where there are different or additional terms in the acceptance?

Formation

- ◆ That depends - are the terms "different" or "additional"?

if **ADDITIONAL**, then the additional terms are considered proposals for adding to the terms

- if this isn't between merchants, then they just stay proposals unless agreed to
- if this is between merchants, then the additional terms automatically are added *unless*
 - they materially alter the deal, or
 - an objection is made within a reasonable time, or
 - the offer expressly limited acceptance to those terms

Now, what if both the purchase order and order acknowledgment both say they are expressly condition on agreement to all the fine-print terms and conditions?

Formation

That's easy - there's no contract established by the writings!

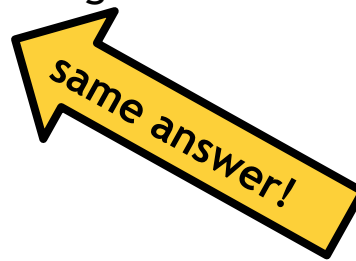
A contract might end up being established by conduct, however.

Formation

What if the purchase order and order acknowledgment are contradictory on the dickered terms?

That's easy - there's no contract established by the writings!

A contract might end up being established by conduct, however.



Formation

So, what are the terms in a case where the writings don't establish a contract, but conduct does?

The UCC says the contract consists of all the terms on which the parties agree, together with supplementary terms from the UCC (usage of trade, gap fillers, etc.)

(Basically this, is the knock-out rule again.)

**That was the battle of
the forms!!**

**Now on to something
different ...**

Firm offers §2-205

A firm offer is an offer that can't be revoked.

Two ways a firm offer be binding:

- consideration
 - same as the common law
 - this is an "option contract"
- without consideration, if:
 - by a merchant
 - in a signed writing
 - assurance is given that it will be held open
 - BUT, the irrevocability in this case can't be enforced beyond three months

Statute of frauds §2-201

Formation

When the price is \$500 or more, the contract must be evidenced by a signed writing.

Statute of frauds

Formation

What counts as a "signed writing"?

The signed writing need not be the contract itself!

Mostly you just need:

- the quantity of goods to be specified
- the writing is “signed” by the party against whom enforcement is sought
 - understand that the requirements for a signature are quite liberal
 - could be a typed name, a printed name, an X, the fact that something was sent on letterhead – only needs to be evidence of intent to authenticate the document

§1-201(37) & (43)

Statute of frauds §2-201

Formation

When the price is \$500 or more, the contract must be evidenced by a signed writing.

Exceptions:

- payment was made and accepted
- goods were received and accepted
- specially manufactured goods where there's a reliance interest
- admission in court testimony or pleading
- promissory estoppel and outright fraud, in many courts
- the "between merchants" exception

Statute of frauds: The between-merchants exception

Formation

Even where the party against whom enforcement is sought never created a signed writing, the statute of frauds can be satisfied with a written confirmation under specified circumstances:

- both parties are merchants
- the writing is sufficient against the sender (i.e., the sender has bound herself or himself)
- the recipient has reason to know of the contents of the confirmation, and
- the recipient fails to object within 10 days after receipt

§2-201(3)



Terms

Hierarchy for determining content of contract (from highest to lowest):

- Express terms
- Course of performance
- Course of dealing
- Usage of trade
- UCC gap fillers

This just makes logical sense!

Principle: UCC likes freedom of contract.

Note that we don't go to the UCC gap fillers unless the other, higher rungs don't tell us the answer!



Terms

Gap fillers

Here's some:

- **Price**
 - a reasonable price
 - often measured by market or seller's catalog
- **Delivery**
 - seller's place of business
- **Time**
 - a reasonable time
- **Payment**
 - due on tender of delivery

Terms

Gap fillers

Here's some:

- Price
 - a reasonable price
- Delivery
 - a reasonable time of business
- Time
 - a reasonable time
- Payment
 - due on tender of delivery

The UCC wants deals to happen!

Contract Interpretation and
the Parol Evidence Rule

Basic Procedure for the Court

- Contract interpretation is a question of law.
- The interpretation of an unambiguous contract is a question of law.
- Whether the contract is ambiguous is a matter-of-law determination.
- Contractual language is ambiguous if it is susceptible to two reasonable interpretations.
- If contractual language is ambiguous, then the court will admit extrinsic evidence to determine which provision the parties intended. This determination is a fact issue, and may be tried by a jury.

Principles of Construing Contracts

- The overarching principle of contract interpretation is to give the effect to the parties' intentions.

Principles of
Construing
Contracts

- Objectively expressed intent controls over the subjectively understood intent.
- A contract is construed in its entirety, with each part considered in relation to every other part.
- Language is to be interpreted according to its plain, ordinary, generally accepted meaning, unless both parties intended for it to mean something else (industry jargon, etc.).

The Parol Evidence Rule

- A substantive doctrine of contract law
- Not a rule of evidence
- And, of course, it has nothing to do with being on parole for prisoners ...
 - but it does come from the same Old French root for “word” as in “promise” and related to Latin for “speech”

The Parol Evidence Rule

Blackletter statement of the rule (part 1):

With a partially integrated contract, no evidence of any prior or contemporaneous oral agreement may be used to contradict the written terms of the contract.

The Parol Evidence Rule

Blackletter statement of the rule (part 2):

With a fully integrated contract, no evidence of any prior or contemporaneous oral agreement may be used to contradict or add to the written terms of the contract.

The Parol Evidence Rule

The integration clause

To make a contract fully integrated, an integration clause (or “merger clause”) is used. The clause states that the writing represents the entire agreement between the parties. It usually works.

The Parol Evidence Rule

Extrinsic evidence despite integration

The parol evidence rule does not bar the introduction of extrinsic evidence for contract interpretation!

Even in an integrated agreement, if it’s ambiguous, the court can use extrinsic evidence to determine what the parties meant by what they said (so long as the evidence is not used to contradict the words of the agreement or, if fully integrated, add to its terms).

Regardless, extrinsic evidence cannot be used to prove an interpretation that, based on the language, is not reasonable.

Some questions ...

**Can you introduce
extrinsic evidence for the
interpretation of a
written contract?**



Some questions ...

**Can you introduce
extrinsic evidence for the
interpretation of a fully
integrated written
contract?**



Some questions ...

**Can you introduce
extrinsic evidence to add
to the terms of a written
contract?**



Some questions ...

**Can you introduce
extrinsic evidence to add
to or vary the terms of a
fully integrated written
contract?**





Warranties

Important general observations about warranties

- Warranty liability does not depend on fault!
- Warranty liability can happen without any contract existing between the plaintiff and defendant!
- Warranty liability has some features of tort liability, some features of contractual liability, and some dissimilarities with both.
- It's probably best to think of "breach of warranty" as its own kind of action that has its own rules.

Warranties

Kinds of warranties:

- Warranty of title
- Warranty against infringement
- Implied warranty of merchantability
- Implied warranty of fitness for a particular purpose
- Express warranties

Warranties

Warranty of title

- arises in every contract
 - unless excluded/disclaimed/modified
- warrants that:
 - title conveyed is good
 - transfer is rightful
 - free of any security interest or other lien
 - except what is actually known to buyer
 - “should have known” doesn’t count
- Note that the effective disclaimer of implied warranties does not disclaim the WoT!
 - disclaiming requires specific language
 - or very particular circumstances that would put a buyer on warning
 - like a police auction for title problems

§2-312

Warranties

Warranty against infringement

- arises on goods sold by merchant sellers regularly dealing in goods of the kind
 - unless excluded/disclaimed/modified
- warrants that:
 - the good can be possessed and used normally without a rightful claim of infringement by third-party holder of intellectual-property rights
- **[SAME:]** Note that the effective disclaimer of implied warranties does not disclaim the Wa!
 - disclaiming requires specific language
 - or very particular circumstances that would put a buyer on warning

§2-312

Warranties

Implied warranty of merchantability

- arises where seller is a merchant of goods of the kind
 - unless excluded/disclaimed/modified
- warrants that:
 - the goods are "merchantable"
- two alternatives for disclaimer:
 - mention "merchantability" and be conspicuous
 - use of "as is," "with all faults," or similar

§2-312

Warranties

Implied warranty of merchantability

What does "merchantable" mean?

- fit for the ordinary purposes for such goods (2 314(2)(c))
- adequately contained/packaged/labeled (2 314(2)(e))
- would pass without objection in the trade under the contract description (2 314(2)(a))
- will run within quality and quantity standards of usage of trade and the contract description (2 314(2)(d))
- will conform to promises or affirmations of fact on container or label (2 314(2)(f))
- *and more ...*

NOTE: This warranty applies to used goods as well! But a used good doesn't need to be as good as a new good to be merchantable.

Warranties

Implied warranty of merchantability

Personal injury contexts

- There is overlap in coverage between strict products liability in tort and breach of the implied warranty of merchantability under the UCC – but the doctrines are different and occasionally may reach divergent outcomes!
- For strict products liability in tort, the question is whether the product has a “defect,” which may involve inquiring about consumer expectations and costs versus benefits of alternative designs.
- For breach of the implied warranty of merchantability, the question is whether the good was merchantable, which generally comes down to whether it was fit for the ordinary purpose for which such a good is used.

Warranties

Implied warranty of fitness for a particular purpose

- arises where the buyer has a particular purpose for the goods and the seller has reason to know this; the buyer is relying on seller to help select suitable goods; and the seller has reason to know about the reliance
 - unless excluded/disclaimed/modified
- warrants that:
 - the goods are fit for that purpose
- two alternatives for disclaimer:
 - a conspicuous, written disclaimer
 - use of “as is,” “with all faults,” or similar

§2-312

Warranties

Express warranties

- arises when the seller makes an affirmation of fact, promise, or description relating to the goods that becomes part of the basis for the bargain
 - words like “warranty” or “guarantee” are unnecessary!
- warrants that:
 - the goods will conform to the affirmation of fact, promise, or description
- theoretically, it can't be disclaimed
 - That would be making a statement of fact and taking it back at the same time.
 - Cf.: Other warranties arise by default or implication.
 - But a disclaimer can often be achieved in practice through the parol evidence rule.

§2-312

Warranties - privity and remoteness issues

- If a manufacturer makes a warranty, but you buy from a retailer who bought from a wholesaler, can you sue manufacturer for breach of warranty?
- If a guest in your home is injured by an unmerchantable produce you bought, can your guest sue the seller?
- It's complicated!
 - Don't assume you need privity – you might not!
 - But sometimes you might!
- For a concise review, see my handout ...
 - http://www.ericejohnson.com/m/Sales_Warranty_Privity-Remoteness_Handout.pdf

S2-312

Warranty Privity/Remoteness Issues - handout [pdf] [docx]

PRIVITY/REMTENESS ISSUES WITH WARRANTY - SUMMARY

VERTICAL PRIVITY/REMTENESS	
UPSTREAM WARRANTY	THIRD PARTY WARRANTY
<p>§ 2-312</p> <p>Between seller's liability for remote seller's express warranty (e.g., non-effectiveness liability for manufacturer's express warranty):</p> <ul style="list-style-type: none"> • Yes, generally 	<p>§ 2-312</p> <p>Between seller's liability for remote seller's implied warranty (e.g., merchantability liability for manufacturer's implied warranty):</p> <ul style="list-style-type: none"> • Depends on facts and circumstances • Usually yes for products of any type • Usually yes for economic damages, but not for non-economic damages
<p>§ 2-312</p> <p>Between seller's liability for seller's express warranty (e.g., non-effectiveness liability for manufacturer's express warranty):</p> <ul style="list-style-type: none"> • No • Because if remote seller adopted seller's warranty, then seller is not liable 	
<p>§ 2-312</p> <p>Between seller's liability for remote seller's implied warranty (e.g., merchantability liability for manufacturer's implied warranty):</p> <ul style="list-style-type: none"> • Depends on facts and circumstances • Adheres to, previous statement of law, as when the remote seller is not liable for the product's condition • If no adequate warning • Merely providing notice of the defect is not adequate 	
<p>§ 2-312</p> <p>Between seller's liability for remote seller's implied warranty (e.g., merchantability liability for manufacturer's implied warranty):</p> <ul style="list-style-type: none"> • Yes, always • Because no adequate warning 	<p>§ 2-312</p> <p>Between seller's liability for remote seller's implied warranty (e.g., merchantability liability for manufacturer's implied warranty):</p> <ul style="list-style-type: none"> • Yes, always • Because no adequate warning

© 2017 Eric Johnson, Esq. All rights reserved. www.ericejohnson.com

http://www.ericejohnson.com/m/Sales_Warranty_Privity-Remoteness_Handout.pdf
http://www.ericejohnson.com/m/Sales_Warranty_Privity-Remoteness_Handout.docx

Warranties

Warranties - notice

- To have a claim for breach of warranty, you must give notice "within a reasonable time" after you discover or should have discovered the warranty breach, or you will "be barred from any remedy."
- This is a huge potential **PITFALL** for warranty claimants.
- **PRACTICAL TIP:** Give notice as soon as possible to everyone you can find up and down the distribution chain (retailer, wholesaler, manufacturer).

§2-607(3)(a)

Warranties

Warranties - beyond the UCC

- There's more to warranties than just what is in the UCC.
- The federal Magnuson-Moss Warranty Act (15 U.S.C. §2301 et seq.) has a huge effect on consumer warranties. (It's the explanation for much of what you see when you buy household goods - e.g., "90-DAY LIMITED WARRANTY".)
- Various state consumer protection statutes can be an important source of warranty law as well.

§2-607(3)(a)



Unconscionability

Excuse and Avoidance

- in general, people are stuck with their bad bargains; unconscionability is meant to be rare
- unconscionability generally requires both procedural unconscionability and substantive unconscionability
- procedural unconscionability
 - unfairness/oppression in the making of the deal; an absence of meaningful choice
- substantive unconscionability
 - oppressive, unreasonably harsh terms of the deal
- remedies courts can choose from:
 - don't enforce contract at all
 - excise unconscionable portion
 - limit effect of unconscionable portion

Excuse and Avoidance

Other means of excuse/avoidance

- Fraud
- Statute of Frauds
- General commercial impracticability (§2-615)
 - an unforeseen contingency makes it impracticable for seller to perform (e.g., a natural disaster)
- Special commercial impracticability (§2-613)
 - the particular goods are destroyed before risk of loss passes to the buyer
- Frustration of purpose
 - the purpose for which the goods were being bought has ceased to be; this can excuse buyer particularly if the seller isn't left worse off than before the contract



Risk of loss

Risk of Loss

- If the contract provides who holds the risk for loss, then the contract controls.
- Otherwise:
 - if the loss is caused by negligence, the negligent party must absorb the loss
 - if the loss is without fault:
 - the UCC has default rules for risk of loss, which are complex and are largely driven by which party is likely to have insurance.
 - as a general matter, risk of loss tends to pass with title and possession
- **BEWARE: PITFALL** If the goods cause damage to something or someone, that's a torts and/or warranty question — not a risk of loss question!



Breach & Performance

Anticipatory repudiation

- if one party repudiates the contract, the other party can suspend its performance and can cancel the contract
- if one party has reasonable grounds for insecurity, that party can demand adequate assurances
 - the demanding party then is permitted to suspend performance until adequate assurances are provided
 - if adequate assurances are not provided within a reasonable time (30 days max), then the party failing to provide assurances is deemed to have repudiated
 - in which case the aggrieved party is now permitted to cancel the contract

Breach & Performance

Anticipatory repudiation

- **BEWARE: PITFALL** Be aware of the danger of one party claiming the other party repudiated and cancelling the contract!
 - where party A cancels a contract on the basis of a claimed repudiation by party B, and that supposed repudiation is later judged by a court not to have been a true repudiation, then party A is held to have repudiated (and therefore breached)
 - recognize that the safer course in a case of apparent repudiation is often to demand adequate assurances

What a buyer can do about non-conforming goods

- This proceeds in stages.
- It starts out easy for the buyer and gets progressively harder.
- Ordered chronologically:
 - I. **Reject**
 - II. **Revoke**
 - III. **Sue for breach of warranty**

What a buyer can do about non-conforming goods

- This proceeds in stages.
- **BUT NOTE:**
 - Things are different for installment contracts.
 - E.g., there's no perfect-tender rule.

What a buyer can do
about non-conforming goods

Breach & Performance

I. Reject

within reasonable time with notice §2-602

b/c THE GOODS AREN'T PERFECT

(this is the “perfect tender rule”)

but seller has a right to cure in two circumstances:
there's still time under the K to make a conforming
delivery §2-508(1)

- or -

the seller had reason to believe non-conforming
goods would be acceptable §2-508(2)

What a buyer can do
about non-conforming goods

Breach & Performance

*if the buyer doesn't reject, then the
buyer has ACCEPTED*

*once the buyer's accepted, then the buyer
can't reject, and will have to pay up §2-607*

but maybe the buyer can ... revoke

What a buyer can do
about non-conforming goods

Breach & Performance

II. Revoke *(a/k/a revoke acceptance)* §2-608

within reasonable time with notice §2-608

b/c ...

(1) the non-conformance substantially impairs the value of the K

- AND -

(2) one of these:

- (A) the buyer thought the seller would cure
- (B) seller gave assurances that strung the buyer out
- (C) there was some reason the buyer couldn't discover the non-conformance before accepting

What a buyer can do
about non-conforming goods

Breach & Performance

*once the time has passed for revocation,
then all the buyer can do is, maybe ...*

sue for breach of warranty

What a buyer can do
about non-conforming goods

Breach & Performance

III. Sue for breach of warranty

- IF -

all the requirements of a warranty
action are met

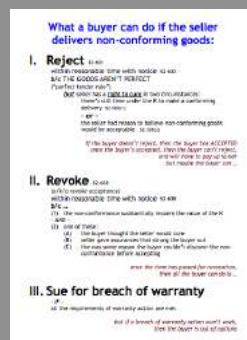
BUT if a breach of warranty action won't work,
then the buyer is out of options

What a buyer can do
about non-conforming goods

Breach & Performance

if you'd like all this on one page ...

Buyer recourse for non-conforming goods - handout [pdf]





Remedies - in general

Remedies

- The UCC wants you to get

**the benefit
of the bargain**

Remedies - in general

- The UCC wants you to get

**the benefit
of the bargain**

- i.e., "protecting the expectation interest"
- **HAVE HOPE:** I'm going to throw some mathematical formulas at you, but if you just remember "benefit of the bargain," you can pretty much derive them by common sense.

Remedies - abbreviations

- contract price (KP)
- resale price (RP)
- incidental damages (ID)
- expenses saved (ES)
- market price (MP)
- value of the conforming goods under the contract (VCG)
- value of the non-conforming goods received (VNCG)

Remedies

Remedies - general points

- Like other things in the UCC, the parties can change remedies by contract
- BUT, there must be a remedy that does not fail of its "essential purpose"
- AND, under the UCC, seller cannot get consequential damages!
- YET buyers can
 - So seller's often try to exclude this by contract.
- **REMEMBER "benefit of the bargain"!**
- The various measure of remedies are not necessarily mutually exclusive.

Remedies

Seller's Remedies - *various measures*

- action for the price §2-709
 - = KP
 - (with buyer keeping the goods)
 - recognize this as specific performance, an unfavored remedy under the UCC
- contract-price/market-price-differential damages §2-708(1)
 - = $KP - MP + ID - ES$
 - market price is measured by reference to the time and place of tender

Remedies

Seller's Remedies - *various measures*

- resale and resale damages §2-706
 - = $KP - RP + ID - ES$
 - proper notice usually must be given
 - resale damages do not give the benefit of the bargain to lost-volume sellers, who, without the buyer's breach, would have been able to sell additional units
- lost-profits damages §2-708(2)
 - = $KP - \text{costs} + ID$
 - roughly, the contract price less costs plus incidental damages
 - lost-profits damages allow lost-volume sellers to get the benefit of the bargain

Remedies

Buyer's Remedies - *various measures*

- cover damages §2-712
 - = $\text{cover} - KP + ID + CD - ES$
 - available where goods not delivered or rejected, where buyer acts in good faith without unreasonable delay
- contract-price/market-price differential damages §2-713
 - = $MP - KP + ID + CD - ES$
 - applicable for non-delivery or repudiation
 - can be available even when they exceed actual losses!
- specific performance
 - this as an unfavored remedy
 - damages must be inadequate, which might be the case where the goods are unique

Remedies

Buyer's Remedies - *various measures*

- cost-of-defect/breach-of-warranty damages

§2-714

- available for accepted goods
= $VCG - VNCG + ID + CD$
- the value of the conforming goods under the contract (VCG) less the value of the non-conforming goods received (VNCG) plus incidental damages (ID) plus consequential damages (CD)

Remedies

Liquidated damages

- to be upheld, must be reasonable in light of
 - anticipated/actual harm caused by breach
 - difficulties in proof of loss
 - inconvenience/non-feasibility of otherwise obtaining an adequate remedy
- unreasonably large liquidated damages are void as a penalty
- reasonability of liquidated damages are generally measured from the point of view the making of the contract, not hindsight after actual harm has been done



Some Big Things to Remember

- The UCC wants deals to happen.
- The UCC cares about freedom of contract.
- We look to the statutory language for answer.
- The UCC thinks merchants are special.
- The UCC wants you to get the benefit of the bargain.