Dated: November 20, 2015

**Memorandum to Students**

**Study Guide for Sales**

**Topics 14–21**

**Fall 2015**

**University of North Dakota School of Law**

**Prof. Eric E. Johnson**

**II. TERMS *(continued)***

**Topic 14: Commercial Impracticability**

Reading:

* Keating, Assignment No. 14 (in part), pp. 232-237
* Hull, Ch. 6.E., pp. 129-131

Problems:

* None

Key code sections:

* 2-615
  + excuse by failure of presupposed conditions
  + i.e., commercial impracticability (more general provision)
* 2-613
  + casualty to identified goods
  + i.e., commercial impracticability (more specific provision)

Key learning objectives:

* understand that the general rule is that parties made worse off by a bargain – even much worse off – are generally stuck with their bad deal
  + commercial impracticability is meant to be rare
* be able to apply the general commercial impracticability provision of 2-615
  + as a general matter there must be an unforeseen contingency
  + understand that 2-615 is the default analog to force majeure clauses
  + note that increased cost – without more – is not a basis for excuse
  + note that failure of supply can be a basis for excuse, but failure of a particular supplier source usually is not
  + note that a change in regulations is recognized as a situation where commercial impracticability may apply
* be able to apply the specific commercial impracticability provision of 2-613
  + applies when particular goods identified to the contract are damaged before risk of loss passes to buyer
  + if total, seller avoids the contract
  + if partial, buyer has the option to taking the goods at a discount to account for the damage
  + understand that this does not award a windfall to the seller, who still absorbs the loss
    - but the seller avoids some harsher possible remedies, such as consequential damages

**Topic 15: Unconscionability**

Reading:

* Keating, Assignment No. 15 (in part), pp. 254-258
* Hull, Ch. 5.E. thru end, pp. 97-103

Problems:

* 15.1 on p. 261

Key code sections:

* 2-302
  + unconscionability

Key learning objectives:

* understand that unconscionability is meant to be rare
  + nonetheless, it forms an important outer bound to oppressive behavior – particularly by merchants toward consumers
* parties to a contract who have made a bad bargain are, as a general matter, bound regardless
* understand that the appropriate point in time for deciding whether a contract is unconscionable is the time when the bargain is made – not some time later when circumstances change that end up making the deal a bad one
* understand that a determination of unconscionability is highly context dependent
  + in this vein, note that 2-302(2) specifically requires a court to give parties “a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”
* understand that a finding of unconscionability sufficient to avoid a contract generally requires both
  + procedural unconscionability
    - unfairness or oppression in the making of the deal
    - “an absence of meaningful choice”
  + substantive unconscionability
    - oppressive, harsh terms in the substance of the deal
    - “unreasonably favorable terms” (i.e., to the party wanting to enforce the deal)
* understand the three remedial paths (three options) a court can take subsequent to a finding of unconscionability:
  + refusal to enforce the contract
  + excise the unconscionable provision and enforce the rest of the contract
  + limit the application of the unconscionable provision so as to avoid an unconscionable result

**Topic 16: Title with Sales of Goods**

Reading:

* Keating, Assignment No. 16, pp. 263-278
* Hull, Ch. 4.A.1., pp. 51-53

Problems:

* 16.1 & 16.2 (a & b only) on pp. 279

Key code sections:

* 2-312
  + warranty of title
  + concerns seller liability with regard to title
* 2-403
  + power to transfer, entrusting, good-faith purchasing
  + concerns buyer liability with regard to title
* 1-201(b)(20)
  + definition of “good faith”
* 1-204
  + what constitutes “value”

Key learning objectives:

* understand the basics of warranty of title, what is warranted and when the warranty arises, 2-312(1)
* be able to determine whether warranty of title has been validly disclaimed, 2-312(2)
* understand the indemnification liability provisions of 2-312(3)
  + of sellers for claims against buyer from third parties
  + of buyer for claims against seller where the seller was acting according to buyer specifications
* be able to determine when a buyer will gain title to a good despite the owner of that good not selling it under 2-403
* be able to apply 2-403, 1-201(b)(20), and 1-204 in problems similar to 16.1 a & b

**Topic 17: Title with Leases, International Sales, and Real Estate**

Reading:

* No Keating reading (i.e., skip Assignment No. 17 in the book)
* Hull, Ch. 4.A.2., pp. 53-54

Problems:

* None

Key code sections:

* CISG Article 4
* CISG Article 41

Key learning objectives:

* understand the key aspects of title with leases as presented in the slideshow
* understand the key aspects of title with international sales as presented in the slideshow
* understand the key aspects of real-estate title as presented in the slideshow

**Topic 18: Closing the Sale with Sales of Goods**

Reading:

* Keating, Assignment No. 18 (in part), pp. 295-303
* Hull, Ch. 6.A.-6.C., pp. 105-125

Problems:

* 18.1 on pp. 310-311

Key code sections:

* 2-508
  + cure by seller after buyer’s rejection
* 2-606
  + what constitutes acceptance of goods
* 2-607
  + effect of acceptance
    - preclusion of rejection
    - preclusion of revocation if acceptance is with knowledge of non-conformity
      * unless on reasonable assumption of seasonable curing
    - requirement of making notice of breach within reasonable time after it was or should have been discovered
      * without which any remedy is barred
* 2-608
  + revocation of acceptance
  + available if
    - buyer reasonably assumed non-conformity would be cured
    - non-conformity was undiscovered and acceptance was reasonably induced by
      * difficulty of discovery or
      * seller’s assurances
  + requires under 2-608(2)
    - occurrence within a reasonable time after buyer should have discovered
    - notice to seller
* 2-612
  + breach of installment contract

Key learning objectives:

* understand under what circumstances a buyer can reject (refuse to accept goods)
  + any time they don’t conform (a/k/a not perfect)
  + this is known as the perfect-tender rule
* understand under what circumstances a buyer can revoke (after acceptance) (K 298)
  + non-conformity must substantially impair the value of the contract
  + there must be some good reason for the buyer waiting
    - the buyer reasonably believed acceptance would be cured, or
    - the buyer was strung along by the seller’s assurances, or
    - the problem was too difficult to discover before acceptance
  + revocation must be timely
* understand that the perfect-tender rule does not apply to installment contracts

**Topic 19: Closing the Sale with Leases, International Sales, and Real Estate**

Reading:

* No Keating reading (i.e., skip Assignment No. 19 in the book)
* Hull, Ch. 6.D., pp. 125-129

Problems:

* None

Key code sections:

* None

Key learning objectives:

* understand the key aspects of closing-the-sale issues with leases as presented in the slideshow
* understand the key aspects of closing-the-sale issues with international sales as presented in the slideshow
* understand the key aspects of closing-the-sale issues with real estate as presented in the slideshow

**Topic 20: Risk of Loss with Sales of Goods**

Reading:

* None
  + No Keating reading (i.e., skip Assignment No. 20 in the book)
  + No Hull reading

Problems:

* None

Key code sections:

* None

Key learning objectives:

* understand the key aspects of risk of loss with sales of goods as presented in the slideshow

**Topic 21: Risk of Loss with Leases, International Sales, and Real Estate**

Reading:

* None
  + No Keating reading (i.e., skip Assignment No. 21 in the book)
  + No Hull reading

Problems:

* None

Key code sections:

* 2A-219

Key learning objectives:

* understand the key aspects of risk of loss with leases as presented in the slideshow
* understand the key aspects of risk of loss with international sales as presented in the slideshow
* understand the key aspects of risk of loss with real estate as presented in the slideshow