

# Sales Study Guide Outline

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This study guide is meant to give you guidance on a topic-by-topic basis for how to concentrate your studies.

In addition to the topic-by-topic treatment given here, you should also focus on:

- slideshows posted to the class website
- doctrine that was the subject of a case we read
- doctrine that was the subject of sustained attention in class
- doctrine needed to solve problems, *meaning*:
  - my own problems from the Teal Set
  - problems in the Compendium casebook
    - of these, the more important are those that are the simpler, more straight-forward, more determinative in their analysis, and more definite in their answers
    - less important are head-scratcher/irresolvable-type problems and problems that point out an interesting but ultimately somewhat obscure point of doctrinal confusion or jurisdictional variance

## I. TRANSACTIONAL TORTS

### **Topic 1. Intentional Interference**

Compendium Chapter 0, pp. 21-34 (§§ 0.0 - 0.1)

Key learning objectives:

- understand and be able to apply the elements of an action for intentional economic interference
- understand the role of justifications/ privilege as a defense
- understand the need for non-speculative damages
- understand that intentional inference applies to third parties (i.e., you can't interfere with your own contract)

### **Topic 2. Fraud and Misrepresentation**

Compendium Chapter 0, pp. 35-51 (§§ 0.2 - 0.3)

Key learning objectives:

- understand and be able to apply the elements of an action for fraud
- appreciate different ways to effect a misrepresentation (false affirmative statement of fact, active concealment, promise without intent to keep it)
- understand how justifiable reliance acts as a key barrier for fraud plaintiffs
- understand how the pleading requirement of fraud works to substantively shape the tort of fraud
- recognize the kinds of circumstances in which causes of action for negligent misrepresentation or innocent misrepresentation could be plausible

## II. GOVERNING CODES

### **Topic 3. History, Purposes, and Basic Structure of the UCC**

Compendium Chapter 1, pp. 53-55 (§§ 1.1 - 1.2)

Hull, pp. 1-4 (§§ 1.A - 1.B.)

Key code sections:

- 1-103(a)
  - liberal construction according to underlying purposes and policies
- 1-302
  - variation of UCC rules by agreement

Key learning objectives:

- be able to compare and contrast the code system vs. the common-law system
- understand the importance of looking to the statute for answers
- appreciate the roles of the ALI, ULC, and state legislatures in the creation and adoption of the UCC
- appreciate Article 1 as a repository of generally applicable provisions
- have a strong sense of how the UCC provisions are to be construed

- understand that the UCC is supplemented by common law and equitable principles
- appreciate the freedom-of-contract ethos of the UCC and the ability of parties to vary by agreement much of what the UCC prescribes

#### **Topic 4. Hierarchy of Construction, Gap-Filling, and Supplementation by Other Law**

Compendium Chapter 1 (rev. 8/31),<sup>1</sup> pp. 55-58 (§§ 1.3 - 1.4)

Hull, pp. 22-23, stopping at "(1) Formal Requirements" (§ 3.A, up to but not including § 3.A(1))

Key code sections:

- 1-201(b)(3)
  - definition of agreement
- 1-103(b)
  - supplementation by common law and equity
- 1-303
  - course of performance, course of dealing, and usage of trade

Key learning objectives:

- for a sales contract, understand the hierarchy of importance among contractual provisions, the UCC code provisions, and the common law
  - in general, as far as the rules that control the deal and any dispute about it, from highest to lowest what controls is:
    - contractual provisions
    - the UCC
      - but note that some UCC rules cannot be contracted around
    - the common law
      - but note that some common-law rules, like fraud, can't be contracted around
- for a sales contract, understand the hierarchy of importance among express terms, course of performance, course of dealing, and usage of trade
  - as far as the content of the contract, from highest to lowest what controls is:
    - express terms
    - course of performance
    - course of dealing
    - usage of trade
- understand when gap-fillers are used and when they are superseded
  - gap-fillers are superseded when terms are supplied by
    - express term of the contract
    - course of performance
    - course of dealing
    - usage of trade

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<sup>1</sup> If you downloaded Chapter 1 prior to 8:20 a.m. on August 31, 2017, you will need to download it again. Otherwise you will be missing §1.3A regarding "Hierarchy of Construction."

## Topic 5. Choice of Law and CISG Applicability

Compendium Chapter 1, pp. 58-59 (§ 1.5)

Hull, pp. 16-18, (§ 2.F)

✓Prepare problems 501, 502, and 503 in Teal Set

Key code sections:

- 1-301
  - choice of law by parties
- CISG Articles 1, 2, 3(2)
  - applicability of CISG
- CISG Article 6
  - choice of law by parties

Key learning objectives:

- be able to analyze under what circumstances the UCC permits the parties to choose governing law by agreement
  - if the transaction bears a “reasonable relation” to the chosen jurisdiction
- be able to analyze whether a sales transaction is governed by CISG
  - apply CISG provisions regarding scope
    - CISG applies (Art. 1)
      - to sale-of-goods contracts
      - where parties’ places of business are in different CISG countries, unless this fact is not apparent to both parties
        - remember that these countries are CISG countries:
          - USA
          - Canada
          - Mexico
          - China
          - Japan
        - remember that this country is not a CISG country:
          - United Kingdom
    - CISG does not apply to goods bought for personal, family or household use, so long as the seller knew or should have known about such use (Art. 2)
    - CISG does not apply to contracts preponderantly consisting of services (Art. 3(2))
  - understand the application of choice-of-law provisions of contracts and the applicability of CISG
    - parties can choose to exclude CISG or vary its provisions (Art. 6)
  - understand what is necessary to prevent application of CISG in a contract and have UCC govern instead
    - must not only choose a certain UCC jurisdiction (e.g., New York) but also expressly state CISG does not apply (since New York is part of USA, a CISG signatory)

### III. SALES OF GOODS UNDER DOMESTIC LAW

#### A. SCOPE: (DOES THIS COUNT AS A SALE OF GOODS UNDER THE UCC?)

##### **Topic 6. Scope and Applicability of Article 2**

Compendium Chapter 2, pp. 60-69 (all of Ch. 2)

Hull, 2.A.-2.E. (all Ch. 2 except 2.F. on International Sales)

Key code sections:

- 2-102
  - general scope of Article 2
- 2-105(1)
  - definition of goods
- 2-104
  - definition of merchant

Key learning objectives:

- understand the scope of a “good” under the UCC
- be able to apply the gravamen test and predominant purpose test to mixed contracts
  - predominant-purpose test looks at the deal
  - gravamen test looks at the dispute
- be able to apply the UCC definitions rather than the common-sense definitions of terms in interpreting UCC provisions
  - but appreciate that courts can sometimes surprise by deviating from UCC definitions, such as by applying common-sense understandings

#### B. FORMATION: (DO WE HAVE A DEAL?)

##### **Topic 7. Basic Formational Rules, Offer and Acceptance, Firm Offers**

Compendium Chapter 3, pp. 71-76 (all of Ch. 3)

Hull, 3.A., all except 3.A.(1), and 3.C. (pp. 22-23, 26-29, 39-41)

✓Prepare problems 701, 702, and 703 in Teal Set

Key code sections:

- 2-204
  - contract formation, indefiniteness
- 2-205
  - firm offers
- 2-206
  - offer and acceptance in contract formation

Key learning objectives:

- understand the key aspects of contract formation under 2-204
  - contracts can be formed by express communications or purely by conduct

- it's not necessary to be able to determine the exact moment a contract is formed
- open (un-agreed-upon) terms do not prevent the formation of a valid, enforceable contract, so long as there is some basis upon which a court could provide a remedy
- understand how firm offers can be binding under 2-205
  - firm offers can be binding if they have consideration (same as the common law)
  - firm offers without consideration are binding if:
    - by a merchant
    - in a signed writing
    - assurance given it will be held open (not revoked)
    - but the irrevocability period for a without-consideration firm offer cannot exceed three months
- understand how offers can be made and validly accepted under 2-206
  - an offer can invite acceptance in any reasonable manner
  - an offer can be accepted by shipping goods
    - shipping conforming goods counts as acceptance
    - even shipping non-conforming goods can count as an acceptance
    - but understand that a shipment of non-conforming goods will be construed as a counter-offer if it's offered as an "accommodation," which the seller can do by seasonably notifying the buyer that the shipment is intended as an accommodation
- understand what happens where the offer and acceptance are not the same
  - understand the common-law background
    - under the common law, the offer and acceptance must be the same for a contract to be formed by them (the "mirror-image rule")
    - under the common law, a purported acceptance that doesn't match the offer will be construed as a counter-offer
      - if conduct by the recipient subsequently establishes that there is a contract, then the party receiving the purported acceptance (the counter-offer) will be construed to have accepted that counter-offer by conduct, and the terms of the counter-offer will control (a situation giving rise to what's called the "last-shot" rule)
  - keep in mind 2-207 (the "battle of the forms"), discussed in the next topic

## **Topic 8. Battle of the Forms**

Compendium Chapter 4, pp. 78-98 (all)

✓ Prepare all problems in chapter. (That's Purple Problems 4-1, 4-2, 4-3, 4-4, 4-5, 4-6, and 4-7.)

Key code sections:

- 2-207
  - additional terms in acceptance or confirmation
  - a/k/a "battle of the forms"

Key learning objectives:

- understand in general about 2-207 (the “battle of the forms”):
  - 2-207 was intended to change the common-law rules where the offer and acceptance are not the same
  - 2-207 permits contract formation even where offer and acceptance are not the same, abrogating the mirror-image rule
  - 2-207 is intended to avoid the harsh results of the last-shot rule
- understand when 2-207 is not an issue, including
  - when the offer and acceptance match
  - when there is an acceptance by conduct prior to any differing writing
  - where the purported acceptance comes too late to count as a valid acceptance
- understand that inconsistent expressions in offer and acceptance can create a contract (2-207(1))
  - but recognize acceptances expressly made conditional on assent to additional or different terms will not operate as an acceptance (2-207(1))
    - understand that in such a situation, if the parties’ conduct indicates a contract was nonetheless formed, 2-207(3) applies
  - be able to distinguish between different terms and additional terms and understand the consequences that follow from that distinction
    - for additional terms, where there is a valid contract, be able to apply 2-207(2)
    - for different terms, where there is a valid contract, be able to apply the majority “knock-out rule” where the conflicting terms drop out of the contract and gap-fillers are used to fill-out the contract
- understand that when there are writings that don’t establish a contract, but conduct that does, 2-207(3) provides that the terms of the contract are those terms that the parties’ writings agree on, together with gap-fillers

### **Topic 9. Statute of Frauds with Sales of Goods**

Compendium Chapter 5, pp. 99-113 (all)

✓Prepare all problems in chapter. (That's Purple Problems 5-1, 5-2, 5-3, 5-4, 5-5, and 5-6.)

Key code sections:

- 2-201
  - statute of frauds, requirement of writing
- 1-201(b)(37)
  - definition of signed
- 1-201(b)(43)
  - definition of writing
- 1-202(e)
  - definition of received
- 1-103
  - general construction of UCC for purposes and policies, applicability of other law

Key learning objectives:

- understand when a contract for the sale of goods must be evidenced by a signed writing
  - when the price is \$500 or more
- understand the threshold of what is necessary for a signed writing
  - the signed writing need not be the contract itself
  - mostly you just need:
    - the quantity of goods to be specified
      - note that the contract cannot be enforced for beyond the quantity specified
    - that the writing is “signed” by the party against whom enforcement is sought
  - understand that the requirements for a signature are quite liberal (1-201(37))
    - could be a typed name, a printed name, an X, the fact that something was sent on letterhead – just as long there is evidence of intent to authenticate the document
- be able to apply the between-merchant exception to the requirement of a signed writing under 2-201(2)
  - 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 (that is, the sender has bound herself or himself under 2-201(1)),
    - the recipient has reason to know of the contents of the confirmation, and
    - the recipient fails to object within 10 days after receipt
- recognize the various exceptions to the statute of frauds listed in 2-201(3), of which any one will do to make a contract enforceable:
  - specially manufactured goods where there’s a reliance interest (see 2-201(3)(a))
  - admission in court testimony or pleading (2-201(3)(b))
    - in some jurisdictions, you might be able to advance a lawsuit just to see if you can get this admission in discovery
  - payment was made and accepted (2-201(3)(c))
  - goods were received and accepted (2-201(3)(c))
  - promissory estoppel and outright fraud, in many courts (via general principles of law and equity incorporated through 1-103)

## C. TERMS: (WHAT IS OUR DEAL?)

### **Topic 10: Basic Contract Interpretation**

No reading for this topic.



Key learning objectives:

- understand the basics of contract interpretation
  - particularly as delineated in the slideshow, *Topics 10 & 12: Basic Contract Interpretation (and the Parol Evidence Rule)* - slideshow

### **Topic 11: Gap Filling**

Re-review §3.2.4, pp. 72-74 in Compendium Chapter 3  
Hull, § 5.C.

Key code sections:

- 2-305
  - open price term
- 2-307
  - delivery
- 2-309
  - time
- 2-307 & 2-310
  - payment

Key learning objectives:

- know the gap fillers for:
  - price
    - a reasonable price
    - often measured by seller's catalog or market
  - delivery
    - seller's place of business in a single delivery
  - time
    - a reasonable time
  - payment
    - due on tender of delivery
- understand that failure to state a quantity can be fatal by causing the would-be contract to fail for indefiniteness
  - but understand that if there is a reasonable basis for supplying the quantity term (course of dealing, e.g.) then lack of quantity need not be fatal
  - appreciate that "output" and "requirements" are ways of providing definiteness for quantity in absence of certainty of quantity at time of contracting
- regarding quality, keep in mind that warranties (covered later in the course) often apply by default

### **Topic 12. Parol Evidence Rule**

Compendium Chapter 8, pp. 115-131 (all)

✓Prepare all problems in chapter. (That's Purple Problems 8-1, 8-2, 8-3, 8-4, 8-5, and 8-6.)

Key code sections:

- 2-202
  - parol evidence rule

Key learning objectives:

- understand when the parol evidence rule is relevant and how to apply it
- understand the difference between contract-interpretation questions and issues involving the parol evidence rule
  - particularly as delineated in the slideshow, *Topics 10 & 12: Basic Contract Interpretation (and the Parol Evidence Rule) - slideshow*

### **Topic 13. Modification of Terms**

Compendium Chapter 9

✓Prepare all problems in chapter. (That's Purple Problems 9-1, 9-2, 9-3, and 9-4.)

Key code sections:

- 2-209(1)
  - modification

Key learning objectives:

- understand that a modification to a contract for the sale of goods can be binding without independent consideration (2-209(1))
- understand that a majority of courts apply the statute of frauds to oral modifications where both the contract as originally created and the contract as modified involve the purchase of goods for \$500 or more
- appreciate that no-oral-modification clauses can be valid, if:
  - between merchants
  - between a merchant and a non-merchant if the non-merchant separately signs the no-oral-modification clause
- appreciate that even where there is a no-oral-modification clause, a putative oral modification can still operate as a waiver

### **D. WARRANTIES: (WHAT IF THE GOODS AREN'T THAT GOOD?)**

### **Topic 14. Introduction to Warranties**

Compendium Chapter 10

Hull, Chapter 4 (pp. 51-73; but you can skip over the parts about the CISG)

Key learning objectives:

- understand that warranty liability does not depend on fault
- appreciate that warranty liability has some features of traditional tort liability and traditional contract liability, and some dissimilarities with both

### **Topic 15. Warranty of Title**

Compendium Chapter 11

Key code sections:

- 2-312
  - warranty of title

Key learning objectives:

- understand when the warranty of title arises
  - every contract
  - → *unless excluded/disclaimed/modified [see Topic 21]*
- understand what is warranted under the warranty of title:
  - title conveyed is good
  - transfer is rightful
  - goods are free of any security interest or other lien
    - except what is actually known to buyer
      - “should have known” doesn’t count

## **Topic 16. Warranty and Indemnification Against Infringement**

Compendium Chapter 12

Key code sections:

- 2-312(3)
  - warranty against infringement
  - indemnification against infringement

Key learning objectives:

- understand when the warranty of title arises
  - only applies to merchant sellers regularly dealing in goods of the kind
  - → *unless excluded/disclaimed/modified [see Topic 21]*
- understand what is warranted under the warranty against infringement:
  - the good can be possessed and used normally without a rightful claim of infringement by third-party holder of intellectual-property rights
- appreciate the complexity and unsureness of “rightful claim of infringement”
  - this is something less than an ultimately victorious, fully proved infringement claim
  - but it is something more than a frivolous claim
  - essentially about a significant adverse effect on buyer’s ability to use the goods
- understand when the buyer’s indemnification obligation arises
  - where the seller infringes a third-party’s intellectual property right by complying with the buyer’s specifications

## **Topic 17. Implied Warranty of Merchantability**

Compendium Chapter 13

✓Prepare all problems in chapter. (That's Purple Problems 13-1, 13-2, 13-3, 13-4, 13-5, 13-6, and 13-7.)

Hull, § 4.B.(2)

Key code sections:

- 2-314
  - implied warranty of merchantability

- 2-104(1)
  - definition of “merchant”

Key learning objectives:

- understand in what contexts the warranty exists (2-314(1))
  - where the seller is a merchant of goods of the kind
  - → *unless excluded/disclaimed/modified [see Topic 21]*
- understand what is warranted (2-314(2))
  - that the goods are “merchantable”
- understand what is meant by “merchantable”
  - it implies (most importantly) the goods must:
    - be fit for the ordinary purposes for such goods (2-314(2)(c))
    - be adequately contained/packaged/labeled (2-314(2)(e))
    - must pass without objection in the trade under the contract description (2-314(2)(a))
  - it also implies the goods must:
    - run within quality and quantity standards of usage of trade and the contract description (2-314(2)(d))
    - conform to promises or affirmations of fact on container or label (2-314(2)(f))
    - if fungible goods, be of fair average quality (2-314(2)(b))
- regarding used goods
  - understand that used goods are also included
    - used goods aren’t necessarily of the same quality as new goods to be merchantable
  - be able to apply merchantability standards to used goods
- regarding food
  - understand that food is also included, including food served in a restaurant
  - understand that a majority of courts apply a “reasonable expectations” test regarding injury-causing substances in food
  - appreciate that the older natural-foreign test (depending on the foreign/natural substances distinction ) was more seller friendly
- appreciate that for personal injury caused by products, while there is overlap in coverage between strict products liability in tort and breach of the implied warranty of merchantability under the UCC, the doctrines are different, and occasionally may reach divergent outcomes in a particular case
  - 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 is fit for the ordinary purpose for which such a good is used

## Topic 18. Implied Warranty of Fitness for a Particular Purpose

Compendium Chapter 14

✓Prepare all problems in chapter. (That's Purple Problems 14-1, 14-2, and 14-3.)

Key code sections:

- 2-315
  - implied warranty of fitness for a particular purpose

Key learning objectives:

- understand when the implied warranty of fitness for a particular purpose arises
  - the buyer has, in fact, a particular purpose for the goods
  - the seller has reason to know of the buyer's particular purpose for the goods
  - the buyer is relying, in fact, on seller's skill or judgment to select or furnish suitable goods
  - the seller has reason to know that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods
  - → *unless excluded/disclaimed/modified [see Topic 21]*
- understand what is warranted
  - fitness for the buyer's particular purpose

## Topic 19. Express Warranties

Compendium Chapter 15

✓Prepare all problems in chapter. (That's Purple Problems 15-1, 15-2, and 15-3.)

Key code sections:

- 2-313
  - express warranties

Key learning objectives:

- understand how express warranties are formed
  - an affirmation of fact, promise, or description relating to the goods
  - which becomes part of the basis for the bargain
- understand what is warranted
  - that goods will conform to the affirmation of fact, promise, or description
- remember that a sample or model made part of the basis for the bargain also creates an express warranty that the goods will conform to that sample or model
- regarding basis-of-the-bargain:
  - understand that many courts take a seller/defendant-friendly view of holding that in order to prove basis-of-the-bargain, a plaintiff must prove reliance upon the warranty in the buying decision
  - understand that many courts take a buyer/plaintiff-friendly view of holding basis-of-the-bargain is presumed, unless there is clear, affirmative proof to the contrary
- understand that such words as "warranty" or "guarantee" are not necessary to the creation of an express warranty
- understand that intent to create an express warranty is not necessary to the creation of an express warranty

- be able to distinguish puffery from an express warranty
- → *keep in mind issues of whether one can exclude/disclaim/modify and parol-evidence-rule effects [see Topic 21]*

## **Topic 20. Remote Sellers, Privity, and Notice Issues**

Compendium Chapter 16

✓Prepare Purple Problem 16-1, 16-2, 16-3, 16-4, and 16-5.

Key code sections:

- 2-607(3)(a)
  - requirement of notification within a reasonable time
- 2-318
  - third-party beneficiaries of express or implied warranties

Key learning objectives:

- understand the importance of notice in breach of warranty disputes
  - understand that to whom notice must be sent (in the vertical chain) differs by court
  - understand that what counts as within a reasonable time is subject to uncertainty
  - appreciate notice problems as a potential pitfall, and appreciate that sending notice quickly and to as many possible defendants as possible reduces the possibility of being precluded from potential avenues of recovery
- be able to analyze warranty vertical-privity/remoteness problems and horizontal-privity problems
  - particularly with regard to the information on the handout: *Sales\_20\_Warranty\_Privity-Remoteness\_Handout.pdf*

## **Topic 21. Eliminating or Reducing Warranty Liability**

Compendium Chapter 17

✓Prepare all problems in chapter. (That's Purple Problems 17-1 thru 17-8.)

Hull, § 4.B.(4)

Key code sections:

- 1-201(b)(10)
  - definition of “conspicuous”
- 2-302
  - unconscionability
- 2-312(2)&(3)
  - disclaimer of warranty of title and warranty against infringement
- 2-316
  - exclusion or modification of warranties

Key learning objectives:

- understand that warranties are cumulative
  - in particular, understand that an express warranty doesn't displace an implied warranty so long as they can possibly be construed as consistent
- understand that post-sale disclaimers are generally ineffective
- be able to determine the enforceability of limitations on implied warranties (IWoM and IWoFfaPP)
  - recognize that there are two alternative paths for written disclaimers of implied warranties, the 2-316(2) method and the 2-316(3) method
    - 2-316(2) method for a written disclaimer:
      - must be mention "merchantability" to exclude the IWoM
      - must be *conspicuous* to exclude IWoM and IWoFfaPP
    - 2-316(3) method
      - use of "as is," "with all faults," or similar language that in common understanding makes it plain there are no implied warranties
- regarding the warranty of title and warranty against infringement
  - understand that an effective disclaimer of implied warranties does not disclaim the WoT or the WaI
  - disclaiming the WoT or the WaI requires specific language
    - or alternatively, for the WoT, particular circumstances that would put a person on warning about title problems, such as a police auction
- understand the issues with attempted disclaimers of an express warranties
  - an express warranty, theoretically, cannot be disclaimed (i.e., you can't express a warranty and disclaim it at the same time)
  - a seller can, however, often achieve a disclaimer in effect through the use of the parol evidence rule to vitiate prior oral and written and contemporaneous oral promises
    - but an action for fraud provides an outer bound on this, as the parol evidence rule cannot bar a fraud claim

## Topic 22. Magnuson-Moss and Consumer Protection Statutes

Compendium Chapter 18

✓Prepare all problems in chapter. (That's Purple Problems 18-1 and 18-2.)

Hull, § 4.B.(6)

Key code sections:

- 15 U.S.C. §2301 (MMWA §101)
  - definitions of key terms
- 15 U.S.C. §2303 (MMWA §103)
  - designation of written warranties as "full" or "limited"
- 15 U.S.C. §2308 (MMWA §108)
  - ineffectiveness and prohibition of disclaimers of implied warranties were written warranty issued
  - allowance of limitation of duration of implied warranties
- 15 U.S.C. §2310 (MMWA §110)
  - recovery of attorneys fees

Key learning objectives:

- recognize when Magnuson-Moss applies -
  - to “consumer products”
  - for which there is a written warranty relating to the material or workmanship of the product, affirming the product is defect free or promising it will meet some level of performance over a period of time
- recognize that Magnuson-Moss does not require sellers to issue warranties
- recognize that Magnuson-Moss requires sellers to designate written warranties within its ambit to be labeled either a “full warranty” or “limited warranty”
- understand where Magnuson-Moss gets its pro-consumer power:
  - making written consumer warranties meaningful, by requiring
    - that “full warranties” meet minimum standards
    - that where there’s any qualifying written warranty, even one marked “limited warranty,” the implied warranties (including the IWoM) cannot be disclaimed
  - making enforcement feasible through attorneys fees

## E. EXCUSE AND AVOIDANCE: (CAN I GET OUT OF THE DEAL?)

### **Topic 23: Unconscionability**

Compendium Chapter 19

Hull, Ch. 5.E.

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 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 24: Impracticability**

Hull, Ch. 6.E.(1)

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
  - note that increased cost – without more – is not a basis for excuse
  - plausible scenarios: natural disasters, sudden failure of a supplier
- 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 25: Frustration of Purpose**

Hull, Ch. 6.E.(2)

Key code sections:

- 1-103
  - supplementation by general law and equity

Key learning objectives:

- understand the basic idea: that a basic assumption of the contract was that the buyer would be able to use the goods for some purpose, and where that

- assumption turns out to be false, the buyer's purpose is frustrated, and this can serve as an excuse for the buyer for going through with the deal
- understand that as with commercial impracticability, frustration of purpose is meant to be rare
  - understand that a successful frustration-of-purpose excuse is much more plausible if the seller will not be put in a worse position than prior to entering the contract

**F. DELIVERY AND TITLE ISSUES: (DO I OWN IT NOW? WAS IT YOURS TO SELL? IF IT'S LOST, WHO'S LEFT HOLDING THE BAG?)**

**Topic 26. Identification of Goods and Delivery**

No reading for this topic.

Key learning objectives:

- understand the basic idea of identification – that some particular physical objects are now associated with the contract
- recognize that if identification does not happen prior, then it happens at least upon tender of delivery, goods are identified
- recognize that tender of delivery doesn't necessarily mean shipment to the buyer, it might mean goods are ready to be picked up

**Topic 27. Risk of Loss**

Hull, Ch. 5.B.

Key learning objectives:

- if the loss is caused by negligence, then the negligent party bears the risk of loss
- after the title and possession pass to buyer, then (in general) the buyer then bears the risk of loss
- risk-of-loss terms are controlled by the agreement, unless it is silent
- risk-of-loss provisions of the UCC can be complex, and in large part they track a projection about which party is likely to have insurance coverage

**Topic 28. Title**

Compendium Chapter 23

✓Prepare all problems in chapter.

Hull, Ch. 6.B.

Key code sections:

- 2-401
  - passing of title
- 2-403
  - power to transfer, entrusting, good-faith purchasing
  - concerns buyer liability with regard to title

Key learning objectives:

- be able to determine when a buyer will gain title to a good despite the owner of that good not selling it, and in this regard:
  - be able to use the concept of voidable title
  - be able to use the concept of a good-faith purchaser
- understand how goods *entrusted* to a merchant who deals in goods of the kind can give the merchant the power to pass good title to a good-faith purchaser in the ordinary course of business
  - keep in mind that pawnshops are statutorily excluded from this
- understand that void title (as opposed to voidable title) is always void, and a seller with void title can never transfer good title
  - although at the outer bounds, the statute of limitations can cut off claims by those with good title

## G. PERFORMANCE AND BREACH: (IS OUR DEAL FALLING APART? HAVE YOU BREACHED?)

### **Topic 29. Prospective Nonperformance and Anticipatory Repudiation**

Hull, Ch. 6.A.

Key learning objectives:

- understand that if one party repudiates the contract, the other party can suspend its performance and can cancel the contract
- understand that 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
- 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

## Topic 30. Tender, Acceptance, Rejection, Revocation

Hull, Ch. 6.C.

Key learning objectives:

- understand the perfect-tender rule:
  - goods must be exactly as described at time of tender of delivery; if not, seller is in breach and buyer can reject the goods and get damages
- understand that the perfect tender rule applies to sale-of-goods contracts generally, but it does not apply to installment contracts
- understand that for installment contracts:
  - a non-conforming installment can only be rejected if there is a substantial impairment in value that can't be cured
  - cancelling the entire installment contract because of non-conforming deliveries is requires a showing that there is a substantial impairment of the value of the entire contract
    - understand that this is a relatively high burden
    - recognize that when in doubt, demanding assurances is generally a safer strategy than cancelling an entire installment contract
- understand the what a buyer can do at different stages if the seller has delivered non-conforming goods
  - in particular, understand the material on the handout, *Topic 30: Buyer recourse for non-conforming goods - handout*

## H. REMEDIES: (WHAT CAN I GET AFTER YOU BREACH?)

### Topic 31. General Remedies Principles

Compendium Chapter 25

✓Prepare all problems in chapter.

Key learning objectives:

- understand the overarching principle of damages for contracts for the sale of goods: *benefit of the bargain*
- understand the concept of *efficient breach*, the unavailability of punitive damages, and the usual unavailability of non-economic damages
- understand and be able to apply the concepts of
  - causation
  - foreseeability
  - certainty
  - mitigation
- understand and be able to categorize damages as
  - direct damages
  - incidental damages
  - consequential damages

## Topic 32. Seller's Remedies

Compendium Chapter 26

✓Prepare all problems in chapter.

Hull, Ch. 8.A.(1)-(2)

Key code sections:

- 2-703
  - sellers' remedies in general
- 2-704(1)(a)
  - right to identify goods to the contract
- 2-706
  - resale
  - resale damages
- 2-708(1)
  - contract-price/market-price-differential damages
- 2-708(2)
  - lost-profits damages
- 2-709
  - action for the price

Special note:

- don't worry about §26.6 in the book or Purple Problem 26-7.

Key learning objectives:

- understand the basic theme of remedies for sellers: the benefit of the bargain
- understand that sellers under the UCC cannot get consequential damages
- be able to analyze which remedies or combination of remedies will be more beneficial to a particular seller given a particular set of facts
- recognize categories of remedies (not necessarily mutually exclusive):
  - withhold or stop delivery of goods
  - resell and recover resale damages under 2-706
  - recover 2-708 damages for non-acceptance
    - contract-price/market-price differential under 2-708(1)
    - recover lost profits under 2-708(2)
  - action for price under 2-709
  - cancel the contract
- action for the price under 2-709:
  - recognize this as specific performance, an unfavored remedy under the UCC
  - be able to determine when this remedy is appropriate
  - be able to figure out what happens when this remedy is ordered:
    - seller gets paid the contract price (KP) while buyer gets the goods and keeps them
    - action on price = KP
      - with buyer keeping the goods
- resale and resale damages under 2-706
  - be able to figure out resale damages:

- resale damages are contract price (KP) less resale price (RP) plus incidental damages (ID) less expenses saved (ES)
    - resale damages =  $KP - RP + ID - ES$
  - recognize that for resale damages to be recoverable under 2-706, proper notice usually must be given
  - recognize that 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
- contract-price/market-price-differential damages under 2-708(1)
  - be able to figure out contract/market-differential damages:
    - contract/market-differential damages are contract price less market price (MP) plus incidental damages less expenses saved
    - contract/market-differential damages =  $KP - MP + ID - ES$
  - recognize that the market price is measured by reference to the time and place of tender
- lost-profits damages under 2-708(2)
  - be able to figure out lost-profits damages:
    - lost-profits damages are, roughly, the contract price less costs plus incidental damages
    - lost-profits damages =  $KP - costs + ID$
  - recognize that lost-profits damages allow lost-volume sellers to get the benefit of the bargain

### Topic 33. Buyer's Remedies

Compendium Chapter 27

✓Prepare all problems in chapter.

Hull, Ch. 7.A.

Key code sections:

- 1-305(a)
  - liberal provision of remedies
  - benefit of the bargain
  - consequential, special, and penal damages prohibited except where specifically provided for
- 2-712
  - cover
  - cover damages
- 2-713
  - contract-price/market-price differential damages
- 2-714
  - damages for breach where goods were accepted
  - cost-of-defect damages

Key learning objectives:

- understand the basic idea theme of remedies for buyers: the benefit of the bargain
- understand that buyers under the UCC can get consequential damages
- be able to analyze which remedies or combination of remedies will be more beneficial to a particular buyer given a particular set of facts
- recognize that generally sellers want to disclaim consequential damages as part of the sales contract, and they often are able to do so
- cost-of-defect/breach-of-warranty damages under 2-714:
  - understand when cost-of-defect damages are applicable
    - accepted goods
    - notice has been given within a reasonable time
  - be able to figure out cost-of-defect damages:
    - cost-of-defect damages are 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)
    - $\text{cost-of-defect damages} = \text{VCG} - \text{VNCG} + \text{ID} + \text{CD}$
- cover and cover damages under 2-712:
  - understand when cover is applicable and what must be done under 2-712 for a buyer to avail itself of this remedy
    - where goods not delivered or rejected
    - where buyer acts in good faith
    - without unreasonable delay
  - be able to figure out cover damages:
    - cover damages are cost of cover (cover) less contract price (KP) plus incidental damages plus consequential damages less expenses saved (ES)
    - $\text{cover damages} = \text{cover} - \text{KP} + \text{ID} + \text{CD} - \text{ES}$
- contract-price/market-price differential damages under 2-713:
  - understand when contract/market difference is applicable
    - damages for non-delivery or repudiation
  - be able to figure out contract-price/market-price differential damages:
    - contract-price/market-price differential damages are market price (MP) less contract price plus incidental damages plus consequential damages less expenses saved
    - $\text{cover damages} = \text{MP} - \text{KP} + \text{ID} + \text{CD} - \text{ES}$
  - appreciate that market price damages can be available even when they exceed actual losses (*Tongish v. Thomas* case)
- regarding specific performance
  - appreciate this as an unfavored remedy
  - understand that damages must be inadequate, which might be the case where the goods are unique

### **Topic 34. Limitations of Remedies**

Compendium Chapter 28

✓Prepare all problems in chapter.

Hull, Ch. 8.A.(3)

Key code sections:

- 2-718(1)
  - liquidated damages
- 2-718(2)
  - deposits
- 2-719
  - limitations of remedies

Key learning objectives:

- understand that parties are generally able to expand or limit remedies by agreement
- understand that parties are generally able to create exclusive remedies as a matter of agreement
- be able to analyze whether a liquidated damages provision will be upheld
  - liquidated damages 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
  - understand that 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 (*C&H Sugar v. Sun Ship*)
- understand and be able to apply to following doctrines bounding the limitation/modification of remedies by agreement:
  - unconscionability can void remedy limitations
  - if the allowed remedy under a contract “fails of its essential purpose,” it is void
    - in other words, there must be a minimum adequate remedy available; if the aggrieved party is effectively deprived of a fair quantum of remedy for breach, then
      - an aggrieved party can then pursue any other available remedy under the code
- regarding deposits, be able to determine how much of a deposit an aggrieved seller can keep:
  - the amount that exceeds validly liquidated damages, or
  - the lesser of 20% or \$500
- recognize that contract can, and often do, limit or exclude consequential damages for buyers
  - but this will not be upheld where unconscionable
  - excluding/limiting consequential damages for personal injuries caused by consumer goods is prima facie unconscionable



## IV. SALES OF GOODS UNDER THE CISG

### **Topic 35. Key Differences Under the CISG**

No reading for this topic.

Key learning objectives:

- understand the key differences as delineated in the slideshow on this topic, *Topic 35: Key Differences Under the CISG - slideshow*
- in particular:
  - understand that there is no parol evidence rule under the CISG
    - you can presumably contract to have one, but you can use parol evidence to determine whether the contract incorporates a parol evidence rule
  - understand that there is no statute of frauds under the CISG
    - you cannot contract around this: it's logically impossible!
  - understand that the CISG allows for the enforceability of firm offers
    - without consideration or special requirements and unlimited as to duration

## V. LEASES UNDER THE UCC

### **Topic 36. Distinguishing Leases, Sales, and Security Interests**

Hull, Ch. 10.A.-C.

Key learning objectives:

- understand key aspects covered in slideshow<sup>2</sup>

### **Topic 37. Key UCC Provisions Regarding Leases**

Hull, Ch. 10.D.-E.

Key learning objectives:

- understand key aspects covered in slideshow<sup>3</sup>

## VI. LICENSING

### **Topic 38. Overview of Intellectual Property Rights**

No reading for this topic.

Key learning objectives:

- understand key aspects covered in slideshow<sup>4</sup>

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<sup>2</sup> To be posted.

<sup>3</sup> To be posted.

<sup>4</sup> To be posted.

## Topic 39. General Principles of Licenses

No reading for this topic.

Key learning objectives:

- understand the basics of licenses
  - a license is a legally binding consent
  - a license has legal effect as an affirmative defense
  - a license is not a contract, but might be part of a contract
- understand the relationship of licenses to contracts and consequences for available claims and remedies
  - a license is not a contract, but a license can be a term of a contract; that is, a license can be a thing bargained for
  - be able to recognize when a contract containing a license will not preclude non-contractual causes of action based on extracontractually existing rights (such as causes of action for trespass or copyright infringement)
    - when the license is made conditional upon some condition not met
  - be able to recognize when a contract containing a license will preclude non-contractual causes of action based on extracontractually existing rights (such as causes of action for trespass or copyright infringement)
    - when the license is given as part of the bargain (i.e., not made conditional)

## Topic 40. Licensing Transactions and Uniform Laws

Compendium Chapter 29

Key learning objectives:

- understand the issues and holding of *ProCD v. Zeidenberg*
- understand other aspects covered in a slideshow<sup>5</sup>

## Topic 41. Key Licensing Specifics

No reading for this topic.

Key learning objectives:

- understand the basics of open-source licenses and how copyleft/ShareAlike uses intellectual property entitlements to force downstream licensees to “license it forward”
- understand other aspects covered in a slideshow<sup>6</sup>

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<sup>5</sup> If applicable: Whether or not there is such a slideshow depends on time.

<sup>6</sup> If applicable: Whether or not there is such a slideshow depends on time.