

# Sales

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## PRACTICE EXAMINATION - MODEL ANSWER AND COMMENTARY

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### The Moped Store

NOTE:

This model answer was made from amalgamating the work of multiple students. Because of the cherry-picking involved, what you have here is a composite that is better than any real response that was received. So, in many ways, this answer is better than the best. Yet this model answer is not perfect. Student-drafted work done under deadline pressure, of course, never would be perfect. And I have intentionally shied away from trying to make this answer perfect in the compositing process. All things considered, however, this is extremely good.

What this all means for you is that you should be wary of comparing your own response to this one as a way of gauging your preparedness for the exam. This is a beyond-the-top-grade response. So don't worry if you can't do as well. Yet at the same time, if you see issues not represented here, it may not be because you are mistaken; it may be because you are perceptive.

What are good lessons to draw from this model? One thing this response does very well is the way in which the law is applied to the facts. Rather than copy-and-pasted blackletter law or needlessly reiterated facts, this exam response focuses on providing analysis. That's excellent, because the analysis is the key to doing well on the exam. Also laudable is the sense of judgment this exam response frequently displays with regard to conclusions: Close calls and toss-ups are presented as such. Rock-solid conclusions are made without hedging.

Note that the responses from which this model response was composited used various abbreviations. But for this model answer, I have standardized references to names and not used abbreviations. I have also aimed for cohesive writing with cleaned up grammar, spelling, and punctuation. Real exams are not so tidy.

At the end of this document there is a "Commentary" section in which I discuss the exam response and student responses I received.

#### QUESTION

Analyze the parties' claims, duties, and liabilities, clearly labeling the subparts of your answer, as follows:

- Subpart A:* Discuss claims, duties and liabilities related to Mr. Moore's moped.
- Subpart B:* Discuss claims, duties and liabilities related to the Swivelmax chairs.
- Subpart C:* Discuss claims, duties and liabilities related to the Luxe Deluxe Special Edition moped.
- Subpart D:* Discuss claims, duties and liabilities related to the Zoom 3000 moped.
- Subpart E:* Discuss claims, duties and liabilities related to Vancouver Tech.

Regarding the Swivelmax chairs, in terms of remedies, include in your analysis what remedies should be available under the terms of the contract. Then, regardless of what your conclusion is, analyze what the remedies would be under the default provisions of the UCC. If nothing else, it will be good to understand as background heading into an attempt to negotiate a settlement.

*[various admonitions omitted; see the exam booklet]*

## RESPONSE

### SUBPART A -- MR. MOORE'S MOPED

Implied warranty of merchantability:

Mack Moore has a winning claim for breach of the implied warranty of merchantability. The implied warranty of merchantability applies because The Moped Store is a merchant under §2-104 since it is a store that deals with mopeds and holds itself out as having knowledge of mopeds. As far as the UCC is concerned, the implied warranty of merchantability was validly disclaimed under §2-316(2) in the written sales agreement because it had the word "merchantability" in it and was conspicuous since it was in ALL CAPS. But Magnuson-Moss applies because the moped is a consumer product under MMWA §101(1) since it is tangible personal property that is normally used for personal or family purposes. And under §108(a), a supplier cannot disclaim implied warranties where a written warranty is issued. The sales agreement expressly includes a 90-limited warranty. The warranty is breached because the moped is not fit for its ordinary purpose – which is riding on the road – since it is backfiring, smoking, and having combustion problems.

Implied warranty of fitness for a particular purpose:

Moore also has a winning Magnuson-Moss claim for breach of the implied warranty of fitness for a particular purpose. Sal Sullivan had reason to know of Moore's purpose of riding the moped at least 45 miles per hour, because Moore explained this need to Sullivan, to which Sullivan said, "I've got the one for you -- follow me!" The implied fitness warranty seems to have been validly disclaimed under the UCC with a written, conspicuous (because in ALL CAPS) disclaimer. But under Magnuson-Moss, the disclaimer is ineffective for the same reason as with the implied warranty of merchantability. The warranty is breached because the moped, going no faster than 38, is unfit for the particular purpose of freeway commuting.

Express warranty:

When Sal falsely promised that the seat was real leather, not pleather, he made an express warranty, since this was part of the basis of the bargain for Moore. The warranty was breached since the seat actually is pleather. The written agreement could have disclaimed this oral warranty, and it could have used a merger clause and the parol evidence rule to avoid that warranty. But the sales agreement has no merger clause, and it says nothing to exclude the possibility of oral warranties. So evidence of the oral statement can be used to add to the terms of the written agreement, and thus the warranty can be proved at trial.

The analysis is the same for Sal's promise that the seat is the most comfortable in the world, except that this statement seems to be mere puffery.

Fraud:

Moore may have a good claim for fraud here as well. Saying the seat was leather and representing that the moped could drive at freeway speeds was a material misrepresentation – it mattered to Moore’s buying decision. From the circumstances, it can be deduced that Sullivan knew or was reckless in not knowing this was true and also that he intended for Moore to rely on these promises in buying the moped. Moore actually relied on these claims and that reliance was justifiable because these were claims that reasonably could have been true. He has suffered a harm because he is out several hundred dollars.

Unconscionability:

Moore may also have an argument that the contract was unconscionable under §2-302. There is an argument for procedural unconscionability because Sullivan took advantage of Moore’s lack of knowledge of mopeds to tell him lies, combined with encouraging Moore not to read the contract. That, along with Moore’s need for the moped to get to work could be construed as an absence of meaningful choice. There also arguably is substantive unconscionability in that the price was \$800 yet the moped was worth much, much less than \$100 – that’s a price that is more than eight times the value of the item. Unconscionability is very hard to win, and it is might be something of a long shot here. But it shouldn’t matter much since Moore should get the relief he needs via the Magnuson-Moss claims.

#### SUBPART B -- SWIVELMAX CHAIRS

There are two different transactions regarding Swivelmax chairs.

(1) The September Transaction:

First is what we can call the September transaction. To understand what the contract is, we first must look at how it was formed. The Moped Store made an offer by sending its purchase order for five teal chairs. Rhodock Resources sent back an order acknowledgement for five black chairs. Since acceptance was not made expressly conditional on assent to particular terms, the purchase order and order acknowledgement could have created a contract even though the terms did not exactly match under §2-207(1). But at least one difference -- the color of the chairs -- goes to a fundamental term of the contract, not mere boilerplate. This suggests there is no contract formed on the basis of the purchase order and order acknowledgement.

If there is no contract based on the purchase order and order acknowledgement, there seems clearly to be a contract based on conduct. Where the writings don’t establish a contract, but the conduct of the parties does, §2-207(3) tells us the

contract's terms include those upon which the parties agree, plus gapfillers. The only terms on which the parties seem to agree is the price. There is no warranty that warrants the chairs will be teal. And there are no gapfillers with regard to color.

We know the goods were accepted, because The Moped Store had them for about five weeks before they objected on October 14, which otherwise could be construed as a notification. This is more than a reasonable time to inspect under §2-606(1)(b). And it's too late to revoke acceptance on the basis of color, because The Moped Store accepted the chairs with the knowledge that they weren't teal. With no chance for rejection or revocation, the only thing left would be for The Moped Store to sue on a breach of warranty. But as we established, there's no warranty that the chairs will be teal. So The Moped Store has no remedy with regard to the September Transaction for the chairs not being teal.

(2) The October Transaction:

Next is what we can call the October transaction -- the October 14 oral offer by Emily Ellajans to sell five teal Swivelmax chairs for \$550. It seems Fiona Flencastle accepted the offer orally by saying "Fine, fine, fine" and then hanging up.

Can Rhodock get out of this agreement on the basis of the statute of frauds?

The price is for \$550, which means the contract must be evidenced by a qualifying writing under §2-201(1) unless an exception applies. Could Emily Ellajans' October 14 4:23 p.m. e-mail count as the needed writing? She is the person against whom enforcement is sought, and it is signed by her in the UCC sense because her signature block at the bottom of the e-mail would count as a "symbol executed or adopted with present intention to adopt or accept" the contents of the e-mail. But her e-mail doesn't say there was a done deal. It makes it sound like she received an order, but it does not indicate that she ever agreed to fill it.

The exception of §2-201(2) may, however, apply, since Fiona Flencastle sent an e-mail evidencing the oral agreement (her October 14 4:39 p.m. e-mail), and this e-mail is signed (signature block) and is enforceable against the Moped Store, and Ellajans knew of its contents and didn't object within 10 days. But under §2-201(2), there is also the requirement that the deal be "between merchants," and while Rhodock is clearly a merchant of chairs, there's no reason to think that The Moped Store is a merchant with respect to chairs.

Another exception Flencastle might pursue is the §2-201(3)(b) exception: She could sue and, if this jurisdiction would allow her to survive a motion to dismiss, she could then try to get Ellajans to admit to the deal in a deposition, which Ellajans would have to do if she is being honest.

Can Rhodock avoid the contract on the basis of commercial impracticability under §2-615? First, performance must be impracticable. A cost increase of 50% is likely still practicable, but here we have a cost increase of about 1500%, definitely a huge increase. Second, the cost increase was caused by a hip-hop video that unexpectedly exploded demand for this discontinued item. It can be said that the non-occurrence of a teal-Swivelmax-themed hip hop song was a basic assumption of the contract at time of contracting.

If the contract is enforceable and is not avoided, then §2-713 contract-price/market-price differential damages are an appropriate remedy for The Moped Store since this would be a case of repudiation. The Moped Store would get the market price (5 x \$15,000 (or more, since that was the wholesale price)) less the contract price (\$550) plus incidental damages (\$0, apparently) less expenses saved (also apparently \$0).

#### SUBPART C -- LUXE DELUX SPECIAL EDITION MOPED

Rhodock Resources has a claim against The Moped Store for breach of contract because they did not deliver the moped on the agreed date. Rhodock can use §2-713 and §2-715 to get consequential and incidental damages related to the breach made by The Moped Store.

Rhodock Resources has a claim for consequential damages against The Moped Store because The Moped Store was aware of particular requirements and needs of Rhodock at the time of contracting. We know this because Ellajans at Rhodock made it clear to The Moped Store that the custom moped was needed on the day of the parade to avoid losing their contract with Caprolli Industries. Thus, these damages were Hadley foreseeable. UCC § 2-715(2) requires Rhodock to mitigate to the extent possible through cover or other means, and Rhodock did this by renting the Zoom 3000. Unfortunately, the attempted mitigation of the non-performance did not prevent Rhodock from losing the Caprolli contract. Because of this, Rhodock can recover consequential damages from The Moped Store based on the lost multi-million-dollar Caprolli account.

Rhodock also has a claim for incidental damages against The Moped Store. Incidental damages under UCC § 2-715(1) include expenses in connection with effecting cover and any other reasonable expenses incident to the delay or other breach. Thus, Rhodock is entitled to the \$100 they spent in order to lease the Zoom 3000 moped for a week.

#### SUBPART D -- ZOOM 3000

Rhodock can keep the Zoom 3000 for the whole week, or else they can sue The Moped Store for breach of lease. They have a valid lease contract. The statute of frauds does not render it unenforceable as the verbally agreed upon amount of \$100 is below the \$1000 threshold of §2A-201(1)(a).

Rhodock won't have to pay for the damage, because there's no term in the oral contract about risk of loss, and per §2A-219(a), the risk of loss is retained by The Moped Store as lessor.

### SUBPART E -- VANCOUVER TECH

The CISG applies because this was not a B2C transaction (Vancouver Tech was not using the mopeds for personal, family, or household use) and because one party was in one CISG country (Vancouver Tech, in Canada) and the other party was in a different CISG country (The Moped Store, in the U.S.A).

Under the CISG, there is no statute of frauds, so this oral agreement can and does bind the two parties.

The CISG does allow parties to disclaim implied warranties, and the CISG, unlike the UCC, has no formal requirements for this, so Fiona Flencastle's oral disclaimer is likely valid.

If Vancouver Tech needs mopeds, then they should let the mopeds be unloaded. If they don't need mopeds, however, the rational choice might be to breach and take the chance of having to pay damages. Vancouver Tech might have to pay The Moped Store's lost profits, but that could well be less expensive than paying the purchase price of \$40,000 for a bunch of mopeds Vancouver Tech doesn't know what to do with.

### COMMENTARY

Here I will provide some commentary about the exam.<sup>1</sup> My comments mostly go to (1) how to organize and break down your analysis in a sensible way and (2) how to make good choices about how what issues to analyze and how much time to spend on them.

#### Overall:

##### Style and citations:

This model answer is relatively heavy on citations to the UCC. Strictly speaking, such citations are generally not necessary. But they are often the most concise way of letting me know the law to which you are referring.

##### Coverage:

Keep in mind that subparts are not meant to be equal divisions of the exam content. They are just a way of organizing students' response. They help me in grading by keeping exams comparable in terms of structure. (See §7 of the Exam Prospectus, which is posted to the class webpage.)

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<sup>1</sup> Much of this is based on a feedback memo I provided to my Fall 2015 Sales class based on their team-written practice exam responses.

Remember to use your judgment about how much time to devote to different portions of the exam. With regard to this particular exam, I was concerned in reviewing responses that many people shortchanged Subparts A and B relative to Subparts C, D, and E.

By the way, the reason I don't specifying percentages ahead of time for the subparts is that I've found doing so ends up creating arbitrariness in the grading results (again, see §7 of the Exam Prospectus).

### **Subpart A:**

Many people struggled with the organization of this subpart. This was a sizeable portion of the exam with a lot of issues to analyze, so organization is important. And it's not just about presentation: It's about keeping your own thinking clear so that you won't get tangled in the analysis. So before you start into a subpart like this, I recommend you stop and plan out how you will tackle it. You want a logical way to break down the analysis.

Issues here are warranties, fraud, and unconscionability. I suggest starting with warranties for no other reason than that we spent the most time on this in class, so it seems more likely to be important, all things being equal.

Once we've picked warranties as a place to start, we realize there are multiple possible warranties, and multiple possible reasons they are or are not valid. You need a plan for tackling this. A universal truth of organizing legal analysis is that you have to take things one at a time. So here, you can't go wrong by taking one warranty at a time.

Pick whichever warranty makes sense to you to talk about first. This model answer first takes up the implied warranty of merchantability. (A possible reason: The facts for this warranty are the simplest.)

Now that we've picked the implied warranty of merchantability, where should we start? For instance, you might be tempted to start with the issue of whether the warranty disclaimers were valid and conspicuous. But hold on a second: Unless there is a reason for a warranty to exist in the first place, a disclaimer doesn't matter. So analysis of whether or not there is a warranty at the threshold should come first. So with the implied warranty of merchantability, it's good to start with how it arises from the fact that that the Moped Store is a merchant. Then discussing the disclaimer makes sense. After that, it makes sense to bring in Magnuson-Moss, explaining how that trumps the disclaimer.

What this leaves us with is a step-by-step logical progression. This helps me follow your analysis. More importantly, however, it will help you understand what you have done and what remains to be done as you work.

### **Subpart B:**

This part of the exam was quite complex – it was the most complex portion of the exam. Again, organization is important.

The best way to deal with complex facts is to figure out how to break things down so that you can tackle one thing at a time. Figure out what steps of analysis you must go through, and then go through them, applying the facts as necessary. Keep going step-by-step, not getting ahead of yourself. That way, you can be sure not to be overwhelmed by the complexity, and you'll show off your ability to analyze the problem – which is far more important than coming up with a “right” answer.

Here there are two transactions for Swivelmax chairs. Both parties treat them as two distinct transactions, so that's how I would proceed with the analysis. Just doing that would help disentangle the analysis of many students' responses. And by the way, along these lines, there would be nothing wrong with saying, explicitly in your exam answer, "There are two transactions for Swivelmax chairs. Both parties treat them as two distinct transactions, so that's how I will proceed with the analysis."

Then, when you start to analyze the first deal, you should start with the question of contract formation. There's clearly a contract. That in itself is not very interesting. But what does the contract consist of? Answering that question requires starting at the beginning, by identifying the offer. Then you've got to ask if that offer was accepted. The purchase order is for teal chairs. That seems to be an offer. The order acknowledgement is for black chairs. Is that an acceptance of the purchase order for teal chairs? If it is, you must ask what comes of it. If it is not, you must ask what comes of that. If you proceed in this sort of way, asking whether something counts as an offer, an acceptance, a rejection, a counteroffer, or none of those - then you will have good, orderly analysis. Again, it is less important that you come up with a particular answer. (The parties have made a mess of things, no doubt, so the courts and the UCC will have to do the best they can.) The important thing is that you do the analysis, step-by-step, attempting as best you can to use the UCC to answer the question of what the contract is and what its terms are.

As an example of why step-by-step analysis is important, consider that one exam response I received began Subpart B with this sentence: "[The Moped Store] ordered 5 teal chairs and received 5 black chairs that were not encompassed in the original bargain or contract." (Emphasis added.) That's a too-hasty way to begin. What "original bargain or contract"? We don't even know what that is. We've got to start with the analysis that gets to the bottom of the question of what the contract is before we can ask what comes of it.

The model answer, above, approaches the organization of this subpart in a very straightforward, transparent, and logical way. It's a good example on that front.

### **Subpart C:**

I found that many people spent far too much time on Subpart C relative to Subpart B. As I said above under the "Overall" heading, it was often the case that people did not allocate their words or time optimally. That was particularly evident with Subparts B and C. For many responses, I found that Subpart B was about the same size or only a little larger than Subpart C. Yet Subpart B was probably five times more complex.

I saw in many instances people giving short shrift to Subpart B issues and somewhat belaboring the needed points for Subpart C. (Even the model answer above is close to overkill with regard to Subpart C.)

### **Subpart D:**

This too was a subpart with subject matter that could be dealt with compactly. More exam responses picked up on the relatively lesser need for detail here, however, than with Subpart C.



**Subpart E:**

This subpart provides an example of where it is worth discussing what law is applicable. The CISG applies. That's notable and worth discussing. How much of analysis should you provide on whether the CISG applies? Only as much as you need. The model answer uses 52 words, which is at the outer edges of how much attention it deserves. On the other hand, if the issue were more complicated, then spending more time on it would have been justified.