

Syllabus For

CONTRACTS II

(Course No. 6203-21; 3 credits)

Professorial Lecturer Gregory E. Maggs

Content of the Course:

Contracts II is a continuation of Contracts I. Contracts II covers advanced topics in the common law of contracts, including the parol evidence rule, express and implied conditions, impracticability, frustration of purpose, third-party beneficiaries, and assignments. It also covers the law of sales under article 2 of the Uniform Commercial Code, including the scope of article 2, formation of sales contracts, terms of sales contracts, warranties, the buyer's remedies, the seller's remedies, insecurity, repudiation, and cancellation.

Learning Outcomes (ABA Accreditation Standards 301 & 302)

Syllabus Appendix E identifies the expected "learning outcomes" for this course.

Class Schedule:

This course is scheduled to meet from 6:00-8:00 p.m. every Tuesday and these Wednesdays: 1/9, 1/23, 2/6, 2/20, 3/13, and 3/27. On Wednesday, 4/10, the class will meet from 7:05-8:00 p.m. Please note that we may need to reschedule some classes.

Office Hours and other Contact Information:

I am available to discuss the class in person or by telephone on Friday afternoons. My office is at the U.S. Court of Appeals for the Armed Forces, 450 E Street, N.W., Washington, D.C. (near the Judiciary Square Metro station). Please contact my assistant, Ms. Veronica Sevier, to schedule an appointment. Her telephone number is (202) 761-1458. You may reach me directly by email at gmaggs@law.gwu.edu.

You may obtain more information, including a copy of this syllabus and copies of past examinations and their grading guides, on the portal and at my website (<http://docs.law.gwu.edu/>)

facweb/gmaggs).

Required Books:

For the first several weeks of this semester, we will continue to use the two books that we used last semester in Contracts I:

1. Farnsworth et al., Cases and Materials on Contracts (Foundation Press, 8th ed. 2013)
2. Burton & Eisenberg, Contract Law: Selected Source Materials Annotated (West 2018) [older editions are equally usable]

We then will begin using the following new book, which you should purchase now:

3. Benfield & Greenfield, Sales: Cases and Materials (Foundation Press, 7th ed. 2015)

Final Examination:

This course will have an open-book, three-hour examination on Tuesday, April 30, at 6:30 p.m. In completing the examination, you may use any written materials that you have brought with you.

Class Participation:

Please come to class prepared to discuss the assigned material. Class participation does not affect your final grade.

Recording of Classes:

This course will follow the law school's "Class Recording Policy," which is available at the Student Affairs Office website. This policy permits students to request the recording of classes when they will be absent for religious reasons, family emergencies, and certain other causes. Please make the requests for recording and address questions about the policy to the Student Affairs Office.

Contracts Reading Assignments:

The following assignments are from Farnsworth et al. and the Restatement (Second) of the Law of Contracts. I will announce at the end of each class how far you should read for the next class.

I. CONTRACT INTERPRETATION

A. PAROL EVIDENCE RULE CONCERNING PRIOR AGREEMENTS

Text, pp. 405-407

Restatement §§ 209(1), 210, 213, 214(b), 216(1)

Note (2), pp. 410-411

Notes (2) & (3), p. 415

Syllabus Appendix A, Part 1

Gianni v. R. Russell & Co., Inc., pp. 407-410

Note (1), p. 410

Masterson v. Sine, pp. 411-415

B. REFORMATION FOR MUTUAL MISTAKE OR FRAUD AS TO CONTENT

Restatement §§ 155, 166

Bollinger v. Central Penn. Quarry, pp. 416-417

Note (1), p. 417

C. INTERPRETING CONTRACT LANGUAGE

1. Introduction

Text, p. 421

Problem (1)(d), p. 435

2. Parol Evidence Rule Concerning Meaning of Terms

Restatement § 214(c)

Hurst v. W.J. Lake & Co., pp. 446-447

Pacific Gas v. G.W. Thomas Co., pp. 421-424

Note (2), pp. 424

Trident Center v. Conn. General, pp. 430-433

3. Misunderstandings

Text, pp. 433-434, 459

Restatement § 201

Raffles v. Wichelhaus, pp. 459-460

Oswald v. Allen, p. 462

Frigalment v. Int'l Sales, pp. 440-445

D. IMPLIED TERMS

Text, p. 550

Dalton v. Educational Testing Service, pp. 550-553

Syllabus Appendix A, Part 2

Note (1), p. 553

Review Video I (link on portal)

II. CONDITIONS AND OTHER DOCTRINES AFFECTING THE DUTY TO PERFORM

A. EXPRESS CONDITIONS

Text, p. 725

Restatement §§ 224, 225(1), 228, 229

Luttinger v. Rosen, pp. 726-727

Note (1), p. 727

Gibson v. Cranage, pp. 738-739

Note (1), pp. 739

Problem, p. 740

B. CONSTRUCTIVE CONDITION OF PERFORMANCE BY THE OTHER PARTY

1. Introduction

Text, pp. 749-750

Restatement §§ 226, 237, 241

2. Independent and Dependent Performances

Kingston v. Preston, pp. 750-751

Syllabus Appendix A, Part 3

3. Substantial Performance and Material Breach

Text, pp. 756-757

Walker & Co. v. Harrison, pp. 782-785

Jacob & Youngs v. Kent, pp. 757-759

Note (4), p. 760

Plante v. Jacobs, pp. 664-666

4. Restitution Despite a Material Breach

Text, p. 769

Restatement § 374(1)

Britton v. Turner, pp. 769-775

Note (2), p. 775

5. Divisibility of Performances

Restatement § 240

Kirkland v. Archbold, pp. 776-778

C. IMPRACTICABILITY AND FRUSTRATION OF PURPOSE

Text, pp. 862, 865-866

Restatement §§ 261, 265

Taylor v. Caldwell, pp. 866-868

Notes (1) - (2), pp. 869

Krell v. Henry, pp. 899-900

Note (1), pp. 900-901

Review Video II (link on portal)

III. WHO MAY ENFORCE A CONTRACT

A. THIRD PARTY BENEFICIARIES

Text, pp. 925-926
[Bain v. Gillispie]

Restatement §§ 302, 304

Seaver v. Ransom, pp. 931-934

B. ASSIGNEES

Text, pp. 969-970, 973-975
[Shiro v. Drew]

Restatement §§ 317, 332

Herzog v. Irace, pp. 971-973

Review Video III (link on portal)

Sales Reading Assignments:

The following reading assignments are for the Benfield and Greenfield textbook. Please look up and read all of the sections of the Uniform Commercial Code (U.C.C.) cited in textbook. U.C.C. article 1 and 2 start on pages 3 and 17, respectively, of the Burton and Eisenberg supplement.

I. SCOPE OF ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE

A. CREATION OF ARTICLE 2

Text, pp. 1-6

Supplement, pp. iii, 2

B. SCOPE AND APPLICATION OF ARTICLE 2

Syllabus Appendix B, Part 1

Text, pp. 9-10

BMC Industries v. Barth Industries, pp. 12-16

Note (1), p. 16

Note (2), pp. 16-18

[Anthony Pools v. Sheehan]

Note (3), p. 18

Text, p. 20

Advent Systems v. Unisys, pp. 21-22

Notes (1)-(2), pp. 22-23

Note (4), pp. 24-25

Note (6), pp. 25-26 & Syllabus Appendix B, Part 2
[Zapatha v. Dairy Mart]

Text, pp. 29-31 & Syllabus Appendix B, Part 3
[Hoffman v. Horton]

Supplement, p. 326

Note (10), pp. 27-28

C. MERCHANT RULES IN ARTICLE 2

Decatur Cooperative v. Urban, pp. 48-52

II. FORMATION OF THE SALES CONTRACT

A. OFFER AND ACCEPTANCE

Text, pp. 35-36
[Jannusch v. Noffziger]

Note (2), pp. 37-38
[Alliance Laundry v. Thyssenkrupp Materials]

Problem (3), pp. 38-39

Note (4), p. 39

B. STATUTE OF FRAUDS

Text, p. 39-40

Lige Dickson Co. v. Union Oil, pp. 53-55

Note (1), pp. 53-54

Note (2), Problem (a), pp. 56

Text, pp. 83-84

C. THE BATTLE OF THE FORMS

Text, pp. 58-59

Belden Inc. v. American Elec. Comps., pp. 59-62

Notes (1) & (4), pp. 62-63

D. TERMS IN THE BOX

Hill v. Gateway 2000, pp. 71-74

Klocek v. Gateway, pp. 75-78

Notes (1) & (2), p. 79

E. CONTRACT MODIFICATION AND WAIVER

Wisconsin Knife v. Nat'l Metal, pp. 85-95

Note (3) and Problem, pp. 99-100

F. OPTION CONTRACTS ("FIRM OFFERS")

Friedman v. Sommer, pp. 103-104

Notes (1), p. 104

Note (5), pp. 105-106 & Syllabus App. C, Part 1
[E.A. Coronis v. M. Gordon Construction]

Review Video VI (link on portal)

III. TERMS OF THE SALES CONTRACT

A. UNCONSCIONABILITY

Text, pp. 107-109

A&M Produce v. FMC Corp., pp. 109-117

Notes (4) & (5), pp. 118-119

B. TRADE USAGE, COURSE OF DEALING, GOOD FAITH

Nanakuli Paving v. Shell Oil, pp. 133-139

Syllabus Appendix C, Part 2

IV. WARRANTIES

A. EXPRESS WARRANTIES

Text, pp. 195-196

Doug Connor Inc. v. Proto-Grind, pp. 196-199

B. IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS

Text, pp. 208-210 [for background only]

Ambassador Steel v. Ewald Steel, pp. 211-214

Tyson v. Ciba-Geigy Corp., pp. 240-245

C. WARRANTY DISCLAIMERS

Text, p. 259

Syllabus Appendix C, Part 3

Sierra Diesel v. Borroughs Corp., pp. 259-262

Note (8.b.), pp. 273-274

[Martin v. Joseph Harris Co.]

Note (9), p. 274

D. PRIVACY

Text, pp. 275-276

Morrow v. New Moon Homes, pp. 290-297

Syllabus Appendix C, Part 4

Notes (2)-(3), p. 297

V. THE BUYER'S REMEDIES

A. REJECTION & WITHHOLDING/RECOVERING PAYMENT

Text, pp. 321-323

D.P. Technology v. Sherwood Tool, pp. 323-326

Note (1), p. 326

Problem (2), p. 326

B. REVOCATION OF ACCEPTANCE & WITHHOLDING/RECOVERING PAYMENT

Text, p. 363

Jorgensen v. Pressnall, pp. 363-366

Note (1), p. 366

C. FORCING DELIVERY BY SPECIFIC PERFORMANCE OR REPLEVIN

Text, pp. 376-377

Syllabus Appendix C, Part 5

Sedmak v. Charlie's Chevrolet, pp. 377-380

Hilmor Sales v. Helen Neushaefer Div., p. 380

Notes (1) & (3), pp. 380 & 382

D. DAMAGES MEASURED BY THE MARKET OR COVER PRICE

Text, p. 383

Problems (1)-(3), pp. 383-384

Allied Canners v. Victor Packing, pp. 391-395

TexPar Energy v. Murphy Oil, pp. 395-397

Note (4), pp. 397-398

Problem (6), p. 390

E. DAMAGES WHEN GOODS ARE ACCEPTED

Text, pp. 398-400

[Chatlos Systems v. Nat'l Cash Register]

Text, p. 400

Eastern v. McDonnell Douglas, pp. 400-402

Review Videos VIII & IX (links on portal)

VI. THE SELLER'S REMEDIES

A. DAMAGES EQUAL TO THE CONTRACT PRICE

Text, p. 427

Note (1), pp. 429-431

[N. Bloom & Son v. Skelly]

Problem (5), p. 431

B. DAMAGES MEASURED BY THE MARKET OR RESALE PRICE

Text, pp. 432-433

Problems (1) & (3), pp. 433-438

[Note: Reference to 2-713(1) should be 2-708(1)]

Note (5), p. 434

Tesoro Petroleum v. Holborn Oil, pp. 434-438

Note (4), pp. 439-440

[Transworld Metals v. Southwire]

C. DAMAGES MEASURED BY LOST PROFITS

Neri v. Retail Marine Corp., pp. 441-444

Note (5), pp. 444-445

[R.E. Davis v. Disonics]

Note (6), pp. 445-447

[Bulldozers, Inc. problem]

D. LIQUIDATED DAMAGES

Syllabus Appendix C, Part 6

Kvassay v. Murray, pp. 450-452

Notes (1) & (2), p. 452

Martin v. Sheffer, pp. 458-460

Note (1), p. 460

Review Video VII (link on portal)

VII. DIMINISHED EXPECTATION OF FUTURE RETURN PERFORMANCE

A. INSECURITY AND INSOLVENCY

Text, p. 465

Clem Perrin Marine v. Panama Canal, pp. 466-468

Note (5), pp. 469

Problem (6), p. 469-470

B. REPUDIATION

Text, p. 470

Problem (1), pp. 470-471

Oloffson v. Connor, pp. 475-478

C. CANCELLATION OF INSTALLMENT CONTRACTS

Syllabus Appendix C, Part 7

Text, pp. 328-330

[Graulich Caterer v. Hans Holterbosch]

Midwest Mobile Diagnostic v. Dynamics, pp. 331-337

Prof. Mixup's Special Guest Lecture [Optional]
(With other review videos, follow portal link.)

Syllabus Appendix A

Part 1. Tests for Whether a Writing is a Complete Integration

Note (2) on page 415 refers to two tests for determining whether a writing is a complete integration. What our textbook calls the "strict formulation" is also known as the Four Corners test, while what the textbook describes as the "modern view" is also known as the All Circumstances or All Evidence test.

Describing the Four Corners Test, Harvard Professor Samuel Williston wrote in his famous Contracts treatise: "If [the parties] provide in terms that the writing shall be a complete integration of their agreement or that it shall be but a partial integration, or no integration at all, the expressed intention will be effectuated. The parties, however, rarely express their intention upon this point in the writing It is generally held [when nothing is expressed in the writing] that the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms." 2 Williston on Contracts § 663, at 1226-1227 (1920). In other words, courts are to determine whether a writing is complete by looking only at what is within the four corners of the document, without considering extrinsic evidence.

Advocating the adoption of the All Circumstances test, Yale Professor Arthur Corbin took a different view in his competing Contracts treatise: "Whether any specific written document has been assented to by the parties as the complete and accurate 'integration' of the terms of their contract is an ordinary question of fact. In determining this question, no relevant evidence is excluded on the mere ground that it is offered in the form of oral testimony." Corbin on Contracts 535 (1952). In other words, courts may consider all available evidence to determine whether a writing is complete.

The Four Corners test (Williston's view) has always been the majority view. The American Law Institute, however, adopted the All Circumstances Test (Corbin's view) in Restatement (Second) of the Law of Contracts § 210 and comment b.

Part 2. Dalton v. Educational Testing Service

On page 552 of the textbook, the fourth full paragraph of the edited opinion in Dalton v. Educational Testing Service condenses and combines several paragraphs from the full opinion. The first of these paragraphs says in full:

The contract, however, did require that ETS consider any relevant material that Dalton supplied to

Syllabus Appendix A (continued)

the Board of Review. The Registration Bulletin explicitly afforded Dalton the option to provide ETS with relevant information upon notification that ETS questioned the legitimacy of his test score. Having elected to offer this option, it was certainly reasonable to expect that ETS would, at the very least, consider any relevant material submitted in reaching its final decision.

663 N.E.2d 289, 292.

Part 3. Examples of Independent Covenants

Restatement (Second) of the Law of Contracts

§ 232 When it is Presumed that Performances are to be Exchanged under an Exchange of Promises

* * *

Illustration 3.

A employs B under a five-year employment contract, which contains a valid covenant under which B promises not to engage in the same business in a designated area for two years after the termination of the employment. It expressly provides that "this covenant is independent of any other provision in this agreement."

After B has begun work, A unjustifiably discharges him, and B thereupon engages in business in violation of the covenant. A's employing B and B's working for A are to be exchanged under the exchange of promises. The quoted words indicate an intention that A's employing B is not to be exchanged for B's refraining from engaging in the same business.

If the court concludes that this intention is clearly manifested, A has a claim against B for damages for breach of his promise not to compete.

* * *

Here are some modern examples of cases involving independent covenants:

Board of Mgrs. of Mews at North Hills Condominium v. Farajzadeh, 712 N.Y.S.2d 722, 724-725 (N.Y. Dist. Ct. 2000) (condominium owner not excused from paying condominium fee even though

Syllabus Appendix A (continued)

condominium association failed to repair leaky skylight; owner's remedy was to sue for damages), affirmed as modified 730 N.Y.S.2d 180 (N.Y. S. Ct. App. Term 2001).

Kobayashi v. Orion Ventures, Inc., 678 N.E.2d 180, 187 (Mass. App. 1997) (owner of delicatessen was not excused from paying rent even though the landlord broke a promise not to lease space to a competitor in the same building; the remedy was for the owner of the delicatessen to sue the landlord for damages).

Fischer v. Nat'l Indus. Servs., 735 S.W.2d. 114, 116 (Mo. App. 1987) (employer was not excused from paying a bonus to a departing executive even though the executive broke a promise not to compete; remedy was to sue executive for damages).

Syllabus Appendix B

Scope of U.C.C. Article 2

Part 1. Initial Questions

Article 2 of the Uniform Commercial Code says in § 2-102 that "[u]nless context otherwise requires, this Article applies to transactions in goods" A number of important initial questions about the scope of article 2 arise from this simple statement.

1. Why does it matter whether the legal rules in article 2 apply to a transaction?

As we will see in chapter 1, and throughout the rest of the book, the legal rules in article 2 sometimes differ from ordinary common law contract rules. For example, as illustrated in Anthony Pools v. Sheehan [p. 16], contracts for the sale of goods may include implied warranties that other kinds of contracts would not.

2. What are goods?

Article 2 defines goods in § 2-105(1) and § 2-107(1) & (2). Read these definitions carefully because we will discuss them at considerable length. Non-goods include everything not encompassed by the definition of goods, such as services, real estate, legal rights, etc.

3. What are transactions in goods?

Although § 2-102 indicates that article 2 applies generally to transactions in goods, most of the individual sections of article 2 concern only contracts for the sale of goods, sales of goods, and present sales of goods. Section 2-106(1) defines these terms. As we will see, article 2 has little relevance to other kinds of transactions in goods, such as bailments or gifts.

4. Does article 2 apply to contracts that involve both goods and non-goods (such as services)?

Contracts that involve both goods and non-goods are called "hybrid" contracts. As we will see in BMC Industries v. Barth Industries [p. 12] and Anthony Pools v. Sheehan [p. 17], courts have developed different tests to determine whether and how article 2 applies to these contracts.

5. Does article 2 ever apply to contracts that do not involve sales or that do not involve goods?

Syllabus Appendix B (continued)

In general, the common law governs contracts outside the scope of article 2. The courts, however, have the power to shape the common law. In some instances, as in Hoffman v. Horton [p. 29], courts have borrowed rules from article 2 and made them common law rules. In addition, as we will see in cases like Zapatha v. Dairy Mart [p. 25], courts sometimes apply article 2 to cases that involve transactions analogous to contracts for the sale of goods.

6. Does article 2 apply to international contracts for the sale of goods?

A multilateral treaty called the United Nations Convention on Contracts for the International Sale of Goods (CISG), rather than article 2, applies to many international contracts for the sale of goods. The CISG is discussed in the supplement at page 326 and in the textbook in note (10) at pages 27-28. The text of the CISG is included in the supplement beginning at page 327. It The CISG is taught at this law school in International Business Transactions (Course No. 6522).

7. Does the common law and other non-U.C.C. law have any relevance to contracts that are governed by article 2?

Article 2 was not designed to provide a comprehensive set of contract rules. On the contrary, article 2 is said to "sit on top of" the common law, adding and changing some rules but leaving the rest of the common law in place. For example, sections 2-205 and 2-209(1) create minor exceptions to the common law's requirement of consideration. Outside of these exceptions, however, the common law requirement of consideration continues to apply even though no provision in article 2 identifies consideration as a requirement. Section § 1-103(b), discussed in the text on pages 9-10, provides authority for supplementing the U.C.C. with common law principles.

8. Does article 2 apply to consumer transactions or just transactions involving merchants?

In general, article 2 applies to all contracts for the sale of goods, whether they involve consumers or merchants or both. Article 2, however, contains some special rules that apply only to sales by merchants, such as § 2-201(2) and § 2-314(1). The definition of a merchant appears in § 2-104(1), which is discussed in Decatur Cooperative Ass'n v. Urban [p. 48].

Part 2. Zapatha v. Dairy Mart, 408 N.E.2d 1370 (Mass. 1980)

WILKINS, Justice.

Syllabus Appendix B (continued)

We are concerned here with the question whether Dairy Mart, Inc. (Dairy Mart), lawfully undertook to terminate a franchise agreement under which the Zapathas operated a Dairy Mart store on Wilbraham Road in Springfield. The Zapathas brought this action seeking to enjoin the termination of the agreement, alleging that the contract provision purporting to authorize the termination of the franchise agreement without cause was unconscionable

* * *

[In 1973, Dairy Mart and the Zapathas entered a franchise agreement for a store in Agwam, Massachusetts.] Under the terms of the agreement, Dairy Mart would license the Zapathas to operate a Dairy Mart store, using the Dairy Mart trademark and associated insignia, and utilizing Dairy Mart's "confidential" merchandising methods. Dairy Mart would furnish the store and the equipment and would pay rent and gas and electric bills as well as certain other costs of doing business. In return Dairy Mart would receive a franchise fee, computed as a percentage of the store's gross sales. The Zapathas would have to pay for the starting inventory, and maintain a minimum stock of saleable merchandise thereafter. They were also responsible for wages of employees, related taxes, and any sales taxes. The termination provision . . . allowed either party, after twelve months, to terminate the agreement without cause on ninety days' written notice. In the event of termination initiated by it without cause, Dairy Mart agreed to repurchase the saleable merchandise inventory at retail prices, less 20%.

The Dairy Mart representative read and explained the termination provision to Mr. Zapatha. Mr. Zapatha later testified that, while he understood every word in the provision, he had interpreted it to mean that Dairy Mart could terminate the agreement only for cause. The Dairy Mart representative advised Mr. Zapatha to take the agreement to an attorney and said "I would prefer that you did." However, he also told Mr. Zapatha that the terms of the contract were not negotiable. The Zapathas signed the agreement without consulting an attorney. . . .

In 1974, another store became available on Wilbraham Road in Springfield, and the Zapathas elected to surrender the Agwam store. They executed a new franchise agreement, on an identical printed form, relating to the new location.

In November, 1977, Dairy Mart presented a new and more detailed form of "Independent Operator's Agreement" to the Zapathas for execution. Some of the terms were less favorable to the store operator than those of the earlier form of agreement. Mr. Zapatha told representatives of Dairy Mart that he was content with the existing contract and had decided not to sign the new agreement. On

Syllabus Appendix B (continued)

January 20, 1978, Dairy Mart gave written notice to the Zapathas that their contract was being terminated effective in ninety days. The termination notice stated that Dairy Mart "remains available to enter into discussions with you with respect to entering into a new Independent Operator's Agreement; however, there is no assurance that Dairy Mart will enter into a new Agreement with you, or even if entered into, what terms such Agreement will contain." The notice also indicated that Dairy Mart was prepared to purchase the Zapathas' saleable inventory.

* * *

1. We consider first the question whether the franchise agreement involves a "transaction in goods" within the meaning of those words in article two of the Uniform Commercial Code, and that consequently the provisions of the sales articles of the Uniform Commercial Code govern the relationship between the parties. The Zapathas point specifically to the authority of a court to refuse to enforce "any clause of the contract" that the court finds "to have been unconscionable at the time it was made." § 2-302. They point additionally to the obligation of good faith in the performance and enforcement of a contract imposed by § [1-304], and to the specialized definition of "good faith" in the sales article as meaning "in the case of a merchant . . . honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." § [1-201(b)(20)].

We need not pause long over the question whether the franchise agreement and the relationship of the parties involved a transaction in goods. Certainly, the agreement required the plaintiffs to purchase goods from Dairy Mart. "Goods" for the purpose of the sales article means generally "all things . . . which are movable." § 2-105(1). However, the franchise agreement dealt with many subjects unrelated to the sale of goods by Dairy Mart. About 70% of the goods the plaintiffs sold were not purchased from Dairy Mart. Dairy Mart's profit was intended to come from the franchise fee and not from the sale of items to its franchisees. Thus, the sale of goods by Dairy Mart to the Zapathas was, in a commercial sense, a minor aspect of the entire relationship. We would be disinclined to import automatically all the provisions of the sales article into a relationship involving a variety of subjects other than the sale of goods, merely because the contract dealt in part with the sale of goods. Similarly, we would not be inclined to apply the sales article only to aspects of the agreement that concerned goods. Different principles of law might then govern separate portions of the same agreement with possibly inconsistent and unsatisfactory consequences.

We view the legislative statements of policy concerning good

Syllabus Appendix B (continued)

faith and unconscionability as fairly applicable to all aspects of the franchise agreement, not by subjecting the franchise relationship to the provisions of the sales article but rather by applying the stated principles by analogy. See *Commonwealth v. DeCotis*, 316 N.E.2d 748 (Mass. 1974). This basic common law approach, applied to statutory statements of policy, permits a selective application of those principles expressed in a statute that reasonably should govern situations to which the statute does not apply explicitly.

2. We consider first the plaintiffs' argument that the termination clause of the franchise agreement, authorizing Dairy Mart to terminate the agreement without cause, on ninety days' notice, was unconscionable by the standards expressed in § 2-302.10. . . .

* * *

We start with a recognition that the Uniform Commercial Code itself implies that a contract provision allowing termination without cause is not per se unconscionable. Section 2-309(3) provides that "[t]ermination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable." This language implies that termination of a sales contract without agreed "cause" is authorized by the Code, provided reasonable notice is given. There is no suggestion that the ninety days' notice provided in the Dairy Mart franchise agreement was unreasonable.

We find no potential for unfair surprise to the Zapathas in the provision allowing termination without cause. We view the question of unfair surprise as focused on the circumstances under which the agreement was entered into. The termination provision was neither obscurely worded, nor buried in fine print in the contract. Contrast *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). The provision was specifically pointed out to Mr. Zapatha before it was signed; Mr. Zapatha testified that he thought the provision was "straightforward," and he declined the opportunity to take the agreement to a lawyer for advice. The Zapathas had ample opportunity to consider the agreement before they signed it. . . .

We further conclude that there was no oppression in the inclusion of a termination clause in the franchise agreement. . . .

3. We see no basis on the record for concluding that Dairy Mart did not act in good faith, as that term is defined in the

Syllabus Appendix B (continued)

sales article ("honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"). § 2-103(1)(b). There was no evidence that Dairy Mart failed to observe reasonable commercial standards of fair dealing in the trade in terminating the agreement. If there were such standards, there was no evidence of what they were.

* * *

Judgments reversed.

Part 3. Hoffman v. Horton, 186 S.E.2d 79 (Va. 1972)

CARRICO, Justice.

The question involved in this case is whether an auctioneer at a foreclosure sale may reopen the bidding when an overbid is made immediately prior to or simultaneously with the falling of the hammer in acceptance of a lower bid.

The question arises from an auction sale conducted to foreclose a deed of trust in the sum of \$100,000 upon the "Field Tract" in Arlington County, owned by the defendants Howard P. Horton and wife and Ralph R. Kaul and wife. At the sale and after spirited bidding, a bid of \$177,000 was made by Hubert N. Hoffman, the plaintiff, and received by the auctioneer. When no other bids appeared to be forthcoming, the auctioneer asked, "Are you all through bidding, gentlemen?" After a pause, he stated, "Going once for \$177,000.00, going twice for \$177,000.00, sold for \$177,000.00." Whereupon, he struck the palm of his left hand with his right fist.

Immediately, one of the trustees, who had been standing nearby, rushed up to the auctioneer and told him that he had missed a bid of \$178,000. The auctioneer, who had neither seen nor heard the bid, stated, "if I missed a bid, you people had better speak up. I am going ahead with the sale." The plaintiff then stepped forward and said, "Gentlemen, I have purchased this property for \$177,000.00." The auctioneer and the trustee both disagreed with the plaintiff, and the auctioneer announced to the crowd that he had a bid of \$178,000. The bidding proceeded, and the property was finally knocked down to the plaintiff for \$194,000.

The plaintiff paid the \$5,000 deposit required by the terms of the foreclosure but insisted that he had purchased the property for \$177,000. Later, he paid the balance of the \$194,000 under protest and brought an action against the former owners and the trustees to recover the \$17,000 difference between the two bids in dispute. The trial court denied the plaintiff's claim, and we granted a writ of

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error to review the judgment.

* * *

The trial court found as a matter of fact, and this finding is not questioned by the plaintiff, that the \$178,000 bid was made "prior to or simultaneously with" the falling of the auctioneer's first in acceptance of the plaintiff's bid of \$177,000. Based upon its finding of fact, the court held that "the bid for \$178,000.00 was made before the bid for \$177,000.00 had been accepted" and that the auctioneer had "acted within the discretion permitted" him in reopening the bidding and continuing with the sale.

In holding that the auctioneer was vested with discretion to reopen the bidding, the trial court relied upon Code § 2-328(2), a part of the Uniform Commercial Code. The statutory language so relied upon reads as follows:

"A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where 567 a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling."

We disagree with the trial court that the transaction in this case, involving the sale of land, is controlled by § 2-328(2) of the Uniform Commercial Code. Title 2 of the Commercial Code applies only to transactions relating to "goods." Code §§ 2-105, 2-107. However, while the Uniform Commercial Code is not controlling here, we think it appropriate to borrow from it to establish the rule applicable to the transaction at hand. To vest the auctioneer crying a sale of land with the same discretion to reopen bidding that he has in the sale of goods is to achieve uniformity and, of more importance, to recognize a rule which is both necessary and fair. We hold, therefore, that the auctioneer in this case was vested with discretion to reopen the bidding for the land which was being sold. And we agree with the trial court that the auctioneer "acted within" his discretion in reopening the bidding and continuing with the sale when it was made apparent to him that a higher bid had been submitted "prior to or simultaneously with" the falling of his fist in acceptance of the plaintiff's lower bid.

Accordingly, the judgment of the trial court will be affirmed.

Syllabus Appendix C

Part 1. Notes on E.A. Coronis v. M. Gordon Construction

In E.A. Coronis v. M. Gordon Construction in note (5), p. 105, the court stated the facts as follows:

. . . Gordon is a general contractor. In anticipation of making a bid to construct two buildings at the Port of New York Authority's Elizabeth Piers it sought bids from subcontractors. Coronis designs, fabricates, supplies and erects structural steel. On April 22, 1963 it sent the following letter to Gordon:

* * *

We are pleased to offer:

All structural steel including steel girts and purlins

Both Buildings delivered and erected \$155,413.50

All structural steel equipped with clips for wood girts & purlins

Both Buildings delivered and erected 98,937.50

* * *

Gordon contends that at some date prior to April 22 the parties reached an oral agreement and that the above letter was sent in confirmation.

Bids were opened by the Port Authority on April 19, 1963, and Gordon's bid was the lowest. He alleges that Coronis was informed the same day. The Port Authority contract was officially awarded to Gordon on May 27, 1963 and executed about two weeks later. During this period Gordon never accepted the alleged offer of Coronis. Meanwhile, on June 1, 1963, Coronis sent a telegram, in pertinent part reading:

"Due to conditions beyond our control, we must withdraw our proposal of April 22nd 1963 for structural steel Dor Buildings 131 and 132 at the Elizabeth-Port Piers at the earliest possible we will resubmit our proposal."

Two days later, on June 3, 1963, Gordon replied by telegram as follows:

"Ref your tel. 6-3 and for the record be advised that we are holding you to your bid of April 22, 1963 for the structural steel of cargo bldgs 131 and 132."

Syllabus Appendix C (continued)

Coronis never performed. Gordon employed the Elizabeth Iron Works to perform the work and claims as damages the difference between Coronis' proposal of \$155,413.50 and Elizabeth Iron Works' charge of \$208,000.

Gordon contends that the April 22 letter was an offer and that Coronis had no right to withdraw it. Two grounds are advanced in support. First, Gordon contends that the Uniform Commercial Code firm offer section, N.J.S. 12A:2-205, N.J.S.A., precludes withdrawal and, second, it contends that withdrawal is prevented by the doctrine of promissory estoppel.

Part 2. Notes on Nanakuli Paving v. Shell Oil

In reading Nanakuli Paving, think back to the Lige Dickson v. Union Oil on page 53. In Lige Dickson, the court held that an alleged oral promise to protect the price of liquid asphalt was not enforceable because of the statute of frauds. Do you see a tension between Lige Dickson and Nanakuli?

Part 3. Examples of Warranty Disclaimers and Limitations

Many consumer products come with a very limited express warranty (e.g., covering materials and workmanship for 12 months) and a general disclaimer of all other warranties. Here are two examples of general disclaimer clauses:

(1) From a Microsoft X-Box® video game console:

"NO OTHER WARRANTIES. The express warranty stated in Section A above is the only express warranty made to you and is provided in lieu of all other express or implied warranties and conditions (if any), including any created by any other documentation or packaging."

(2) From a Welbilt® bread oven:

"THIS LIMITED WARRANTY IS GIVEN IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS OF A PARTICULAR PURPOSE."

Some consumer products do not come with a disclaimer of warranties, but sellers limit their liability either by shortening the duration of any warranties or by limiting the remedies recoverable for breach of warranty. Here are two examples:

(3) From a Bell® bicycle helmet:

Syllabus Appendix C (continued)

"Any BELL helmet determined by Bell to be defective in materials or workmanship within one (1) year from date of original retail purchase will be repaired or replaced, at Bell's option Any implied warranties of merchantability or fitness for a particular purpose are limited to the same duration as this express warranty."

(4) From a Kidde® smoke and carbon monoxide detector:

"In no event shall the Manufacturer be liable for loss of use of this product or for any indirect, special, incidental or consequential damages, or costs, or expenses incurred by the consumer or any other user of this product whether due to a breach of contract, negligence, strict liability in tort or otherwise. The Manufacturer will have no liability for any personal injury, property damage or any special, incidental, contingent or consequential damage of any kind from gas leakage, fire or explosion."

Are these very common, indeed customary, disclaimers and limitations enforceable?

Part 4. Vertical and Horizontal Privity

Suppose a merchant sells a defective tool to Person A. Person A then resells the tool to Person B. When person B uses the tool, it injures both him and Person C, a relative who was watching B work. The question arises whether Person B and Person C can recover from the merchant for breach of warranty even though they did not have a contract with the merchant.

As a descriptive matter, we might say that Person A has a relationship of ordinary "privity of contract" with the merchant because Person A made a contract with the merchant. Person B, in contrast, had a relationship of "vertical privity," which is the "legal relationship between parties in a product's chain of distribution." Black's Law Dictionary (8th ed. 2004). Person C at best had a relationship of "horizontal privity," which is the "legal relationship between a party and a nonparty who is related to the party (such as a buyer and a member of the buyer's family)." Id.

While the terms "vertical privity" and "horizontal privity" are helpful in describing liability issues, the U.C.C. does not use them to determine the scope of warranties. Instead, U.C.C. § 2-318 attempts to identify what it calls the "Third Party Beneficiaries" of warranties. Official comment 2 § 2-318 says:

The purpose of this section is to give certain

Syllabus Appendix C (continued)

beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller's warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him [As amended in 1966].

The drafters of § 2-318 could not agree on what the rule should say, so they drafted three alternatives. Most states have adopted Alternative A. Alternative A addresses certain cases of horizontal privity, but it is silent on issues of vertical privity. Official comment 3 explains:

The first alternative expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

Part 5. Specific Performance and Replevin

Sometimes the buyer does not want damages but instead actually wants the goods that the seller promised. Section 2-716 specifies how the buyer can obtain the goods from the seller through specific performance of replevin.

Specific performance is "a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate." Black's Law Dictionary (8th ed. 2004). Replevin is "[a]n action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it." Id.

While either specific performance or replevin will allow the buyer to obtain the goods from the seller, the two remedies have different requirements. One difference is that replevin is only available when the goods are already identified; that's not true

Syllabus Appendix C (continued)

for specific performance. Another difference is that specific performance is only available when "goods are unique or in other proper circumstances." In contrast, replevin is available whenever the buyer is "unable to effect cover."

For example, suppose a buyer contracted to purchase a new gaming console from a retail store, but the store broke the contract. If the goods are in the store's inventory, the buyer could obtain replevin simply by showing that the gaming console was sold out at other stores, and thus cover was not possible. The buyer would not have to show that the goods were unique. If the seller did not have possession of the goods, the buyer could obtain specific performance (which would require the seller to find the goods from somewhere else), but only if the buyer could show that the goods were unique or other proper circumstances.

Part 6. Liquidated Damages and Penalties

Subsection 2-718(1) allows the buyer and seller to agree, at the time that they make the contract, on liquidated damages in the event of a breach. But the section further says that the buyer and seller may set the damages "only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." Section 2-718(1) also says that a "term fixing unreasonably large liquidated damages is void as a penalty." This provision resembles Restatement § 356(1), which we considered last semester.

Applying these factors, courts have upheld liquidated damage clauses that require buyers to pay large percentages of the contract price if they breach or unjustifiably cancel a contract. See Coast Trading Co., Inc. v. Parmac, Inc., 587 P.2d 1071 (Wash App. 1978) (15% cancellation charge not a penalty); Speedi Lubrication Centers, Inc. v. Atlas Match Corp., 595 S.W.2d 912 (Tex. Civ. App. 1980) (50% of contract price not a penalty). But could a seller ever require the buyer to pay the full contract price as liquidated damages? Consider Martin v. Sheffer on page 458.

Part 7. Canceling Installment Contracts

An installment contract is defined in § 2-612(1) as a contract which requires delivery of goods in separate lots. For example, an office supply company might have a contract to deliver certain quantities of copier paper to the law school every month for a year. If there is default with respect to one installment--e.g., the seller does not deliver the goods or the

Syllabus Appendix C (continued)

buyer does not pay--the aggrieved party clearly has a right to remedies with respect to that one installment. See § 2-612(2). But a more difficult question is whether the aggrieved party may cancel the whole contract merely because of a default with respect to the one installment.

The general listing of remedies in § 2-703(1)(f) and § 2-711(1) says the seller or buyer may cancel an installment contract upon a breach by the other party "if the breach goes to the whole contract." Section 2-612(3) says that a default with respect to one installment in an installment contract is a "breach of the whole contract" if the default "substantially impairs the value of the whole contract."

No section of the U.C.C. defines "substantial impairment." But § 2-610 and its official comments provide some guidance. Section 2-610 concerns a party's rights upon a repudiation that "will substantially impair the value of the contract." Official comment 3 to § 2-610 explains:

The test chosen to justify an aggrieved party's action under this section is the same as that in the section on breach in installment contracts--namely the substantial value of the contract. The most useful test of substantial value is to determine whether material inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the part or aspect repudiated.

Thus, it would seem that a party could cancel an installment contract upon a breach with respect to one installment if denying the right of cancellation, and merely allowing suspension of performance, would result in "material inconvenience or injustice."

Syllabus Appendix D
Index of Seller's and Buyer's Remedies

BUYER'S REMEDIES	if seller repudiates or fails to deliver goods in conformity with the contract . . .	if seller becomes insolvent . . .	if buyer is insecure about seller's performance . . .
withhold/suspend payment to seller	2-610(c)	<u>cf.</u> 2-609(1)	2-609(1)
cancel the contract & cease performance -- non-installment vs. installment contracts	2-610(b), 2-711(1) 2-612		
await delivery/retraction of repudiation from seller	2-610(a)		
reject goods delivered by seller	2-601		
revoke acceptance of goods delivered by seller	2-608		
recover payments made to seller	2-711(1)		
recover damages from seller <u>for goods not accepted</u> , equal to -- cover difference -- market difference	2-610(b), 2-711(1) 2-712(1) & (2) 2-713(1)		
recover damages from seller <u>for goods accepted</u> to compensate for -- non-conformity of tender -- breach of warranty	2-714(1) & (3) 2-714(2) & (3)		
force delivery from seller -- specific performance -- replevin -- insolvency recovery	2-610(b), 2-711(2) 2-716(1) & (2) 2-716(3), 2-501(1)	2-502(1), 2-501(1)	
SELLER'S REMEDIES	if buyer repudiates or fails to pay . . .	if buyer becomes insolvent . . .	if seller is insecure about buyer's performance . . .
withhold/suspend delivery to buyer	2-610(c), 2-703(a)	<u>cf.</u> 2-609(1)	2-609(1)
cancel the contract & cease performance -- non-installment vs. installment contracts	2-610(b), 2-703(f) 2-612		
await payment/retraction of repudiation from buyer	2-610(a)		
reclaim goods delivered to buyer		2-702(2) & (3) 2-403	
recover damages from buyer, equal to -- price -- resale difference -- market difference -- lost profit -- liquidated damages/amount of buyer's deposit	2-610(b), 2-703(d) & (e) 2-709(1)(a) & (b) 2-706(1) 2-708(1) 2-708(2) 2-718(1) & (2)		
deliver to buyer only for cash		2-702(1)	
stop delivery to buyer	2-703(b)	2-702(1), 2-705(1)	

Syllabus Appendix E

This appendix identifies the "learning outcomes" for this course in accordance with ABA Accreditation Standards 301 and 302 and the "Guidance" to these Standards.

(a) Knowledge and understanding of substantive and procedural law

Upon completing Contracts II, students should know and understand the law of contracts pertaining to:

1. parol evidence;
2. express and implied conditions;
3. impracticability;
4. frustration of purpose;
5. third-party beneficiaries;
6. assignments;
7. the scope of article 2 of the Uniform Commercial Code;
8. formation of sales contracts;
9. doctrines affecting the terms of sales contracts, including good faith and unconscionability;
10. warranties in sales contracts;
11. the buyer's remedies in sales contracts;
12. the seller's remedies in sales contracts; and
13. insecurity, repudiation, and cancellation under article 2.

(b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context

When assigned to read a contracts case, students should be able to:

1. identify and discuss the facts, the plaintiff's claim, the defendant's defense, the remedies sought, the pertinent legal rules, the issue for decision under these rules, the arguments of the parties, and the holding and reasoning of the court;

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2. apply the holding to hypothetical variations of the facts;
3. discuss the logical strengths and weaknesses of the parties' arguments and the court's reasoning; and
4. identify and analyze competing policy considerations about what the law should be.

When given a hypothetical problem, students should be able to identify and discuss any claims and defenses that the parties might assert and any remedies that they might seek.

Students should be able to identify ambiguities in contractual terms and propose alternative ways to draft the terms.

Students should be able to parse and explain statutory provisions, identify ambiguities in statutory provisions, and suggest improved ways of drafting statutory provisions.

Students should be familiar with the history of the courts of law and courts of equity, the common law method, and the relationship of statutes to the common law.

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system

Students should be able to evaluate the legal advice that was given in actual cases, suggest what would have been better legal advice, and formulate advice that should be given in the future in similar caeses.

Students should be able to identify and discuss ethical issues that arise in willfully breaking promises, in raising technical defenses to avoid liability, and in giving legal advice that might encourage perjury.

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession (including, but not limited to, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation)

Students should be able to present arguments as if they were representing clients in contract disputes.

Students should be able to discuss controversial legal and

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policy issues in a professional and respectful manner.

Students should understand the role of lawyers in advising clients as they enter into contractual arrangements and resolve or litigate disputes.

Students should understand the basic structure of common contractual transactions familiar to all competent lawyers