Syllabus For

CONTRACTS II

<Course No. 6203-13; 3 credits>

Professor 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 will meet on Wednesdays from 8:50 to 9:45 a.m. and on Thursdays and Fridays from 11:00-11:55 a.m. The class will not meet on Friday, January 20 (Inauguration Day) or the week of March 6-10 (spring break). The last day of class is Wednesday, April 19, which is a constructive Friday (meaning that class will meet at 11:00 a.m. instead of 8:50 a.m.).

Office Hours and other Contact Information:

I will announce my office hours in class and on the portal. My office is in Stuart 416. You also may contact me by phone or email. My email address is gmaggs@law.gwu.edu and my telephone number is (202) 994-6288.

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 2016)

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


Final Examination:

This course will have an open-book, three-hour examination on Tuesday, May 2, at 2:00 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

2
Restatement §§ 209(1), 210, 213, 214(b), 216(1)
Note (2), pp. 410-411
Notes (2) & (3), p. 415
Syllabus Appendix A, Part 1
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
D. IMPLIED TERMS

Text, p. 550

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, 974-975
[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

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
   [Zapatha v. Dairy Mart]
Text, pp. 29-31
   [Hoffman v. Horton]
Supplement, p. 341
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
      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. PRIVITY
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
C. DAMAGES MEASURED BY LOST PROFITS

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

Note (5), pp. 444-445
[R.E. Davis v. Diasonics]

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.


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:

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

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?

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 included in the supplement beginning on page 342. It is discussed in the supplement at page 341 and in the textbook in note (10) at pages 27-28. 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].

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."
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:
(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
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 repossessing 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 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 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

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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 unconscionablility;
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;
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 cases.

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
Syllabus Appendix E

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.