Sales Outline

**Part I: Scope of Article 2**

1. Transactions Involving Goods
   1. Law of sales is applicable only to transactions involving “goods” [§2-102]
      1. Basically covers all *tangible* chattels, anything movable at the time and is *identified* to the K of sale – presently in existence
   2. Goods Attached to Realty
      1. Article 2 does not apply to the sale of land itself, or any interest therein, but it does apply to certain kinds of property attached to land, if severed and sold apart from the land:
         1. Crops
         2. Minerals, structures
         3. Timber
      2. Fixtures – anything else that can be removed w/o material harm thereto is covered, as long as it is severed [§2-107(1), (2)]
   3. Non-existent or destroyed goods
      1. If parties make a present sale of identified, *specific* goods (*that* horse), but unknown to them the goods have been *totally destroyed* or are nonexistent, the K is void from the outset [§2-613(a)]
      2. If goods are damaged or deteriorated, but not totally destroyed at the time of sale, the K is not void, rather buyer has the option to void the sale [§2-613(b)]
         1. Buyer doing so is entitled to a due allowance from the K price, but waives all other rights against the seller
   4. Fungible Goods
      1. Goods in which each unit by its nature, or by mercantile usage, is the commercial equivalent of every other unite (oil, wheat, etc…) [§1-207(1)]
      2. Fungible goods may be either identified (e.g., all wheat in my silo) or unidentified (e.g. 600 bushels form the wheat in my silo)
         1. Ordinarily there can be no present sale of unidentified goods
         2. Exception is made where goods are fungible, and an agreement to convey an undivided interest in an identified mass of fungible goods is made
      3. Buyer of interest in mass of fungible goods becomes an owner in common
         1. Ex. S sells to B, “600 bushels of wheat in my silo,” and there are 1,200 bushels of wheat, the sale is effective to transfer title immediately to B of an undivided 50% interest in all the wheat
   5. UCC sales provisions do *not* apply to [§2-105(1)]
      1. Real estate or any interest therein
      2. To choses in action (ability to sue for breach of k except those involving goods)
      3. Investment securities (Stocks, bonds, etc…)
      4. *Secured* transactions (chattel mortgage or conditional sales k)
   6. Service Contracts Involving Goods
      1. K to perform services are not transactions in goods
      2. If K involves the sale of both goods *and* service, Courts apply the UCC only if the sale of goods is the predominant factor
2. Non-sale Transactions Subject to UCC
   1. Unless a provision expressly restricts its application to a *sale* of goods (as the warranty provisions all do), Article 2 also applies to leases, bailments, franchises involving goods
      1. If the relevant state has adopted Article 2A, that article will govern disputes involving the *lease* of goods
   2. Distinguishing Lease (Article 2A) v. Disguised Sale on Credit (Article 9)
      1. If a K contains a clause permitting the lessee to terminate the lease at any time and return the goods, the transaction is a true lease
      2. If the lease is for the entire economic life of the leased goods, the transaction is a disguised sale, and seller must take steps under Article 9 for perfection of a security interest to ensure priority to the subject goods in case of default
3. Good Faith
   1. Every k or duty within the scope of UCC imposes an obligation of good faith in its performance or enforcement – cannot be waived by the parties
      1. Tests subjective honesty, whether or not actor was reasonable
   2. Merchant is held to a higher objective standard that includes the “observance of reasonable commercial standards of fair dealing in trade” [§2-103]
      1. Regularly deals in goods of the kind sold
      2. Otherwise holds himself out as having special knowledge or skill as to the practices or goods involved; or
      3. Employs an agent who fits within these categories [§2-104]
4. Higher Standard for Merchants than Non-merchants
   1. Merchants held to standard of *fair dealing in the trade*[§2-103]
      1. Non-merchants owe only a duty of *honesty in fact* in the transaction
   2. Merchant-seller is held to certain *implied warranties* as to goods sold
      1. Non-merchants have no such liability [§2-314]
   3. Oral agreements are enforceable against a merchant, regardless of the price of the goods involved, if the merchant has failed to reply to a letter from the other party in confirmation of the deal (merchant’s confirmatory memo rule)
      1. Non-merchants cannot be held to oral agreements for the sale of goods priced at $500 or more [§2-201]
5. Construction Terms
   1. “Usage of trade” means custom w/in the industry, binding all of those who *should* know about it, sometimes including customers [§1-205(2)]
   2. “Course of dealing” refers to parties’ past contacts with each other, past dealings give insight to their current agreement [§1-205(1)]
   3. “Course of performance” (practical construction) refers to what the parties do when performing this particular k – significant when there are repeated occasions for performance without objection, as in an installment contract [§2-208]
6. Hierarchy of Construction Terms
   1. In determining meaning of the k, prefer specific over general
      1. Express terms in the k control over course of performance (unless the course of performance shows the express term was waived by later conduct) [§2-208]
      2. Course of performance controls over course of dealing
      3. Course of dealing controls over mere usage of trade
7. International Sales
   1. UN Contracts for the Int’l Sale of Goods (CISG)
      1. Authorizes contracting parties to use any law of they choose, but if the parties do not agree on a law and both are signatories of the GISC, GISCG will be applied
   2. Treat does *not apply* to or regulate:
      1. Personal injury; sale of consumer goods; goods sold by auction or pursuant to execution; sale of ships, vessels, hovercraft, or aircraft; the sale of electricity; or issues regarding validity of a sales K
8. Basic Application of CISG
   1. Applies when parties are:
      1. In different countries
      2. Both countries are signatories to the treaty
      3. Parties do not agree to be bound by some other body of law
   2. Treaty does not regulate matters of validity of the sales K
      1. Issues of capacity, fraud, mistake, etc., are not addressed anywhere in the treaty and have to be litigated according to other law
   3. See Q. 62
9. How CISG varies from Article 2
   1. CISG recognizes oral K, no statute of frauds
      1. Under CISG, acceptance is not effective until received, however, the offeror is not permitted to revoke an offer once an acceptance has been dispatched
   2. Under CISG, a reply to an offer purporting to be an acceptance, but containing additions, limitations, or modifications is a rejection and counteroffer
      1. Reply to an offer purporting to be an acceptance buy has adt’l terms that do not materially alter the K is an acceptance unless offeror orally objects
      2. If no objection, modifications in the acceptance are included in the K
   3. GISG gives a broader range of remedies for fundamental breach, buyer must give a seller notice of breach w/in reasonable time, but no longer than 2 years after receiving goods
      1. Presumption in favor of specific performance
      2. Buyer may not reject goods and require delivery of conforming goods unless the original tender was so deficient it was a fundamental breach
      3. CISG gives parties an opp. to propose grace period, giving breaching party change to remedy the problem

**Part II: Contract Formation**

*Offer and Acceptance*

1. Contract Formation in General
   1. UCC does not limit the making of k to oral or written agreements
   2. Sales K can be formed *in any manner sufficient to show an agreement* between the parties, including their conduct
2. Contract Creation – Two-Pronged Test [§2-204(3)]
   1. Even where the merchants leave out important matters, the UCC creates a contract if:
      1. The parties so intend to create a k; and
      2. The court can fashion an appropriate remedy
3. Irrevocable (“Firm”) Offers
   1. Common Law: To create an offer irrevocable for a specified time (e.g., an option), the promise to keep it open had to be supported by consideration
      1. If the requisite consideration is not met, the offer could be w/drawn at will
      2. A firm offer is an offer irrevocable for a specified time
   2. UCC: Firm offers are irrevocable *without* consideration *if*… [§2-205]
      1. The firm offer relates to a contract to sell goods;
      2. It is made by a merchant; and
      3. The offer is in a signed writing and state that it will be held open
   3. An offer meeting the above criteria are held open/irrevocable for:
      1. The period of time specified in the offer; or
      2. If no period is specified, for a reasonable time – but never longer then 3 months
   4. If the firm offer is on a form supplied by the offeree, the *offeror* is *not* bound by it unless the offeror separately signs it
4. Medium of Acceptance
   1. Common Law: Offeror could specify any medium of acceptance
      1. Acceptance was limited to this specified medium
   2. UCC: Acceptance can be by *any reasonable means* unless the offer unambiguously specified the means of acceptance [§2-206(1)(a)]
5. Acceptance by Shipment
   1. An offer by the Buyer to purchase goods for prompt or immediate shipment is accepted either by a prompt promise to ship *or* by the act of shipment by seller [§2-206(1)(b)]
   2. Under the UCC, the shipment of *nonconforming* goods may be treated as either an acceptance or a counteroffer, depending on the seller’s actions
      1. Mere shipment – If seller merely ships *nonconforming* goods, the shipment is both an acceptance *and* a breach of k
      2. Shipment plus notice – If upon shipping nonconforming goods, the seller also promptly notifies the buyer that the seller is not accepting the offer but is only sending the substituted goods as an *accommodation*, then the seller has made a counteroffer that the buyer can accept *or* reject
         1. If the buyer accepts the shipment, k is formed
6. Acceptance by Beginning Performance
   1. Common Law: Whether such acceptance was effective depended on the forseeability of seller’s actions
   2. UCC: Commencement of the performance specified in the offer constitutes acceptance provided that the offeree-acceptor *notifies* the offeror *w/in a reasonable time* [§2-206(2)]
      1. The notice is *not* the acceptance
      2. Acceptance (and the formation of the K) stems from commencing performance
7. Time of Acceptance Uncertain
   1. Correspondence between parties does not disclose exactly when the offer/acceptance were made, but the parties *act as if a K has been made*
   2. Despite uncertainty, a binding K still exists [§2-204(2)]

*Offer and Acceptance: Battle of the Forms*

1. Common Law
   1. The mirror-image rule requires an acceptance to conform to the *exact terms* of the offer, any variation constitutes a counteroffer
2. UCC Rules
   1. Generally, K is formed despite variations between offer and acceptance, *unless* the responding offeree *specifically* states that there shall be no K unless the original offeror expressly accepts the second set of terms – “proviso clause” [§2-207(1)]
   2. If the offeree specifically limits the K to the new terms under the “proviso,” any response is treated as a counteroffer, and no K has been created (until offeror expressly accepts)
      1. If offeror begins performance, then K created as well [§2-207(3)]
3. New Terms – Where Proviso **Not** Used
   1. General Rule: New terms are deemed *proposals* to the k and do not become part of K
      1. New terms must be separately accepted to modify the original offer
      2. Course of performance might show these terms were impliedly accepted by the original offer [§2-207(2)]
   2. Merchants/Special Rule: When both parties are merchants, the new terms *do* become part of the k unless one of the following happens or has happened…
      1. The original offer *expressly* limited the k to the original terms; [§2-207(2)(a)]
      2. The original offeror *objects* to new terms w/in a reasonable time; [§2-207(2)]
      3. The new terms would *materially alter* the original terms
         1. Only the material alterations fails to become part of the K
            1. Ex. Disclaimer of warranties or a clause requiring arbitration
         2. The other parts of the offeree’s form *do* act as an acceptance, creating a K
            1. Only the material alterations are excluded [§2-207(2)(b)]
4. Different Terms (Unclear whether BoF rule apply)
   1. Use of §2-207(2)
      1. Some courts follow the battle of the forms rule regarding new terms and so *strike* different terms in the offer only if they are *materially different* from the acceptance or if the other party objects
   2. Knock-out Rule
      1. Other courts find that both parties have objected to the differing terms so that a K is concluded without an agreement on the matter
      2. Court will then apply the Code’s gap-filling rules (See *Part 4*, I)
   3. No Contract
      1. If the disagreement concerns a major term of the K, some courts will find that no K ever arose
      2. However, if the parties begin go perform, §2-207(3) would be used to create the terms of the deal (*see below*)
5. Writings that do not Create a Contract
   1. In response to §2-207, forms now typically contain “objection” clauses
      1. Offeror’s form objects in advance to any new terms (an offeree’s proviso clause)
      2. Offeree’s form proposes new terms and states that it is *not* an acceptance unless the offeror consents to the new terms (proviso clause)
      3. In these cases, no “meeting of the minds,” and no K *unless performance begins*
      4. Prior to performance, either party may back out w/o impunity
   2. Effect of Performance
      1. If the parties behave as if they have a K by beginning to perform, K exists
      2. The K consists of all the terms on which the writings agree plus terms supplied by the UCC where the parties are silent

*Statute of Frauds*

1. In General [§2-201]
   1. Certain sales k are unenforceable unless there is:
      1. Writing sufficient to indicate that a k has been formed; or
      2. Some other act deemed sufficient to evidence the existence of a k and thus obviate the need for a writing
   2. UCC SoF applies only to k for the *sale* of goods w/ a price of $500 or more
      1. 2003 revision increases the threshold amount to $5,000
   3. Sales K that does not comply w/ the SoF is unenforceable
      1. Neither party can force the other to proceed therewith
      2. However, the K is not void, if the parties choose to perform, enforceable rights may be created – but lack of writing can only be asserted by the k parties
      3. Ex. Oral k for the sale of goods in excess of $500, neither party can be compelled to proceed; however, if the seller does deliver the goods and they are accepted by the buyer, the SoF is satisfied and oral agreement may be enforced
2. What Constitutes Sufficient Written Memorandum
   1. Can satisfy the SoF, and thus render the k enforceable, by producing a written note or memo signed by the party to be sued/sought to be held to the k [§2-201(1)]
3. Terms that Must be Contained in Written Memorandum
   1. Common Law – all essential terms of the transaction
      1. Parties, subject matter, time for performance, and price
   2. UCC – Indicates that a k for sale has been made and *specifies* the quantity term
      1. Ex. I agree to sell Buyer 200 wrenches, (signed) Seller
      2. Quantity stated in terms of the seller’s “output” or the buyer’s “requirements” is sufficient for 2-201 (all the steel you produce/need)
   3. No particular form of writing is required as long as it has the required terms
      1. The buyer’s check, if it notes the subject matter and quantity (ex. deposit on purchase of 200 Regal computers), is a sufficient memo to satisfy the SoF in an action against the buyer
      2. If the check is cashed by the seller, thus bearing the seller’s endorsement, it will render the k enforceable against the seller
4. Signature Requirement
   1. Essential that the memo be signed by the party to be charged [§1-201]
      1. Any form of signature is okay (typed, stamped, etc…)
      2. Does not need to be at the the bottom of the writing
      3. Any mark w/ the intent to authenticate the writing is a signature under the UCC
   2. Printed letterhead may satisfy the SoF if it was *intended* as the equivalent of a signature
      1. Ex. Buyer sends seller a purchase order on a printed form bearing the buyer’s name and address, it may be treated as “sighed,” although not actually signed by the buyer, *if* it is shown that the buyer intended to be bound by the order
   3. Signature may be supplied by an authorized agent or broker (but some states require agent’s authority to enter into the k be in writing)
5. Written Confirmation from Sending Merchant as Binding on the Recipient Merchant
   1. Written memo can become binding on the party to be charged even though that party never signed anything… [§2-201(2)]
      1. *Both* parties must qualify as “merchants” in the goods or practices involved
      2. If the merchant sends a written confirmation of the k to another merchant, and the writing would be sufficient to satisfy the SoF were the sender being sued
      3. The recipient merchant *must object* to its terms by sending a *written* notice of objection w/in 10 days or lose any defense based on the SoF
   2. Such written confirmation only satisfies the SoF
      1. Does not by itself prove the existence of a k
      2. Burden is still on suing party to show on oral agreement was made and the writing correctly reflects its terms
   3. Not enough to establish that P sent a confirmation, must establish the D received it
      1. D need not actually have read it, as long as the D had reason to know its contents
6. Exceptions – Partial Acceptance
   1. UCC provides that a k not otherwise enforceable bc of the SoF is made enforceable by the receipt and acceptance of goods, but *only to the extent of the quantity of goods actually received and accepted* [§2-201(3)(c)]
7. Exceptions – Partial Payment
   1. UCC provides that a k not otherwise enforceable bc of the SoF is enforceable with respect to goods *for which payment has been made*.[§2-201(3)(c)]
   2. Where a down payment made on an *indivisible* item, the partial payment shows that there is alt least a quantity of one, thus, SoF is satisfied for that one item
      1. Ex. Oral k where seller agrees to sell car for $1,500, and buyer pays $100 down payment; SoF is satisfied by down payment, and Buyer gets entire car (not just a part)
8. Exceptions – Specially Manufactured Goods
   1. CL: Oral purchase agreement of goods *to be* specially manufactured was enforceable
   2. UCC: Seller must have made either a *substantial beginning* on their manufacture or commitments for their procurement before receipt of the buyer’s notice of repudiation
      1. Must be obvious that the goods are meant for this particular buyer 9§2-201(3)(a)]
9. Estoppel
   1. If no exceptions apply, courts may estop either party from asserting SoF as a defense
   2. Word or conduct, that party has caused detrimental reliance on the oral promise so that enforcement would cause unconscionable injury or loss

**Part III: Warranties**

*Warranty of Title*

1. What is Deserved under Warranty of Title
   1. UCC provides an automatic warranty that the seller… [§2-312(1)(a), (b)]
      1. Will convey *good title*;
      2. That the transfer is *rightful*; and
      3. That the goods are *free of any claim* of the seller’s creditors of which the buyer has no knowledge
   2. This warranty is not classified as either express or implied
2. No Warranty of Quiet Possession
   1. The warranty of title does *not* contain a warranty as to freedom from all lawsuits
      1. Warranty of title is breached only when someone makes a non-frivolous claim to superior title
      2. The seller is not responsible for colorless claims of superior title [§2-312]
3. Warranty Against Infringement
   1. The seller, if a merchant, warrants that goods shall be delivered free of the rightful patent or trademark claims of third persons [§2-312(3)]
4. Disclaiming the Title Warranty
   1. Title warranty does *not* arise where a buyer should reasonably know that the seller makes no claim of title (e.g. judicial sale, caveat emptor) [§2-312(2)]
5. Express Disclaimer
   1. General language disclaiming warranty liability will not rid the K of the warrant of title
   2. *Specific, conspicuous* language in a K disclaiming the title warranty is valid [§2-312(2)]

*Warranties of Quality* – *Express Warranties*

1. Creation of Express Warranty (Written or Oral)
   1. A statement of fact or promise that *relates to the goods* and is *part of the basis of the bargain* creates an express warranty that the goods shall conform to [§2-313(1)(a)]
      1. Descriptions, samples, and models of the goods may create an express warranty
         1. [This is a new car] [If it doesn’t work I’ll fix it] [It’ll look like this one]
      2. No technical words are needed [§2-313(1), (2)]
   2. Seller’s intent/culpability immaterial: No intent to warrant is required, and where the warranty is breached, the seller is absolutely liable [§2-313(2)]
   3. Fact v. Opinion: Seller will be held liable only for statements of fact or promises, *not* for mere “puffing.” Relative knowledge of the parties is a principal consideration [§2-313(2)]
2. Basis of the Bargain
   1. Statement must be part of the deal and *played some part in buyer’s decision* to buy
      1. However, buyer’s reliance is not a significant factor
      2. All statements by seller becomes part of the basis of the bargain, unless good reason is show to the contrary [§2-313]
   2. Time of warranting: Statements made *after* the sale can be considered an express warranty by the UCC if the statement becomes part of the basis of the bargain
      1. Statement becomes a modification of the K [§2-209]
3. Unread Warranties
   1. Seller makes an express warranty but the buyer does not learn of it until *after* the sale (e.g. buyer sees an old advertisement)
   2. Buyer *may prevail* on recovering for breach of warranty if the buyer claims to be a 3rd party beneficiary of the express warranty made to those who did see the warranty and purchased as a result of it
      1. Such parties would legitimately expect any purchaser hurt by breach of the warranty to be able to sue the warrantor for the breach

*Warranties of Quality – Implied Warranties*

1. In General
   1. Certain warranties are imposed by law irrespective of the parties’ intentions in every sale of new or used goods, unless expressly negated by the parties or circumstances
2. Warranty of Merchantability
   1. *Only* imposed on sellers who are *merchants* with respect to “goods of that kind”
      1. Law implies a warranty that the goods are of merchantable quality [§2-314]
      2. Arises in all sales transactions except sales by private individuals or occasional sales by professionals who normally deal in other markets
      3. Still an obligation of good faith, so that even a nonmerchant may be held liable for failure to disclose a known hidden defect in the goods [§1-203]
   2. Standards of merchantable quality – must meet at least all six of the standards stated, and any other standards the court may add [§214(2)(a)-(f):
      1. Goods must be those described in contract (i.e. saleable and usable)
      2. Bulk of fungible goods must be of fair average quality
      3. Goods must be fit for the ordinary purposes for which such goods are used
      4. Any variations must be within normal limits
      5. The goods must be adequately contained, packaged, and labeled
      6. Goods must conform to the label
         1. Dealer becomes responsible for affirmations on the label or container, unless the dealer disclaims them
         2. If the labeling is incorrect so that goods cannot be used safely in reliance, breach of implied warranty of merchantability
         3. If the goods do not conform to the label/package, may be a breach of an express warranty. However if package is delivered after o/a, no express warranty bc not part of “basis of bargain,” but implied warranty exists
3. Implied Warranty of Fitness for a Particular Purpose
   1. If seller has *reason to know of the particular use* anticipated by the buyer, and is aware that buyer is *relying on seller’s judgment*, there is an implied warranty of fitness for *that particular use* of the buyer [§2-315]
      1. Actual knowledge is *not* required
      2. Applies in *any* sale transaction, whether by a merchant or nonmerchant
      3. Seller must either select or furnish the goods for the fitness warranty
   2. Distinguished from Merchantability Warranty
      1. Buyer’s reliance is not required for the implied warranty of merchantability, because this warranty only covers ordinary purpose
      2. Buyer’s reliance on particular purpose is required for warranty of fitness
         1. If buyer insisted upon a particular brand, buyer cannot show necessary reliance on seller’s judgment
         2. If sales k is based on plans/specifications by buyer, there is no reliance on seller’s selection of goods
4. Does warranty liability extend to abnormal reactions?
   1. Unique or abnormal reactions are sustained by the buyer in the use of the product
      1. Ex. Buyer’s scalp is unusually sensitive to chemical in purchased hair spray
   2. *Majority* rule is that the warranties of fitness and merchantability are *not* breached unless the buyer can show the reaction is common to an appreciable number of users
5. Implied Warranty of Wholesomeness
   1. Special implied warranty arises with respect to foods or beverages [§2-314(1)]
      1. Ex. Goods that are fit for human consumption or are “wholesome”
   2. Retail Grocer
      1. Grocer impliedly warrants the wholesomeness of the food sold, but only for *normal use* – applies even to products the grocer received in sealed packages
      2. Sale occurs when the shopper takes the goods off the grocer’s shelf
   3. Restaurants
      1. UCC specifically includes food sold for consumption (on-or-off premises) in the warranty of wholesomeness
      2. Majority test is whether the difficulty in the food was one that the buyer had a reasonable expectation of encountering
         1. Do not extend warranty to indigenous objects (chicken bone in pot pie)
         2. Extend warranty to nonindigenous/foreign objects (glass in pot pie)

*Warranty Disclaimers and Limitations*

1. Disclaiming Express Warranties
   1. UCC attempts to find both the express warranty and disclaimer effective if possible
      1. Disclaimer fails if it is inconsistent w/ the warranty [§2-316]
      2. All disclaimers are narrowly construed so as to preserve all express warranties were reasonable
         1. Ex. Express provision imposing a time limit of 15 days for discovery of defects is not applicable to latent defects not reasonably discoverable w/in that time period
      3. Partial disclaimer in disregarding the disclaimer to the extent it is unreasonable
         1. Court tries to read entire K about warranties and disclaimers as consistent, but if impossible (typically is), warranty stands and disclaimer void
   2. Admissibility of Parol Evidence
      1. Typically, warranty will have been expressed orally and the sales K will contain a broad disclaimer; two options in this situation…
         1. Courts admit evidence of the oral warranty on the basis of unconsionability or fraud; or
         2. Parol evidence rule is inapplicable since the K did not reflect both parties’ agreement (i.e., buyer did not intend to have warranty disclaimed)
2. Disclaiming Implied Warranties (done more easily, in 4 ways)
   1. By specific language [§2-316]
      1. Disclaiming merchantability – Disclaimer *must* mention “merchantability”; it can be oral, but if written, it must be conspicuous
         1. Written so a reasonable person against whom it is to operate ought to have noticed it (not fine print, contrasting color, bold, etc…)
      2. Disclaiming fitness for particular purpose – The disclaimer must be in *writing* and must be conspicuous
         1. “Fitness” need not be mentioned
         2. Oral disclaimer is not enough
      3. Timing of disclaimer – An effective disclaimer must be part of the offer and acceptance, disclaimer delivered after K is in existence has no effect
         1. BUT, warranties can be added after the, modification by agreement
      4. “Layered” Contracts – Sellers include disclaimers inside a packaged item, disclaimer valid as long as the buyer who objects to the enclosed terms is given an opportunity tot reject the K
   2. “As is” or Similar language
      1. Implied warranties may also be disclaimed if the goods are sold “as is” or “with all faults” (or similar language)
      2. Such language must be conspicuous; fine print not effective
   3. Buyer’s examination of goods
      1. Situation where a buyer either examines the goods or the seller demands that the goods be inspected and the buyer does not do so
         1. Inspection in no way affects existence of *express* warranties
      2. There are *no implied warranties* as to faults that the buyer *should* have found
         1. What buyer should have found depends on individual buyer
   4. Custom or Usage
      1. Implied warranties may be excluded or modified by the course of dealing or custom and usage in the trade
      2. If the parties understand that no implied warranties are part of the sale, none arise
3. Disclaiming by Limiting the Remedy
   1. Under the UCC, parties may specify the remedy in the event of a breach of warranty
      1. The parties may make the specified remedy the exclusive remedy
         1. Disclaims any other fitness or merchantability warranty
      2. Such a warranty implies a promise to repair or replace defective goods
         1. If seller repeatedly fails to correct the defect as promise, seller is liable for breach of that promise
   2. Effectiveness of warranty disclaimers is limited by judicial constructions, state and federal consumer protection statute, and the law of torts
      1. Wherever possible, courts will construe warranty disclaimers narrowly in order to preserve an action for breach [§2-719]
      2. Disclaimer is effective only as to the warranty (K) claim, and does not bar an action for negligence or strict tort liability where a defective product has caused personal injury or property damage

*Defenses in Warranty Actions*

1. Breach of Warranty Must be Proximate Cause of Injury
   1. In action for breach of warranty, buyer must always show that the breach was the proximate cause of the loss sustained (§2-715(2)(a)(b)]
   2. Not sufficient that the buyer demonstrate that the defendant’s breach of warranty could have been one of several possible causes of damage
   3. Buyer must *prove* breach is the proximate cause of injury
2. Notice Requirement
   1. To recover for a breach of warranty, buyer must *plead* and *prove* that the seller was given notice of the breach w/in a *reasonable time* after breach should have been discovered
      1. If no notice is given, the buyer’s right to recover against the seller in a warranty action is entirely *barred*
   2. Failure to give notice deprives the buyer of any rights under the UCC [§2-607(3)(a)]
      1. No particular form of notice is required – can be written (better) or oral
      2. Notice need not contain any claim of damages or threat of litigation, sufficient merely to inform the seller that the transaction is troublesome and bears watching
      3. Courts split as to whether filing of the lawsuit itself can serve as notice satisfying the UCC requirement
3. Privity
   1. Historically, privity meant that no person could complain of a breach of warranty unless that person had a sufficient legal connection w/ K party who made the warranty
      1. UCC only speaks to the issue by addressing which potential plaintiffs are “third-party beneficiaries” of the warranties made to the buyer
      2. Seller is not allowed to restrict this protection granted by §2-318
   2. Original §2-318
      1. Provided that the seller’s warranty – express or implied – extended not only to the actual purchaser of the goods, but also to any natural person who was a member of his household, or a guest in his home (only horizontal privity)
         1. Can also bring claims against others in the distributive chain (i.e. retailer/manufacturer, vertical privity) [§2-318]
         2. Labeled as Alternative A
   3. 1966 Amendments; Two Alternative Provisions
      1. Alternative B: Extends seller’s warranty liability to any natural person who may reasonably be expected to use, consume, or be affected by the goods (innocent bystander affected by car), but only for personal injury
      2. Alternative C: Extends warranty liability to property damage as well. Further, not limited to protection of “natural” persons, so *corporate* plaintiffs cold sue as third party beneficiaries of the warranty
   4. Amendments are construed very broadly
      1. Ex. Bicyclist who ran his bike into parked car and injured his leg, sued auto manufacturer and won because all persons using public highways were affected by the automobile, and UCC privity requirement was met
4. Strict Products Liability
   1. Permits recovery by an injured consumer in a suit against the manufacturer as long as the consumer can prove that the manufacturer distributed into commerce a product that contained a dangerous defect [§402(a) restatement of torts]
      1. Economic loss doctrine should preclude the application of tort theories to commercial matters where the only injury is to the product itself
      2. Where the injury is not only to the product but to other property as well, most court will allow the tort theories to go forward
   2. Typically suit for breach of implied warranty of merchantability or §402A can be a viable legal alternative under the same facts
      1. §402A does not require notice, UCC §2-607(3) does
      2. §402A limits damages to physical injury, UCC cause of action does not §2-715
      3. §402A has a SoL imposed by state law for tort actions, UCC governed by §2-725
      4. §402A is not affected by disclaimers or remedy limitations, UCC may be so
      5. §402A not affected by privity, may be an issue in UCC
      6. §402A requires that the product contain a “defect,” but a UCC warranty may be breached even if the product is not defective (may not fit particular purpose)

*UCC Warranties and the Magnuson-Moss Act*

1. In General
   1. Implied warranties of merchantability and fitness for particular goods have been expanded by statute, insofar as they apply to “consumer goods” after 7/4/75
   2. i.e., those purchased primarily for personal, family, or household purposes (including major purchases such as automobiles and motor homes)
2. Magnuson-Moss Warranty Act [15 USC §§2301-2312]
   1. Does *not* require a seller to give any warranty on consumer products
   2. However, if any written warranty is given on consumer products costing more than $10, it must be conspicuously designated as either a… [15 USC §2303]
      1. *Full warranty* (statement of duration, e.g., “one year); or
         1. Seller must provide reasonable service and repair facilities [15 USC 2304]
         2. Can be no limitation or disclaimers on implied warranty liability; **and**
         3. S must allow the purchaser to obtain a refund or replacement if product is defective and cannot be repaired after reasonable number of attempts by S
      2. *Limited warranty* (This rule applies to advertisements or “service policies” as well as to warranty cards accompanying the product)
         1. Encompasses anything less than a full warranty [15 USC §2308]
         2. Even with a limited warranty, no total disclaimer of implied warranty liability is allowed
         3. However, a limitation on the duration of liability to a reasonable period of time is permitted if conscionable in length and conspicuously disclosed
   3. Disclaimers Void
      1. MMWA prohibits disclaimers of the implied warranties that arise under state law
         1. e.g., merchantability and fitness for a particular purpose
      2. If the Seller decides to give a *written warranty* (and remember, doing so is never required), the warrantor *may not disclaim* the implied warranties given by state law – any attempt to do so is *void*
         1. If the warrantor offers only a *limited warranty*, the warrantor is allowed to limit the duration of the implied warranties in some situations
         2. If a *full warranty* is given, the duration of implied warranties cannot be limited, they last for a reasonable time (question of fact)
3. FTC Rules
   1. The MMWA also authorizes the FTC to promulgate rules requiring sellers to:
      1. Make *presale disclosure* of the availability of written warranty terms; and
         1. E.g., products/persons covered by warranty, procedure to obtaining repairs
      2. To provide informal procedures for settlement of warranty terms [15 USC §§2302, 2310]
4. Scope of the Act
   1. Suppliers – Suppliers of consumer products and others who give written warranties on such products are targets of the law; Any persons engaged in the business of making a consumer product directly or indirectly available to consumers [15 USC §2301(4), (5)]
   2. Consumers – Buyer of a consumer product (but not a purchaser for resale), or any person receiving such a product for the duration of the warranty or service K [15 USC §2301(3)]
   3. Warranty – “written warranty” is a written statement about the nature or quality of the product and its condition, or what the warrantor will do if anything goes wrong with the product [15 USC §2301(3)]
   4. Deceptive Warranties – Contain “false or fraudulent affirmation, promise, description, or representation, or which, in light of all the circumstances, would mislead a reasonable individual exercising due care” [15 US §2310(c)]
5. Attorneys Fees
   1. Successful plaintiff in a MMWA suit may get legal and equitable relief and is entitled to costs and a reasonable attorney’s fee [15 USC §2310(d)]

*Warranties and Article 2A*

1. In an Article 2A lease, the lessor makes all the usual warranties made by a seller in Article 2
   1. One major exception is the finance lease
2. Finance Lease Defined
   1. In a finance lease, the lessee has the lessor purchase the goods from the seller (“supplier”) and then leases the goods from the lessor
   2. The lessee is the one who selects the goods – not the lessor
3. Warranties in a Finance Lease
   1. Finance lease lessor makes no implied warranties, but any warranties made by the supplier to the lessor are passed on to the lessee, who may bring a direct action against the supplier for any breach
4. “Hell or High Water” Clause
   1. Except in consumer leases, a finance lease imposes an absolute duty on the lessee to make payments to lessor no matter how badly the leased goods perform or break down

**Part IV: Terms of the Contract**

*Filling in the Gaps – Missing Contract Terms*

1. Introduction
   1. Many sales K end up w/ certain terms omitted, usually inadvertently
   2. Law will provide the missing terms if it appears the parties *intended* an enforceable K
      1. The more “gaps,” and the more vague the language, more difficult it becomes to establish real bargaining interest
   3. In determining the K terms:
      1. Express terms (oral or written) over implied terms, followed by Course of performance, Course of dealing, Usage of Trade, and finally the Code
      2. If these do not “fill the gap,” the Court is unlikely to supply the missing term
2. Open Price Arrangements
   1. If the price is missing, the parties’ *intent* to form a K is crucial [§2-305(a)]
      1. If they did intend a K, and the K is silent as to price, it is assumed that the parties intended a *reasonable* price at the time and place of delivery [§2-305(1)(a)]
   2. This rule is also applicable to K where parties agree to agree at a future date
      1. Ex. “Price to be determined next January 1st”
      2. If the parties are unable to agree on the price at the later date, then it is to be a *reasonable* price at the time and place of delivery [§2-305(1)(b)]
      3. If the K grants one party the right to set the price at a later date, that party must do so *in good faith* [§2-305(2)]
         1. If person setting the price acts in bad faith, the other party may cancel the K or exercise the same option and set a reasonable price. [§2-305(3)]
         2. If the price is not fixed for some reason attributable to the fault of *either* party, the other party may cancel or set a reasonable price. [§2-305(3)]
   3. Inoperative reference to third party [§2-305(1)(c)]
      1. Where the price is to be set by a 3rd person or some K defined standard (price in a trade journal), and for some reason – without the fault of either the seller or buyer – the price is not set, the price is a *reasonable* price at time/place of delivery
   4. K may also contain *maximum-minimum* ceilings for prices to be set
      1. Courts are divided, w/ some holding the terms void for indefiniteness
3. Open Quantity Arrangements
   1. The quantity term is the one term the UCC will *not* supply
      1. K may specify terms in “all” or a percentage of the buyer’s “needs” or “requirements” for a commodity during a given period of a valid K [§2-306(1)]
         1. Agreement to buy all (or some %) of goods produced by a seller from a specific production unit during a given period of time is a valid K
      2. If the K is phrased in “wants” or “desires” that is illusory and K is void for want of mutual obligation
   2. Changing quantity problems: In cases where the requirements (or output) change disproportionately, the UCC requires *good faith* and limits the quantity to an amount *not unreasonably disproportionate* to the original estimate
      1. In the absence of a stated estimate, provide a normal or otherwise comparable prior output or requirement
   3. Changing business problems: When buyer’s needs, or a seller’s output, radically decrease due to claimed financial reverses, whether such decreases limit liability under a requirements or output K is a *good faith* issue
      1. Firm may discontinue a particular line of business if it proves unmarketable over a prolonged period of time w/o breaching its good faith duty
      2. Curtailing output by a seller, or suspension of purchases by a buyer, merely bc the k in question is more expensive than the party wishes, is not “good faith”
4. Open Delivery Arrangements
   1. UCC requires delivery to be in *single lots* unless otherwise agreed by the parties
   2. Place of delivery is *seller’s* place of business
5. Open Time Arrangements
   1. If K is silent as to timing of performance, it is to occur w/in a reasonable time [§2-309(1)]
   2. Contracts for indefinite duration: These are valid for a reasonable time
      1. Note that open duration agreements are terminable at will as long as *reasonable advance notice* is given to the other party
6. Open Payment Arrangements
   1. Absent a contrary agreement, payment & delivery are concurrent conditions [§2-310(a)]
      1. Payment is due at the *time and place* at which the buyer *receives* the goods
      2. “Receipt” occurs upon taking physical possession of the goods
   2. Document transaction: Payment is due at the time and place the buyer receives the docs
      1. E.g., warehouse receipts [§2-310(c)]
   3. Open Credit: General rule in credit transaction is that the credit period begins to run from the *date of shipment*, unless the sending of the invoice is delayed [§2-310(d)]
7. Other Open Terms
   1. Open Assortment: The purchase of mixed or bulk lots entitles the *buyer to specify* the assortment [§2-311(1)]
   2. Open Shipping Arrangements: If *no shipping arrangements* have been agreed upon, it is *seller’s* duty to make them [§2-311(2)]
8. One Party to Specify Missing Terms
   1. Where details of performance are to be supplied by a specified party, that party must perform in *good faith* [§2-311(1)]
   2. Usage of trade, course of dealing, and course of performance are also used to fill any missing K terms

*Parol Evidence Rule*

1. Common Law
   1. PE rule excludes evidence of oral representation or understanding made prior to the signing of a k that would alter or vary the written terms
2. UCC and Sales Contracts
   1. Before parol evidence is excluded from a K, a court must find that the parties intended the writing to be a complete and exclusive statement of the k terms [§2-202(b)]
      1. If the Court does not so find, parol evidence (oral representations prior to signing the k) is *allowed* concerning consistent, additional terms
      2. A term is not a consistent, additional term (and barred by the PE rule) if it should certainly already be in writing; a CCA term that could naturally be left out is ok
   2. Even if the writing was intended to be the complete and exclusive statement of terms, parol evidence may be used to explain or interpret the terms [§2-202(a)]
      1. Common law exceptions to the parol evidence rule (e.g., fraud, mistake) are alos good in sales transactions

*Unconscionability*

1. In General
   1. Unconscionability generally defined as a K that is so *grossly unfair* that it shocks the conscience of the court [§2-302]
   2. Often courts find Unconscionability where there is both *procedural* (bargaining process) and *substantive* (terms in resulting K) unfairness in the transaction
2. Effect of Unconscionability
   1. If a court finds a K or any part thereof unconscionable it may… [§2-302(1)]
      1. Avoid the whole K;
      2. Enforce the K w/o the unconscionable clause; or
      3. Limit the application of the clause so as to avoid the unconscionable result
3. Application of Unconscionability Doctrine
   1. UCC requires a hearing before a finding of unconscionability is made [§2-302(2)]
   2. Terms bargained for (i.e., those to which both parties *voluntarily* and *knowingly* consent) will not generally be deemed unconscionable even if they are unfair
   3. Printed-form K that are unfair by virtue of disparate economic power are more likely to be held unconscionable
4. Commercial Contracts
   1. When buyer and seller are *both* business entities, the resulting K is *almost never* held unconscionable

*Requirement of Identification*

1. Identification of Goods
   1. Goods must be identified before title to goods can pass
2. Identification Defined
   1. Identified goods are those to which the K refers [§2-501]
   2. The goods have been singled out in some manner
3. Method of Identifying Goods
   1. Where goods are already *in existence*, they may be identified by the making of the K
      1. Must be clear as to what chattels the parties mean [§2-501(1)(a)]
      2. Ex. Seller agrees to sell to Buyer a certain Chevy, which Seller describes by serial and engine number. The goods are identified at the time K is made.
   2. Other goods cannot be identified at the time the K is made, and subsequent actions by the parties are necessary to identify them [§2-501(1)(b)]
      1. Ex. Seller contracts to sell 10 radios to buyer. Later, Seller pulls 10 radios from stock and packages them in cartons addressed to buyer. Goods now identified.
4. Seller’s Right to Substitute Goods After Identification
   1. If the seller made the original identification, the seller may still substitute other goods for those identified, unless and until… [§2-501(2)]
      1. The seller defaults;
      2. Becomes insolvent; or
      3. Notifies the buyer that identification is final
   2. Substitution requires that the seller, and not the buyer, made the original identification

*After Identification, Title Passes When Parties Intend*

1. Where Parties Have Expressed Intent
2. Once goods are identified, title passes whenever the parties intend that it should pass
3. Note that title to *future goods* cannot pass, even though specified, until the goods are in existence [§2-401(2)]
4. Parties’ Intent Presumed
5. If there is no evidence of the parties’ intent as to passage of title, the UCC applies a presumption that title passes when seller complete performance [§2-401(2)]
   * 1. Where goods are to be shipped – If the K merely authorizes the seller to ship, but does not provide that delivery will be at the shipping destination, the seller’s duty ends, and title passes, when the seller delivers the good to a carrier.
        1. If the K requires delivery at a destination, the seller’s duty does not end, and title therefore does not pass, until goods reach that destination
     2. Delivery without movement – Title passes at the time and place where the documents of title are delivered or, if there are no documents of title involved, at the time of contracting [§2-401(3)]

*Delivery Terms under Sales Contracts*

1. Types of K
   1. Where a seller is obligated to ship the goods, the seller’s duties depend on the type of K:
      1. Shipment K – Provide for delivery *to a carrier* at the place of shipment, after which the seller’s responsibility ends
      2. Destination K – provide for delivery at a *particular place* before the seller’s responsibility ends
         1. The UCC presumes that all contracts are *shipment* K unless expressly specified otherwise [§2-503]
      3. Seller’s duties under shipment K – Besides delivery to the carrier, the seller must:
         1. Make a *reasonable* *K* with the carrier on the buyer’s behalf;
         2. Promptly notify the buyer of shipment; and [§2-504(c)]
         3. Provide the buyer with any necessary *documents of title* [§2-504(b)]
      4. Seller’s duties under destination K – The seller must:
         1. Tender conforming goods to the buyer at the *agreed-upon destination*; and
         2. must give reasonable *notice* so the buyer can take delivery [§2-503(3), (1)]
2. Commercial Shipment Terms
   1. F.O.B. stands for “Free on Board” [§2-319]
      1. FOB Point of Shipment (seller’s factory)
         1. Seller is required only to bear the risk and expense of putting the goods into the possession of the carrier
         2. Seller does *not* bear the expenses or risks of loading [§2-319(1)(a)]
      2. FOB Vehicle of Transportation (“FOB Car 4029, Union RR Depot, LA)
         1. References to the vehicle of transportation
         2. Seller is obligated to bear the expense and risk of having the goods loaded *on board* [§2-319(1)(c)]
      3. FOB Point of Destination (buyer’s showroom)
         1. Seller must arrange to transport the goods *to the point of destination* at the *seller’s* own expense and risk [§2-319(1)(b)]
   2. F.A.S. means “Free Alongside” [§2-319]
      1. Generally used in *maritime* shipping K
      2. Seller is to deliver the goods free of expense to the buyer alongside (on the dock next to) the vessel on which they are to be loaded
      3. Seller is to obtain a receipt therefore, in exchange for which the carrier is obligated to issue a bill of landing
      4. The buyer bears the expense and risk of loading onto the vessel
   3. C.I.F. (“Cost, Insurance, and Freight”) and C. & F. (“Cost and Freight”) [§2-320(1)]
      1. Both always indicate shipment contracts
         1. Buyer has the risk of transit damage
         2. True even though the delivery term used in connection w/ the destination
         3. Ex. CIF Buyer’s warehouse is still a shipping K
      2. Under a CIF K, the price agreed to be paid by the buyer includes:
         1. The cost of the goods;
         2. All freight charges to the named destination; and
         3. Appropriate insurance of safe delivery
      3. Under a C&F K, the price does not include insurance, but does include freight
3. Ex Ship
   1. When a seller agrees to deliver “ex ship,” means that no particular ship is intended
      1. Seller bears *full risk and expense*  until the goods are unloaded [§2-322(1), (2)(b)]
   2. Seller is required to discharge all liens arising out of the carriage and furnish the buyer w/ such documents as required to enable buyer to take possession of goods [§2-322(2)(a)]

**Part V: Performance of the K**

*The Perfect Tender Rule (Performance by Seller)*

1. Tender of Delivery – In General
   1. Seller must *offer* (proper tender) the conforming goods to the buyer to discharge the seller’s duties under the sales K
      1. Where goods have been shipped by the seller to the buyer; and
      2. In cases where delivery is to be made directly to the buyer by the seller without need for carrier transport
   2. Seller need not make actual delivery where the buyer is unwilling to take the goods
      1. Seller only needs to tender the goods, not force them on buyer
   3. Tender shifts performance to the buyer
      1. Until such tender is made, the buyer is under no duty to accept or pay for the goods – principal effect is to shift obligation of performance to buyer [§2-507(1)]
2. What Constitutes Tender of Delivery
   1. Manual Transfer of Possession [§2-503(1)]
      1. Tender made at a reasonable hour at an agreed upon place
      2. If no such agreement, the place is the *seller’s* place of business or residence
      3. Tender must be held open for a reasonable time to enable buyer to take possession
   2. Constructive Tender
      1. Goods may be tendered to buyer w/o actual offer to transfer physical possession
      2. E.g., seller tells buyer to get a pile of lumber at a railroad siding
   3. Goods in Possession of Bailee [§2-503(4)(a)]
      1. Tender of delivery can occur w/o a manual transfer by seller when the goods are in hand of a bailee, w/ seller procuring acknowledgment from bailee that goods are henceforth being held by the buyer (e.g., delivering document of title)
         1. Negotiable Document of Title – Entitle the possessor of the negotiable document to compel the bailee to deliver the goods
         2. Nonnegotiable Document of Title – NDT or written direction to the bailee to deliver the goods is sufficient unless the buyer reasonably objects
            1. Risk of loss to the goods and the risk that the bailee will refuse to honor the document remains on the seller until the buyer has had a reasonable time to present the document or direction to the bailee
            2. If the bailee refuses to honor the document or obey the direction, the tender of delivery is defeated and risk never shifts
3. Sufficient Tender – Perfect Tender Rule
   1. Common Law – PTR
      1. Seller required to make a delivery of goods that *conformed* in every respect to the K requirements – quality, quantity, and place and time of shipment
      2. Substantial performance not enough
   2. UCC on the PTR [§2-601]
      1. If the goods or the tender of delivery *fail in any respect* to conform to the K, the buyer has 3 options:
         1. *May reject* the whole;
         2. Accept the whole; or
         3. Accept part and reject part
4. Mitigating the PTR – In General
   1. Much of the force of the PTR is mitigated by other UCC provisions
      1. Most importantly allowing cure of a defective tender (see below)
   2. Special rules allow *substantial performance* in two instance:
      1. Installment sales (see above)
         1. Buyer’s right to reject an installment limited
         2. Buyer’s right to cancel K limited
         3. Seller may recover for partial performance
      2. Shipping arrangements – Even if the seller does not adhere rigidly to the K insofar as shipping arrangements are concerned, the buyer is not privileged to reject unless *material* delay or loss ensures [§2-504]
         1. If the agreed type of carrier becomes unavailable, or the agreed manner of delivery otherwise becomes commercially impracticable (and is neither party’s fault), but a commercially reasonable substitute is available, the subst. means of performance *must* be tendered and accepted [§2-614(1)]

*Curing Imperfect Tender*

1. If the original tender is rejected by the buyer bc it is nonconforming, the seller may
   1. Promptly notify the buyer of an intention to cure; **and** 
      1. The notice must be seasonable, and if time not agreed upon, a *reasonable* time
      2. Notice need not be in any particular form, although it should state the approx date (w/in permitted K period) by which substitution will be accomplished
   2. Within the K time for performance, remove the defect or breach
      1. If the seller does both, it constitutes sufficient performance, removing any breach resulting from the original improper delivery [§2-508(1)]
2. Surprise Rejections
   1. If the seller provides nonconforming goods and has reasonable grounds to believe that they will nevertheless be accepted, but the buyer rejects the tender upon notice the seller has a reasonable time in which to substitute conforming goods, *even if time for performance has expired* under terms of the K
      1. Occurs where merchants have been dealing w/ each other for a long time; or
      2. Where buyer has been accepting imperfect tenders in the past wants to get out of K w/o breaching

*Impossibility of Performance*

1. Doctrine of Commercial Impracticability
   1. UCC §2-615 codifies common law doctrine of impossibility of performance
   2. Exists where conditions under which both parties assumed the K was to be performed fail, and it becomes either impossible or impracticable to perform the K as contemplated
2. Requirements
   1. Seller is entitled to claim excuse by failure of presupposed conditions when:
      1. A contingency has occurred, the nonoccurrence of which was a basic presumption upon which the K was made; or
      2. Seller complies in good faith w/ a foreign or domestic government regulation that was promulgated *after the K was formed,* and the seller is unable to provide a commercially reasonable substitute for the agreed-upon performance
   2. No definition of commercial impracticability, exists as a question of fact
      1. Ex. Whether a labor strike justifies nonperformance depends on the expectation of the bargaining parties at the time K was entered into
         1. i.e., whether they would have expected the K to be performed even in the face of such labor difficulties
      2. Ex. Mere inflation or skyrocketing costs of performance do *not* justify nonperformance *unless* the variation is so great that no reasonable person would have foreseen such a risk at the time K was entered into
         1. i.e. milk supply k enforced even though supplier’s costs, which never varied more then 4%, jumped 23%
3. No discharge if Part Performance Possible
   1. If the seller is able to perform in part, this is required
   2. Seller must *allocate* production and deliveries among all customers in any *fair and reasonable manner*
   3. Seller may also, at his own option, include regular customers not then under K as well as the seller’s own requirements for further manufacture [§2-615(b)]
4. Procedure on Claiming Excuse
   1. Seller must *notify* the buyer (orally or in writing) that there will be a delay or nondelivery
   2. If there is going to be part performance via an allocation of production, seller must also advise the estimated quantity forthcoming [§2-615(c)]
5. Buyer’s Alternatives
   1. Upon receiving notice of excuse, buyer may:
      1. Terminate the K as to any delivery concerned, and may terminate the entire K where the prospective deficiency *substantially impairs the value of the whole K* [§2-616(1)(a)]; or
      2. Accept a modification of the K by agreeing to take any available quota in substitution for the amount originally called for under the K [§2-616(1)(b)]
   2. If Buyer fails to respond w/in reasonable time (30 days or less), the K will *automatically lapse* w/r to any deliveries the seller has indicated won’t be made [§2-616(2)]
6. No Waiver of Rights
   1. UCC prohibits any K clause made in advance that would purportedly “waive” the buyer’s right to terminate, etc…
   2. If Seller claims excuse, Buyer cannot be required to stand ready to perform [§2-616(3)]
      1. Seller, however, can effectively waive the right to claim excuse
      2. Ex. If the seller has agreed in advance to fulfill the K “despite any unforeseen contingencies,” the seller is bound no matter what [§2-615]

*Acceptance (Performance by Buyer)*

1. Facilitating Receipt of Goods [§2-503(1)(b)]
   1. The buyer’s first duty is to furnish facilities reasonably suited to receive the goods
2. Right to Inspection of Goods [§2-513(1)]
   1. Buyer has the right to inspect the goods *before payment or acceptance* and within a *reasonable time after receipt* of the goods, at any reasonable place
      1. What is reasonable depends on all the circumstances of the transaction
         1. Look at nature of the goods, marketability, usage of trade
      2. Inspection must be made at a reasonable hour
   2. If visual inspection is inadequate, buyer can test and sample reasonable amount of goods
      1. Expenses of inspection must be borne by the buyer, but may be recovered from the seller if the goods do not conform and are rejected [§2-513(2)]
   3. Loss of right to inspect by K provision
      1. This right may be inconsistent w/ certain K provisions that require the buyer to make full payment before getting possession of the goods or documents of title
         1. Payment against documents – provisions calling for the buyer to pay against shipping documents (documents of title) before receipt of goods override the right to inspect before payment [§2-513(3)(b)]
         2. Payment COD – where the K calls for payment COD, there is no right of inspection unless agreement provides otherwise [§2-513(3)(a)]
      2. Payment in such cases is *not* an acceptance and does not waive the buyer’s remedies for nonconforming goods [§2-512(2)]
3. Acceptance of Goods
   1. Buyer’s basic duty is to accept and pay for goods [§2-301]
      1. Acceptance may be by words or conduct of the buyer signifying approval of the goods delivered
         1. Acceptance after inspection – After having reasonable opportunity to inspect the goods, buyer indicates to seller either the goods are conforming *or* the buyer will take then in spite of their nonconformity [§2-606(1)(a)
         2. Failure to make valid rejection – buyer simply holds the goods for an unreasonably long time w/o notifying the seller of rejection [§2-606(1)(b)]
            1. However, buyer is entitled to a reasonable trial use period – depending on what the goods are (ice short, bricks longer)
            2. Possession is not the same thing as acceptance
         3. Performance of acts inconsistent w/ seller’s ownership – if buyer does anything inconsistent w/ seller’s ownership (consuming goods or selling them to others) constitutes acceptance [§2-606(1)(c)]
            1. There are circumstances where goods are perishable or decline speedily in value, buyer can resell w/o accepting
   2. Right to make partial acceptance
      1. If the goods are nonconforming in any way, the buyer may accept *any commercial unit* and reject the rest [§2-601(c)]
      2. If the buyer accepts part of any commercial unit, the entire commercial unit is deemed accepted [§2-606(2)]
   3. Effect of complete acceptance
      1. Once the buyer accepts the goods, the buyer cannot thereafter reject them as nonconforming [§2-607(1), (2)]
      2. In any event, acceptance does not bar a claim for damages
         1. If seller is late in delivery or delivers non conforming goods, buyer may keep and use goods, and still sue the seller for damages, or assert the claim as a setoff to any action brought by the seller to recover purchase price
         2. To preserve right to damages, buyer needs only be sure to give notice of the seller’s breach w/in a reasonable time after the buyer should have discovered it [§2-714]
      3. In certain situations, buyer can revoke acceptance and rescind sale (see below)
4. Payment
   1. Unless a credit sale, payment is due *concurrently* with delivery [§2-310]
      1. Parties can agree on any form of consideration: other goods, real estate, credit, etc
   2. Payment can be made in any reasonable manner *unless* the seller demand payment in legal tender *and* gives the buyer the time to procure it [§2-511(3)]
   3. If the agreed means or method of payment fails bc of a domestic of foreign government regulation, the seller may withhold or stop delivery until the buyer provides a means of payment that is commercially a substantial equivalent [§2-614(2)]

*Buyer’s Right to Preserve Evidence Where Condition of Goods is in Dispute*

1. Right of Inspection, Testing, and Sampling
   1. Either party on *reasonable notice* to the other may, for the purpose of ascertaining the facts and preserving evidence, inspect, test, and sample goods in the control of the other party [§2-515(a)]
2. Submission to Impartial Arbiter
   1. If the parties agree, they may submit the goods to a 3rd party for inspection and survey so that the 3rd party will be available to testify as to the conformity or condition of the goods
   2. Parties may also agree to make the findings by the 3rd party binding upon themselves in any subsequent litigation or adjustment [§2-515(b)]

*Buyer’s Anticipatory Repudiation of Acceptance*

1. Repudiation – In General
   1. An unconditional repudiation by either party or some future performance due under the K, other than the mere payment of money, is a breach of K
      1. Creates an *immediate* right of action by the other party, even if it takes place long before the time set for promised performance and before conditions specified I the promise have ever occurred
   2. Must be unequivocal *and* unconditional, a clear indication, or else no immediate right of action will arise in the other party (“I’m not sure” is only enough for demand assurance)
      1. Ex. Sales K for 1,000 widgets, S agrees to deliver widgets to B on July 1st, where B will pay. On May 15, B tells S he has discontinued the product and tells S to not send the widgets. This is an unconditional and unequivocal repudiation of K
      2. S does not have to wait until July 1, tender the widgets, and if B refuses to accept, sue him – S has an immediate right of action
2. Rights of Aggrieved Party
   1. When there is an anticipatory repudiation, the *aggrieved* party is under no obligation to consent to the repudiation of the K
      1. Aggrieved party may remain inactive only for a *commercially reasonably reasonable period of time* and then must take action in *mitigation*
      2. If the aggrieved party fails to do so, damages are measured as if some mitigation action had been taken following a commercially reasonable time [§2-610(a)]
   2. Remedy for Breach – Aggrieved party is entitled to any remedy for breach, even if the aggrieved party has notified the repudiation party that the aggrieved party would await the repudiator’s performance and has urged retraction of the repudiation [§2-610(b)]
   3. Seller in Process of Manufacturing – If the aggrieved party is the seller and is manufacturing goods to the buyer’s order when the buyer repudiates, seller need not suspend performance
      1. Manufacturing process may be completed and identify the goods to the K; or
      2. Seller may cease manufacturing and resell product in current state for scrap
3. Retracting repudiation
   1. Repudiating party is free to retract the repudiation and perform the K originally agreed upon, unless the nonrepudiating party has *materially altered* his position in reliance on the repudiation [§2-611(1)]
      1. E.g. by entering into another K to acquire or dispose of such goods
   2. Where retraction is proper, may use *any method* that clearly indicates to the aggrieved party that the repudiating party no intends to perform as originally promised [§2-611(2)]

*Buyer’s Demand for Assurance of Performance*

1. Grounds for Demand
   1. Either party can demand adequate assurance if there are reasonable grounds for insecurity as to the other party’s performance (e.g., apparent insolvency) [§2-609(1)]
      1. Reasonable grounds is a question of fact
      2. Need not be limited to financial conditions or performance dates
   2. Reasonable grounds for insecurity is *not enough* for anticipatory repudiation
2. Procedures for Demand
   1. Adequate assurance of due performance must be demand in *writing*, and the recipient must respond within 30 days [§2-609(4)]
      1. Failure to supply assurance is a repudiation of the K
   2. Until assurance is received, aggrieved party can *suspend further performance* [§2-609(1)]
3. Standards for Demand
   1. Between *merchants*, the reasonableness of grounds for insecurity and adequacy of any assurance are determined pursuant to commercial standards (i.e., customary in trade)
4. Effect of Acceptance or Payment
   1. Acceptance of any improper delivery or payment does *not bar* the aggrieved party’s right to demand adequate assurances as to any *future* performance [§2-609(3)]

*Installment Sales*

1. Substantial Performance Sufficient
   1. Installment sales contract is a K that requires or *authorizes the delivery of goods in separate lots* to be separately accepted
   2. Rule of substantial performance applied to installment sales K [§2-612]
2. Limiting Buyer’s Right to Reject Installment
   1. When the seller is to make deliveries in installments to the buyer, the buyer is privileged to reject an installment only if the defect in tender *substantially* impairs the value of that installment [§2-612(2)]
3. Limiting Buyer’s Right to Cancel K
   1. Only if nonconformity of one or more installments substantially impairs the value of the *whole contract* is there a breach of the entire K by the seller [§2-612(3)]
   2. Whether the breach is this serious is a question of fact
4. Seller May Recover for Performance
   1. UCC is very supportive of installment sales K
   2. Permits the seller under an installment K to recover for performance rendered, even where the deficiencies in seller’s own performance would clearly be a breach in any other kind of sales K

*Rejection (Performance by Buyer)*

1. Rejection
   1. Buyer entitled to reject nonconforming goods must *notify* the seller of the rejection w/in a *reasonable* time after receipt of the goods [§2-602(1)]
      1. Reasonable time contemplates due allowance for the right of inspection, the nature and size of shipment, etc…
      2. Notice must be given by the buyer even if the seller has *knowingly* shipped nonconforming goods – gives seller opportunity to cure the defect
   2. In single-delivery K, *any* defect entitles buyer to rejection
      1. In installment K, defect must substantially impair the value of goods tendered
2. Specifying the Defect to Seller
   1. Generally, buyer need *not* specify the particular defects that are asserted as grounds for rejection (i.e., rejection for nonconforming goods is usually sufficient)
   2. If buyer knew or should have known of the defect when rejecting, and buyer does not specify the defect, the buyer will be precluded from later relying on the unstated defect to justify the rejection or establish breach in 2 situations:
      1. Whenever the seller *could have cured* the defect if stated seasonably by buyer, or
      2. When both parties are *merchants* and the seller has made a request in writing for a full and final written statement of all defects that buyer proposes to rely [§2-605]
3. Effect of Rejection
   1. When seller has shipped defective or nonconforming goods, buyer has no duty to pay after an effective rejection [§2-510(1)]
   2. The goods and risk of loss remains with the seller
4. Duties as to Rejected Goods
   1. After rejection, the buyer has a duty *not* to exercise dominion over the goods
      1. If the buyer does so (e.g., using or selling the goods), most courts hold that an acceptance has occurred [§2-602(2)(a)]
      2. All courts will excuse postrejection use of goods where unavoidable (carpeting)
      3. Under the *revision*, any reasonable use following rejection (or revocation or acceptance) is permitted, although the buyer may be obligated for the *value* of use
   2. Duty to hold, return, or resell
      1. If buyer has rejected, but still is in physical possession of goods, the buyer must *reasonably* store the goods [§2-602(2)(b), (c]
      2. Buyer is also required to follow the seller’s *reasonable* instruction regarding disposal/reselling of the goods if three factors are present… [§2-603(1)]
         1. Seller has no agent or place of business in market of rejection;
         2. Buyer is a merchant; and
         3. Buyer has possession or control of the goods
      3. Instructions are not reasonable if they do not include indemnity for expenses, where requested by the buyer [§2-603(1)]
   3. If there are no seller’s instructions, the buyer may… [§2-604, 2-603(1)]
      1. Store the goods for seller’s account;
      2. Reship them to the seller; or
      3. Resell them for the seller’s account
   4. Buyer is entitled to reasonable expenses from the seller for caring and disposing of goods, including a selling commission [§2-603(2)]
      1. Buyer must make reasonable efforts to sell *perishable* goods [§2-603(1)]

*Revocation of Acceptance (Performance by Buyer)*

1. In general, buyer cannot reject goods after technical acceptance [§2-608]
   1. However, where serious flaws in the goods are discovered after acceptance, the buyer can revoke the acceptance
   2. The flaw must be one that *substantially impairs* the value of the goods
2. Steps for Revocation
   1. Buyer must justify acceptance of defective goods by proving…
      1. Buyer knew of the nonconformity buy assumed the seller would cure it (and the seller has failed to do so); or
      2. Defects were difficult to discover or buyer was deceived by seller’s assurances
   2. Buyer must give notice of the revocation to the seller
      1. Notice must be given w/in a reasonable time *after* the buyer *should have discovered* the defect [§2-608(2)]
   3. Effect of Change in Goods
      1. If, prior to revocation, the goods have substantially changed for some reason *other than the defect*, the buyer *cannot* revoke the acceptance
      2. Money damages caused by the breach is the only remedy here
   4. After Revocation
      1. Buyer still has the same duty to care for the goods as if they had originally been rejected (i.e., not use them, reasonably care for them)
         1. May claim a possessory security interest in goods for expenses
      2. Buyer who rightfully revokes is entitled to sue for damages (purchase price paid plus consequential damages not preventable by cover) [§2-711, 715]

*Risk of Loss: No Breach – General Rules*

1. Risk of Loss in General
   1. The UCC usually provides that risk of loss follows *possession* of goods
   2. If a party has caused the damage or destruction, that party remains liable for obligations under the K
2. Risk of Loss Shifts when Parties Agree
   1. The parties can agree as to when the risk of loss shifts [§2-509(4)]
   2. Sometimes the parties’ intent will be implied from the nature of the transaction
      1. Risk of loss is on buyer in sale or return transactions (until paid or returned)
      2. Seller has the risk in a sale on approval (until buyer signals acceptance)
3. When Parties have not agreed, Control is the determinative factor
   1. Where goods are shipped via carrier:
      1. In *shipment* K (i.e., merely requires the seller to place the goods in hands of a carrier and not to deliver them) the risk of loss passes to the buyer *upon the seller’s delivery* of conforming goods *to the carrier* [§2-509(1)(a)]
         1. Covers the following K: FOB origin, FAS vessel, CIF, and C&F
      2. In *destination* K (i.e., requires seller to deliver the goods to a particular destination), risk of loss passes to the buyer only when the goods *arrive* at the destination *and* are duly *tendered* to the buyer [§2-509(1)(b)]
         1. Covers FOB destination K
         2. Ex. If the K delivery term says that the price is “$5,000 FOB buyer’s warehouse,” the parties have agreed upon a destination K, and the price mentioned includes the cost and risk of delivering goods to the buyer
      3. Unless expressly designated a destination K (i.e. FOB destination), a K is construed as a shipment K
   2. Where goods are held by bailee (e.g. warehouse or a carrier):
      1. Where the goods are covered by a *negotiable* warehouse receipt, the risk of loss passes to the buyer upon receipt of the negotiable document[§2-509(2)(a)]
         1. Warehouse receipt is a doc giving proof of ownership of goods in storage
         2. Negotiable warehouse receipt is deliverable to the bearer or to another party named (holding document represents new ownership of goods)
      2. Where the goods in possession of a bailee are covered by a *nonnegotiable* document of title, risk of loss passes upon receipt of the document or other written directions from the seller *to* the bailee [§2-509(2)(c)]
         1. Nonnegotiable receipt specifies to whom the stored goods are deliverable
      3. If there is *no document of title*, negotiable or otherwise, risk of loss passes when the bailee tenders the goods or otherwise acknowledges the buyer’s right to immediate possession [§2-509(2)(b)]
   3. In all other nonbreach situations (“catch-all”): In all other nonbreach situations, the result generally depends on whether the seller is a merchant. If so, the UCC shifts the risk to the buyer only upon actual receipt of the goods. [§2-509(3)]
      1. If the seller is *not* a merchant, the risk of loss passes upon mere tender of delivery by the seller
      2. The revision’s default rule drops the merchant distinction and provides that risk of loss passes to the buyer upon receipt of the goods

*Risk of Loss: Breach*

1. In General
   1. Risk of loss presupposes that neither party was in breach at the time of the accidental damage or destruction of the goods
   2. Results are different if the seller or the buyer was in *default* at such time
2. Seller’s shipment of nonconforming goods
   1. If the goods shipped by the seller so fail to conform to the K as to give the buyer the right to reject then, the risk of loss remains w/ the seller until cure or acceptance [§2-510(1)]
3. Buyer Rejects
   1. In single-delivery K, any defect justifies buyer’s rejection
   2. In installment K, there is no right to reject unless the defect substantially impairs the value of goods tendered
   3. Risk of loss remains with the seller only if the goods have been properly rejected
4. Buyer Revokes Acceptance
   1. Where buyer discovers defects in the goods after accepting them, and defect is so substantial that it justified buyer’s revocation of acceptance
   2. Risk of loss is then treated as having been on the seller from the beginning (to the extent it is not otherwise covered by buyer’s insurance) [§2-510(2)]
5. Buyer’s Repudiation
   1. Where the seller has shipped *conforming goods* (i.e. is not in breach), but
      1. Buyer has wrongfully repudiated (or otherwise breached before the risk of loss has passed to the buyer), and
      2. Goods are damaged and not covered by the seller’s insurance, then
      3. The seller may treat the risk of loss as resting on the buyer for commercially reasonably period of time [§2-510(3)]
   2. This only applies where the seller is *uninsured* and has otherwise acted in a *commercially reasonable manner*
      1. In example below, if Buyer had repudiated and Seller had retained the goods for an indefinite period of time, Seller could not claim protection
      2. At the end of a commercially reasonable period of time, seller still in possession of goods regains the risk of loss, even though completely uninsured
   3. Ex. Buyer orders goods to be manufactured by seller and shipped to Buyer. Just prior to shipment, Buyer repudiates. The goods are destroyed by lightning the net day.
      1. Loss falls on Buyer since repudiation prevented the shipment that would have shifted the loss per the K

**Part VI: Remedies**

*Special Remedies – Remedies on Insolvency*

1. Insolvency
   1. Person is insolvent within the UCC meaning if that person:
      1. Has ceased to pay debts in ordinary course of business;
      2. Cannot pay debts as they become due; or
      3. Whenever liabilities exceed assets
2. Right to Withhold Delivery or Demand Cash Payment
   1. In certain circumstances, a seller is entitled to *withhold* delivery of goods [§2-703]; or
      1. When buyer wrongfully rejects;
      2. When the buyer rescinds (i.e., revokes acceptance);
      3. When the buyer fails to make a payment when due; or
      4. When the buyer anticipatorily breaches the k
   2. Demand *cash payment* for goods despite an earlier agreement for credit [§2-702 (1)]
      1. If the buyer becomes *insolvent* and the seller *learns* of the insolvency, then irrespective of any credit term in the K, the seller is privileged to demand cash
      2. This includes payment for goods previously delivered *and* for goods delivered thereafter, and the seller may w/hold future deliveries until cash is forthcoming
   3. Seller loses the right to w/hold delivery once the buyer gets possession of the goods
      1. In this case, the seller acquires the right of reclamation (see below)
3. Reclamation of Goods
   1. UCC recognizes an unpaid seller’s right to reclaim goods in two situations:
      1. Cash sales – where the buyer pays by check at the time of delivery, but the check is returned for insufficient funds [§2-507(2)]; and
         1. In a cash sale, the seller may reclaim the goods regardless of whether the buyer is insolvent
      2. Credit Sales – where, after delivery of the goods to the buyer, the seller discovers that the buyer is insolvent [§2-702(2)]
         1. In either situation, the seller may reclaim the goods by *demanding their return w/in 10 days* after the buyer receives them
   2. Buyer’s Insolvency
      1. Seller’s right to reclaim exists in all cases where the buyer is *in fact insolvent* at the time the goods are *received* 
         1. This is true regardless of whether the buyer knew or should have known of the insolvency; or
         2. Whether the buyer made any representations at all to the seller w/respect to financial conditions
   3. Effect of Buyer Misrepresenting Solvency
      1. If the buyer misrepresents solvency to the seller, in writing, within 3 months prior to the delivery, then the 10-day limit on demand for reclamation does not apply
      2. The seller then has a *reasonable time* to demand reclamation [§2-702]
         1. Some courts hold that the buyer’s check satisfies the requirement of a written representation of solvency
4. Enforcement of Reclamation Right
   1. Right of reclamation exercised by a written demand for return of the goods
      1. “Self help” not authorized – unless the buyer voluntarily returns the goods to the seller, the seller must institute proper legal proceedings
      2. The seller need only make written *demand* within the 10-day period, he does not lose right to reclaim merely by failing to obtain goods in that time period
   2. If the buyer refuses to honor the demand, then an *action for possession* of personal property – replevin or claim and delivery – will lie to recover it
      1. Successful reclamation of goods *excludes all other remedies*
      2. Cannot thereafter sue for loss of profits on the sale
5. Rights of Third Parties
   1. Transfer to a bona fide purchaser cuts off the seller’s right of reclamation
      1. If buyer has transferred possession of the goods to a purchaser for value without notice of the seller’s rights, BFP prevails over the seller as to possession
      2. Cannot reclaim good, and must sue buyer for cash damages
   2. Secured creditor who advanced money in the past and obtained a perfected security interest covering the debtor’s after acquired goods is treated as a good faith purchaser
      1. Prevails against the unpaid seller of the goods who attempts to reclaim them
6. Cash Sales – No Requirement of Insolvency
   1. Where cash sales are involved, if the buyer pays by check and the check bounces, the seller can reclaim the goods *regardless of buyer’s solvency* [§2-507(2)]

*Special Remedies – Limitation on Remedies*

1. Liquidated Damages Provisions
   1. UCC allows the parties to provide liquidated damages clauses *if:*
      1. The amount is reasonable; and
      2. There is no unconscionability (disparity in bargaining power, oppressive practice)
   2. Reasonable amount is measured in light of… [§2-718(1)]
      1. Anticipated or actual harm caused by the breach
      2. Difficulties of proof of loss; and
      3. The inconvenience or nonfeasibility of otherwise obtaining an adequate remedy
   3. If a liquidated damages clause is unreasonably small or large – void as penalty
      1. If valid, damages limited to the liquidated damages set forth in the K, even if P can prove a greater loss
      2. Liquidated damages intended for situations where it would be impractical or extremely difficult to fix the actual damages
2. Limitations on Damages
   1. Parties may limit or alter damages (including consequential damages) between themselves if the limitation or exclusion is *not* unconscionable [§2-719(1)(a)]
      1. Unconscionability is *presumed* in consumer goods cases
      2. Limitations are often found in warranty disclaimers
3. Exclusive Remedy Provisions
   1. Parties may choose their own remedies as long as *adequate minimum remedies* are available [§2-719(1)(b)]
   2. Exclusive remedies must be clearly stated, or courts will interpret around them
4. Failure of Essential Purpose of Remedy Limitation
   1. When an exclusive or limited remedy fails to function as planned by the parties, the injured party can *ignore that remedy* and have recourse to remedies under the UCC
5. Consequential Damages and Limitation of Remedies Relationship
   1. Courts have reached differing results in deciding whether the failure of a limitation’s essential purpose permits recover of consequential damages, or whether the aggrieved party must still prove that the disclaimer is unconscionable
   2. Courts are more likely to find the provisions dependent in consumer cases, thus making it easier to obtain consequential damages, and independent in commercial cases so that the commercial party must also prove unconscionability

*Special Remedies – Breaching Buyer’s Restitution*

1. Restitution of Payments Where Buyer in Default
   1. There is a right to recover advance payment on the purchase price where the *buyer* has defaulted, but the default has not caused must damage to the seller
   2. Ex. B agrees to purchase a machine from S for $1,000, and puts a $500 down payment. Later, B repudiates the K and S resells the machine to someone else for $1,200. S has not been damaged by B’s breach, and is actually better off.
2. “Rule of Thumb Offset”
   1. Buyer is entitled to restitution of the amount by which the advance payments *exceed 20% of the purchase price or $500*, whichever is *smaller* [§2-718(2)(b)]
      1. This rule eliminated by revision, which allows breaching buyer to recover any amount paid that exceeds the liquidated damages provision or, if no such clause, the amount which exceeds damages proved by seller
   2. Ex. S must return $300 as the amount exceeding 20% of the purchase price (500-200)
3. Effect of Valid Liquidated Damages Provision
   1. Result may differ if the K contains a valid liquidated damages clause
   2. Then, if buyer breaches, the seller may be required to refund only any excess of the buyer’s prepayments over the amount of valid liquidation damages [§2-718(2)(a)]
4. Other Damages
   1. Seller can recover greater damages, if proved, rather than the rule of thumb offset
   2. Even if the seller is unable to prove any damages, in addition to the offset, the seller can recover incidental damages and the value of any benefits received by buyer

*Seller’s Pre-Litigation Remedies*

1. Stoppage in Transit of Goods
   1. Seller can stop goods while they are in transit where
      1. Buyer’s insolvency is discovered *after* shipment; *or*
         1. Discovery prior to shipment can demand a cash payment/refuse shipment
      2. Whether the buyer repudiates a large order, fails to make a payment due, or for any other reason seller would have right to withhold goods (e.g. truck/planeload)
   2. Good must be *In Transit* – Consists of the time when they are delivered to a carrier until the buyer is in receipt (physical possession) of them
      1. Transit ends when, after the goods arrive at their scheduled destination, or a bailee acknowledges holding the goods on behalf of the buyer
      2. Carrier in transit is a carrier, carrier holding goods as a warehouse is a bailee
   3. Manner of Exercising Right of Stoppage – Right may be exercised by the seller giving *notice* to the carrier upon such circumstances that the carrier may, by reasonable diligence, prevent delivery of the goods
      1. All expenses of redelivering the goods to the seller are borne by him
   4. Effect of Exercise of Right – Where the right of stoppage has been properly exercised by the seller, the carrier must hold and deliver the goods according to seller’s directions
      1. If buyer sells the goods to another buyer in the ordinary course of business while goods are in transit, the 2nd buyer cuts off seller’s right of stoppage [§2-403(2)]
2. Identifying Conforming Goods and Salvaging Unfinished Goods
   1. Seller’s primary prelitigation remedy is to resell goods after they are *identified* to the K
      1. Issue is if buyer breaches and the seller has possession of conforming goods not yet identified to the K or goods in the process of manufacture
   2. Designation Conforming Finished Goods – If Seller is in possession of conforming goods, upon learning of the buyer’s breach, the seller may identify the goods to the K regardless of their resalability [§2-704(1)(a)]
      1. Ex. B order 100 cases of dog food from S, who has 10,000 cans. B then advises S that B will not perform. S may segregate 100 cases from his inventory and mark them as being held for performance of K by B. This puts S in a position to resell the 100 cases and recover any diff between K price and resale price.
   3. Unfinished Goods – Seller may stop the manufacturing process and identify goods in their *incomplete state* only where the goods are *demonstrably intended* for the particular K (e.g., imprinted calendars) [§2-704(1)(b)]
      1. Seller may also *complete* the manufacture of the goods if it appears to be a *reasonable commercial judgment* and identify completed goods to the K; or
      2. The seller can cease manufacture and resell the unfinished goods for salvage sale
         1. Both situations fall under §2-704(2)
3. Resale
   1. UCC provides that where the seller resells goods, the seller may recover as damages the difference between the *resale and contract prices*
      1. The resale must be made in *good faith* and in a *commercially reasonable* manner
      2. Seller is *not limited* by the “market value” [§2-706(1)]
   2. Public v. Private Sale
      1. Seller may resell at either a public (auction) or private sale, but *notice* to the buyer is required in either case [§2-706(2), (3)]
         1. If a public sale, seller must also advise the buyer of the time and place of the sale, unless the goods are perishable or threaten to decline speedily in value (SBowl shirts), then notice requirement is waived [§2-706(4)(b)]
         2. Failure to give proper notice results in a denial of any further damages
      2. Seller is permitted to buy at a public sale, but not a private sale
      3. If the seller obtains more on the resale than the original K price, the seller may keep the excess and does not account to the buyer therefore [§2-706(6)]
4. Cancellation
   1. The seller may choose to cancel the K [§2-703(f)]
      1. Cancellation is not an election of remedy
   2. This course of action retains for the seller any remedy for breach of the whole K or any unperformed balance [§2-106(4)]
      1. Different from recission, as a seller who rescinds a K has elected to pursue a remedy inconsistent w/ any claim for damages
5. Remedies of Third Parties
   1. Several of the seller’s remedies are available to certain third parties who are financing or otherwise have a financial interest in the transaction (e.g., a bank)

*Seller’s Litigation Remedies*

1. Action for Full Purchase Price
   1. Seller can sue the buyer for “specific performance” (full payment) under the K
2. This “specific performance” remedy is available in three circumstances:
   1. When the buyer has accepted the goods; [§2-709(1)(a)]
   2. When the goods are damaged after the risk of loss has passed to the buyer; or
   3. When the goods still in the seller’s possession are such that they cannot be resold (e.g., specially manufactured goods) [§2-709(1)(b)]
      1. If the goods have been designated/identified to the K, and the seller after reasonable efforts was unable to resell or clear that efforts would be unavailing, seller can sue buyer for the full price
      2. If the seller recovers the price of such goods from the buyer, and the buyer still refuses to take the goods, should seller resell the goods later, any proceeds of the sale belong to the *buyer* [§2-709(2)]
3. Action for Damages for Nonacceptance
   1. When a buyer refuses to accept conforming goods, the seller may
      1. Resell the goods and recover the K-resale differential [§2-706(1)]
         1. This is true even if the resale was for less than the “market value,” increasing the damage spread
         2. Still must resale in a commercially reasonable manner though
      2. Recover the K-market differential *at the time and place* that the goods were tendered; [§2-708(1)] or
         1. In proving market price at the time of tender, seller may use
            1. Price of the goods in any established commodity market
            2. Employ reports in official publications, periodicals, or
            3. Use the testimony of witnesses [§2-724]
         2. If there is no available evidence of market price at the time and place of tender, recovery may be based on market price w/in reasonable proximity, spatially and chronologically [§2-723(2)]
            1. Must give buyer advance notice of the intention to use a different market place or time, to prevent unfair surprise [§2-723(3)]
4. Lost Profits
   1. If the K-resale or K-market differential remedies are inadequate to put the seller in as good a position as performance would have, recover for *lost profits* [§2-708(2)]
      1. Lost profit measure is appropriate measure of damages when B has repudiated the purchase of a standard-priced item in unlimited supply, which the seller is able to resell, at the same price, to another
      2. Ex. S sells car for $5,000, but B repudiates. S sells the same car for $5,000 the next day. S is damaged, bc he could have sold 2 cars instead of 1. Thus, S can recover against B the *profit* he would have made on the first sale.
   2. Lost “profit” includes the recovery of reasonable “overhead”
      1. Defined to mean fixed costs of the seller’s operation that in no way vary with the number of items sold
      2. Ex. decline in overhead costs with a fourth sale of an item. Should the fourth buyer breach, can recover for lost profit including decline in overhead expense
5. Incidental damages
   1. I all of the 3 above measures, the seller is entitled to recover incidental damages
      1. Incidental damages includes expenses or commissions incurred in stopping delivery, in the transportation and care of goods after buyer’s breach, and all other commercially reasonable charges [§2-710]
   2. However, the seller must deduct any expenses saved as a result of the buyer’s breach
6. Deduct expenses saved
   1. Any expenses saved as a result of the buyer’s breach must be deducted from any recover by the seller
   2. Ex. if S was required to deliver goods in packaging costing $1/package, but due to the breach is able to package the goods for 50 cents, the 50 cent/unit saving is deducted from the seller’s damages

*Buyer’s Pre-Litigation Remedies*

1. Sale of Goods to Recover Prepayments
   1. Buyer who has prepaid all or part of the purchase price and has received goods that *do not conform* to the K is in a position like that of an unpaid seller in possession of goods
      1. Buyer has a security interest in the goods for the amount of the prepayment
      2. If the buyer offers to restore the seller’s goods and demands repayment of the price paid, and seller then refuses, the buyer may sell the goods. [§2-711(3)]
   2. This right exists regardless of whether the buyer ever accepted the goods
      1. i.e. buyer may have rejected upon receipt, but still be in possession
   3. Unlike an unpaid seller, however, the buyer has only a security interest in the goods and therefore must remit to the seller the proceeds from the resale in excess of the buyer’s prepayments plus any *costs* incurred in handling, storing, and reselling the goods
2. Right to Cover
   1. Right to “cover” is the right to purchase *substitute* goods on the open market [§2-712(1)]
      1. Buyer can then sue the seller for the excess of the cover price over the k price
      2. Buyer must act reasonably and in a timely manner
   2. Substitute Goods – Cover involves the procurement of substitute goods
      1. Not required that the buyer purchase the exact same thing ordered from the seller
      2. If precisely the same commodity is unavailable, the buyer may purchase a commercially reasonable substitute
   3. Cover must be Timely – Cover must be made w/o unreasonable delay
      1. Buyer has whatever time is commercially reasonable to locate and purchase the precise commodity or the best available substitute
   4. No duty to cover
      1. A buyer has no duty to cover [§2-712(3)]
      2. However, failure to do so, when reasonable, bars the buyer from recovering *consequential damages* that could have been prevented by covering
3. Recoupment
   1. A buyer may deduct from payments to the seller, damages incurred through nonconformity in performance (i.e., a setoff) under the particular K [§2-717]
      1. If seller’s deliveries are short quantity or too late, are freight-collect when they should have been freight-prepaid, or the buyer is damaged in any other way by seller’s breach, buyer may deduct the damages form the K price
      2. Subtraction of damages against price can only be done on the same K
   2. The buyer must notify the seller of any nonconformity *and* of the buyer’s intention to set off damages before doing so
4. Preparing Buyer – “Right to Goods”
   1. If the buyer has prepaid – in part or in full – for goods (i.e., put them on layaway) and the seller becomes insolvent, buyer may reclaim goods in seller’s possession if:
      1. The goods must be identified (i.e., ascertained as belonging) to this one K between the parties;
      2. The buyer must make and keep full tender of any unpaid purchase price; *and*
      3. The seller must have becomes insolvent *within 10 days* of the receipt of the buyer’s first installment [§2-502]
   2. This situation almost never occurs, no practical help to the buyer

*Buyer’s Litigation Remedies*

1. Possessory Actions – Replevin
   1. UCC authorizes the buyer to seek replevin (i.e., an action to recover the goods) when:
      1. Inability to cover – buyer may seek replevin if [§2-716(3)]:
         1. Goods are identified to the K; and
         2. After a reasonable effort, the buyer is unable to procure substitute (cover) goods in the market, or the circumstances reasonably indicate that such effort will be unavailing
      2. Satisfaction of security interest – action in replevin may also be used if:
         1. Seller has shipped the goods under reservation; and
         2. The buyer has made or tendered payment of the price but the seller, some carrier, or bailee has failed to release the goods to the buyer
2. Possessory Actions – Specific Performance
   1. UCC permits specific performance (terms, conditions, *and* payment) in any case where goods are unique, or in other proper circumstances (see below) [§2-716(1)]
      1. Goods in scarce or short supply
      2. Damages are inadequate or too difficult to determine
         1. Limitation on damages – fact that the buyer obtained a closeout price from the seller that could not be duplicated is not enough to entitle the buyer to specific performance
         2. Buyer limited to an action for damages between price quoted and replacement cost
3. Actions for Damages for Non Delivery (when seller fails to deliver the goods)
   1. Contract-Cover Differential
      1. Buyers can go purchase substitute goods (cover)
         1. Buyer may recover the difference between the cover price and the K price
         2. Cover must be chosen in good faith [§2-712(2)]
         3. Buyer choosing to cover is entitled to whatever added cost incurred when obtaining replacement goods
   2. Contract-Market Differential
      1. Buyer may recover against the seller for the difference between the K price and the market price at the time buyer learned of the breach [§2-713(1)]
         1. The “market” is the place where the seller should have tendered the goods if the seller refuses to deliver
         2. If seller makes a nonconforming tender, which buyer rejects, the market price is determined at the place of arrival
   3. Consequential Damages
      1. Buyer can recover for any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise [§2-715]
         1. Promotes a lost profits recovery where the buyer cannot go out into the market to cover, and is deprived of profits on resale
         2. Lost profits include loss of future profits (goodwill) as well
         3. Normally, buyer cannot recover consequential damages unless buy has made an attempt to “cover,” but rule does not apply where cover would be unreasonable (e.g., K to buy at a low price, can’t find price elsewhere)
   4. Incidental Damages
      1. Buyer is entitled to recover any incidental damages resulting from the seller’s failure to deliver conforming goods
      2. Damages include any commercially reasonable charges in connection w/ effecting cover, and any other reasonable expense incident to delay or other breach
         1. Inspection, receipt, transport, care, custody of goods, etc…
      3. UCC does not allow punitive damages, no matter how aggravated the S’s breach
   5. Deduction for Expenses Saved
      1. From any recovery had by the buyer, there must be deducted any expenses saved in consequence of the seller’s breach
      2. Ex. Savings on cover must be deducted from any claim on incidental damages [§2-712(2), 2-713(1)]
4. Actions for Breach of Warranty (When Seller has breached the K after Buyer’s acceptance)
   1. Breach of warranty *before* acceptance
      1. If breach of warranty occurs prior to acceptance of the goods, breach is treated like any other failure to perform the K…buyer may:
         1. Reject the goods outright (but provide notice and S right to cure defect
         2. Demand specific performance (see above)
         3. Cover (see Buyer’s pre-litigation remedies)
         4. Action for damages for non delivery (see above)
   2. Breach of warranty *after* Buyer’s acceptance
      1. Once buyer has accepted the goods, UCC provides that Buyer may:
         1. Recover any loss in *value* of the goods bc of the breach [§2-714(1)]
         2. Also gain consequential and incidental damages where proper [§2-714(3)]
      2. In appropriate circumstances, buyer may revoke acceptance and recover damages
         1. See P. 30 for Revocation of Acceptance
   3. Loss in Value of Goods (Standard Damages)
      1. Standard measure of *value* in goods in a breach of warranty suit is:
         1. The difference, at the time and place of acceptance,
         2. Between the value of the goods *accepted* and the value they *would have had if they had been as warranted* [§2-714(1)]
      2. The *price* of the goods has nothing to do with fixing damages
         1. Where the market price has fluctuated upward or downward from the price at which B bought, and the B still elects to accept the goods and sue for breach of warranty, B gets the benefit of bargain under the K
         2. B gets the difference between what was promised and what was received
5. Consequential Damages in Breach of Warranty
   1. Loss of value of goods often represents only a part of the B’s loss
      1. UCC also imposes liability where the S, *at the time of K* had reason to *know* of additional loss that would result from a failure to meet the buyer’s needs or requirements [§2-715(2)(a)
   2. CD may include economic loss
      1. In appropriate cases, CD may included any of the following:
         1. Loss of profits from expected resale of goods;
         2. Loss of operating profits due to disruption of business; and
         3. Damages to good will or business reputation
      2. CD for economic loss requires forseeability of additional loss
         1. CD for injury to person/property does *not* require forseeability
      3. Note: Retailer who is held liable to a customer for breach of warranty of merchantability will normally have the same cause of action against the wholesaler or manufacturer who supplied the product
         1. Whatever damages retailer is forced to pay customer is recoverable as CD in action against the original manufacturer/wholesaler
   3. CD may include noneconomic losses
      1. Ex. Purchaser of a defective “big game” rifle was allowed to recover consequential damages for…
         1. Safari expenses, and
         2. $10,000 for “loss of prestige in killing a Bengal Tiger”
      2. Personal injury of property damage – Of course, where there is a foreseeable risk of harm to person or property through use of the S’s product, the buyer may recover CD for personal injuries or property damage resulting from breach of warranty [§2-715(2)(b)]
         1. In personal injury, includes med-bills, damage for pain/suffering
         2. For injury to *person* or *property*, forseeability is not required
   4. Limitation to CD for Breach of Warranty – Concept of “Cover”
      1. Where CD are claimed on account of the non-availability of the goods bargained for (rather than on account of injuries or losses sustained through their use”
      2. Then to whatever extent the damages could have been prevented by “covering” w/ goods from another source, damages are limited to cost of “covering” (see p. 39)
6. Incidental Damages
   1. Buyer may also recover any cost or expense reasonably incurred incidental to seller’s delay or delivery of defective goods (the breach of warranty after acceptance)
      1. E.g., storage or inspection, return freight, costs of cover, etc…

*Statute of Limitations*

1. Statute of Limitations – In General
   1. UCC creates a 4-year SoL on actions to enforce rights or obligations under any K sale, oral or written [§2-725(1)]
2. Parties’ Agreement
   1. Parties are permitted to shorten the SoL by agreement to *no less than 1 year*, but they are *not* permitted to *lengthen* it [§2-725]
3. Accrual of Actions
   1. Statutory period starts to run *when the cause of action accrues*
      1. Cause of action accrues when the aggrieved party could bring suit
      2. i.e. When the breach of K occurs
   2. Normally, this is the date on which the other party’s performance was due under the K
      1. Statutory period starts to run regardless of the aggrieved party’s knowledge or lack of knowledge [§2-725(2)]
4. Breach of Warranty
   1. Presumption that the period starts to run *at delivery* in breach of warranty actions
      1. This is true even if the buyer does not discover the breach until much later
   2. *Express warranties of future performance* start to run the 4-year SoL when buyer should have discovered the breach
      1. New car had a “5-year” warranty, and it broke down in the 3rd year. The 4-year SoL will run from that moment, not the moment of delivery
   3. *Implied warranties* are always breached on delivery
      1. Implied warranties
         1. Merchantability
         2. Fitness for a particular purpose
         3. Wholsomeness
      2. Ex. SoL begins when manufacturers tender delivery to the dealership
         1. Manufacturers must protect themselves w/r to SoL period tolling
         2. Manufacturers know the date when it tenders to the dealer, however, does not know when dealer ultimately sells it
   4. Instances of Fraud
      1. An express warranty on a fraudulent sale, makes the warranty a fake
         1. Court can gain a later accrual date for SoL in this instance
      2. Argue that the express warranty is actually a warranty of authenticity, and extends to all future performance bc it only matters if the good is authentic or fake (Q. 83)
         1. Ex. Sale of imitation painting that was warranted as an authentic piece

**Part VII: Documents of Title**

*Introduction*

1. Possession of Documents Equals Ownership of Goods
   1. Ownership of goods is frequently evidence by documents of title that arise from the shipment and/or storage of goods
      1. Documents are more than mere conveyances of title, such as an assignment
   2. If negotiable, the documents are deemed to represent the goods themselves
      1. Possession of the documents, to varying degrees, is equivalent to ownership
2. Applicable Law
   1. Article 7 of the UCC is devoted to documents of title
      1. Replaces comparable provisions of the Uniform Sales Act, the Uniform Bill of Lading Act, and the Uniform Warehouse Receipts Act
   2. Federal law (most importantly Federal Bill of Lading Act) governs the interstate shipment of goods, and Article 7 is limited to intrastate shipments

*Bills of Lading*

1. Definition
   1. Bill of lading is a document issued by a carrier to the shipper of goods
      1. Lists the goods received by the carrier
      2. States the agreed destination for the goods
      3. Terms under which the carrier undertakes to deliver them
   2. Bills of lading may be negotiable or nonnegotiable
      1. Negotiable means that the parties have put the piece of paper in such a form that they intend transferees of the paper to take it *free from the normal defenses* that would otherwise transfer with it
         1. E.g., mistaken delivery, fraud, breach of underlying K, etc…
2. Other Article 7 Terminology
   1. Shipper – Person who delivers the goods to the carrier for shipment
   2. Consign – Is to “send” something to another
      1. Shipper is the consignor, and the person the goods are delivered to is a consignee
   3. Issuer – Issuer of a document of title is the person who creates it and hands it to another
      1. Typically, the issuer will be the carrier (or if the document is a warehouse receipt, “the warehouser”
3. Nonnegotiable Bills (Straight Bills)
   1. Under federal law, a nonnegotiable bill of lading (i.e., one that travels with its defenses) is called a “straight bill”
      1. Straight bill of lading is one stating that the goods are consigned to a specified person (e.g., consigned to the XYZ co.), but not to that person’s “order” (e.g. consigned to the order of XYZ Co.) [§7-104]
         1. Under such a bill, the carrier is K obligated to deliver the goods to the named consignee only
      2. Straight bill is nothing more than a receipt for the goods and a K for their carriage
   2. Carrier’s Obligation– Under a straight bill, a carrier may be held liable for conversion of the goods if the carrier delivers them to someone other than the named consignee, even though such person was in possession of the straight bill covering the shipment
      1. Delivery Order: delivery to someone other than the named consignee is ok if the carrier has received *written instructions* from the *shipper* to make such a delivery
   3. Consignee’s Rights – Due to the nature of the document, it is not necessary that the consignee present or surrender the bill of lading in order to pick up the goods
      1. The consignee has the right to receive the goods, and the carrier is obligated to deliver them, *without the surrender of the straight bill*
4. Negotiable Bills
   1. Negotiable bill is a bill of lading where the carrier undertakes to deliver the goods *to whomever is legally in possession of the bill*
      1. The person who is in legal possession of a negotiable bill is entitled to possession of the goods described in the bill
      2. Thus, legal possession of the bill is *tantamount to ownership* of the goods
      3. Negotiable bills are effective “documents of title”
   2. Negotiable bill may be either:
      1. Order bill (e.g. consign to the order of XYZ co.); or
         1. Negotiated by *indorsement* by the named consignee *plus* delivery to the party to whom the bill is being negotiated [§7-501(1), (2)(b)]
      2. Bearer bill (e.g. consign to bearer) [§7-104(1)(a)
         1. Can be negotiated by mere *delivery* of the bill [§7-501(1)(2)(a)]
5. Negotiable Bills – Types of Indorsements
   1. An order bill may be indorsed in blank (i.e., consignee merely signs the bill), which continues the *full negotiability* of the instrument
   2. Or the indorsement may be *special* (i.e., naming a specific transferee – deliver to Jones Co.), which limits the further negotiability to the named transferee
      1. But named transferee may indorse it in blank (the transferee’s name only) and restore full negotiability [§7-501(3)]
6. Negotiable Bills – Effect of Failure to Indorse
   1. If an order bill has been transferred for value, but the transferor has failed to indorse it properly, no rights pass
   2. However, the transferee can compel the transferor (by an equitable action for specific performance) to make an indorsement
   3. Indoresment is effective, however, only as of the time it was made [§7-506]
7. Negotiable Bills – Warranties on Negotiation
   1. One who negotiate a negotiable bill (by indorsement and delivery of an order bill or by delivery of a bearer bill) thereby warrants that:
      1. The document is genuine;
      2. The transferor has a legal right to transfer it and the goods it reps; and
      3. The transferor has no knowledge of any fact that would impair the validity or worth of the document [§7-507]
   2. Warranties that run with Goods unaffected – the fact that a seller chooses to transfer ownership by a document of title rather than by physical delivery of the goods has no effect on the warranties that run with the goods
      1. Party negotiation a negotiable bill makes the warranties mentioned above in addition to any warranty made in selling the goods
      2. Thus, unless disclaimed, the usual express and implied warranties that are made in connection w/ the goods are also made on the sale of the document of title representing the goods
      3. The above warranties on negotiation do *not* include a guarantee that the goods will be delivered by the carrier
   3. Warranties arise on negotiation – The above warranties arise only where there is a negotiation – an outright transfer of the bill
      1. If the document is merely assigned for collection, warranties do not apply
      2. Ex. Bank acquires a negotiable bill as security for money advance to seller by the bank on goods shipped. When bank forwards the bill to the buyer’s bank for collection, there are no warranties except for good faith and authority to act in the transfer between the two banks
8. Carrier’s Obligations
   1. To Deliver Goods
      1. Having issued a negotiable bill, the carrier is obligated to:
         1. Deliver the goods to the bearer of the bill if it is a bearer bill, or
         2. If it is an order bill, to the lawful current *holder* of the bill (i.e., the consignee or some person to whom the consignee has negotiated the bill).
      2. If the carrier improperly delivers the goods, the carrier is liable for conversion
         1. The carrier is always protected by complying w/ the terms of the document, even if the shipper was not authorized to ship the good or the party to whom the carrier delivered had no authority to receive them
      3. As long as the carrier delivers the goods in accordance w/ the bill (bearer or indorsee of a negotiable bill, or to the consignee on a nonnegotiable bill), the duty is satisfied, and the carrier is not liable for misdelivery
   2. Taking up the Bill
      1. It is also the carrier’s duty to take up and cancel the negotiable bill upon delivery, or, if the delivery is partial, to not conspicuously on the face of the amount of the partial delivery
         1. If the carrier fails to do so, and the holder thereafter sells the bill to a bona fide purchaser, the carrier is liable for the loss
      2. Similarly, if the document of title is a warehouse receipt, the warehouser who has issued a negotiable warehouse receipt must be careful to get it back before releasing goods from the warehouse [§7-403(3)]

*Warehouse Receipts*

1. Definitions
   1. Warehouse receipt is a document issued by a warehouser, acknowledging receipt and storage of the goods identified in the document
   2. Receipt usually also specifies the date of receipt, the rate being charged for storage, etc…
      1. Such receipts may be negotiable or nonnegotiable
2. Purpose of Warehouse Receipts
   1. Warehouse receipts are used to finance the sale of merchandise held in storage
   2. Sometimes the storage is at the warehouser’s premises, and at other time it is on the owner’s premises, or a “field warehouse”
3. Procedure
   1. Warehouse receipt financing is accomplished by the owner’s storing goods with the warehouser and receiving in return the warehouse receipt
      1. The owner (bailor) then takes the receipt and sells it or pledges the receipt as *security for a loan*; or
      2. Where a buyer has not paid for goods ordered from a seller, the seller may ship the goods to a warehouse and have a warehouse receipt issued in the buyer’s name, to be delivered to the buyer upon receipt of payment
   2. Transfer of a *negotiable* warehouse receipt is basically transfer of ownership of the goods covered under the receipt
      1. Transfer leads to the making of warranties for the sale of goods under Article 2
4. Bills of Lading – Same Rules Apply
   1. Problems encountered and rules applicable to warehouse receipts are substantially the same as those pertaining to bills of lading
   2. Discussion and rules in the section on bills of lading (see above) are applicable to warehouse receipts, and reference should be made to them when handling any similar problems involving warehouse receipts

*Rights of Third Parties*

1. Rights of 3rd Parties Under Document Not Regularly Issued
   1. If the document is a forgery, or if its issuance was obtained by fraud or deception, *no rights* are created thereunder as against the true owners of the goods
      1. An exception to this rule exists where the person who procured the negotiable document was a *bailee* to whom the true owner had *entrusted* the goods
   2. Entrustment creates an aura of *apparent authority* [§2-403(3)]
      1. If the true owner of goods entrusts them to someone who deals regularly in goods of that kind (merchant), and the merchant sells the goods to a buyer in the ordinary course of business (w/ no knowledge of the true situation), the buyer gets good title of the goods purchased
      2. Even though the true owner has lost them to an innocent purchaser, owner may sue the bailee (merchant) for breach of the bailment k, conversion, etc…
2. Rights of 3rd Parties Under Document Regularly Issued But Negotiated w/o Authority
   1. Where a negotiable document has been validly issued, but has been subsequently negotiated w/o authority to an innocent purchaser (due negotiation), the purchaser gets full title to the document and the goods
      1. Due negotiation is the transfer of the document to the holder who buys in good faith and without notice of problems, in the regular course of business or financing or payment of debt [§7-501(4)]
3. Rights of 3rd Parties Under Document Issued to Cover Nonexistent Goods
   1. Sometimes, through carelessness or dishonesty, a carrier signs a document showing that it received goods not actually received (Misdescription)
   2. In these cases, the carrier can limit its liability by noting on the document, “shipper’s weight, load, and count,” or similar language
4. Bills Drawn to Seller or Seller’s Order – Divided Property Interests
   1. A seller who does not wish to ship goods to a buyer on open credit may consign the goods to seller (straight bill) or to the order of the seller (order bill)
      1. Seller retains right to possession of the goods until payment received from buyer
      2. Buyer cannot obtain the goods from the carrier until the seller has negotiated to the buyer the bill of lading covering the shipment
      3. If the carrier delivers the goods to the buyer without obtaining the bill, the carrier is liable to the seller for conversion
   2. This practice is called shipment under reservation
      1. Means that seller has a reserved title and thus maintains control over the goods
      2. Gives the seller a *security interest* in the goods shipped [§2-505]

*Collection Through Banks*

1. Shipment Under Reservation
   1. Seller consigns the goods to himself on a negotiable bill of lading, thus retaining a security interest and the right to possession of the goods
      1. Shipment under reservation reserves in the seller a security interest in the goods quite apart from title to the goods
   2. This method is widely used to ensure that the buyer pays for the goods before obtaining possession [§2-505(1)]
      1. Buyer has no right to obtain physical possession of the goods from the carrier unless the buyer presents the bill of lading, and the seller will, of course, not indorse it over to buyer until payment is made
2. Seller’s Duty Regarding Delivery of Documents
   1. It is customary in shipments under reservation for the seller to take the bill of lading, an invoice, and other appropriate documents to the seller’s bank and have the bank transmit them to the buyer’s bank
      1. Buyer then pays the required price to the bank, which releases the bill of lading so that the buyer can collect the goods
   2. Procedure – Delivery of documents through banking channels is specifically in UCC
      1. Seller must tender all such documents in correct form and properly indorsed so that the buyer can obtain the goods from the carrier [§2-503(5)(a)]
      2. Referred to as Payment against documents
   3. Draft – Frequently, in a documentary transaction, the docs will be accompanied by a draft
      1. Draft is very similar in form to an ordinary check, in substance it provides:
         1. “Pay to the order of [my bank] the price on such and such a date, signed Seller,” and will be addressed to the buyer
      2. For the buyer to procure the documents entitling the buyer to possession of the goods, the buyer will “accept” the draft by writing “Accepted” on it
         1. This obligates buyer to pay it
         2. Drafts are used to enable collection of the price of goods against documents to be handled through banking channels
      3. Refuse to accept a draft – If the buyer refuses to accept a draft, this constitutes rejection of the goods and sets in motion seller’s remedies
      4. Acceptance of draft – If the buyer accepts the draft, whether the docs are turned over immediately or later depends on the payment date specified in the draft:
         1. If the payment date is more than 3 days after the draft is presented to the buyer for acceptance, the buyer is entitled to get the docs upon acceptance, without making payment at that time, in other words, it’s a sale on credit
         2. On the other hand, if the payment date specified is less than 3 days from the date on which the draft is presented to the buyer for acceptance, the buyer cannot get the docs (absent contrary agreement) until the draft is paid, even though the buyer accepts it immediately
3. Liability of the Collecting Bank
   1. Certain seller’s remedies may also be exercised by 3rd parties who are financing the particular sales transaction or who otherwise have a financial interest in the sale
   2. Where a bank, finance company, or other lender has advanced funds by purchasing or paying a draft drawn by the seller against the buyer…
      1. The financing agent acquires not only rights in the draft, but also the rights of the seller-shipper in the goods that are subject of the sale
      2. This includes the right to stop delivery on learning of buyer’s insolvency and the right to reclaim the goods [§2-506(1)]
   3. The UCC uses the term “person in position of a seller” to cover an agent who has paid or become liable for the price of goods on behalf of the principal or anyone who otherwise holds a security interest or right in the goods similar to that of the seller [§2-707(1)]
      1. Such a person has the right to withhold or stop delivery of the goods and to recover incidental damages, but has no other remedies or rights in goods [§2-702]