Sales classnotes, Fall 2004. Professor Beard.

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Monday, August 23

Introduction to Article 2

The seven parts of Article 2

1. Does A2 even apply?
2. Is there a K?
3. Obligations
4. Obligations wrt. title
5. Performance
6. Breach, repdudiation, and excuse—when will performance be insufficient?
7. Remedies (except there's some stuff on remedies in parts 5 and 6)

Definitions: see, to start with, §§ 1-201 and 2-103. Beard notes that it is difficult to emphasize too much how important the Code's definitions are.

Commentary: the commentary, for one thing, is legislative history. But it's better than that, actually. It is often

- very persuasive, and
- very enlightening

(however, the commentary isn't as enlightening and persuasive in A2 as it is elsewhere in the UCC).

Nevertheless, the anwers must always, ultimately, be found and based on actual text in the statute itself.

Cross-references: these are usually not complete in the UCC.

Wednesday, August 25

Scope of Article 2

- What's a "sale"? It's passage of title for a price (§ 2-106(1)).
  - Is a lease a sale? No, because there's no passage of title.
  - Is a gift a sale? No, because there's no price.
  - Is a bailment a sale? No, because there's no passage of title.

- "Unless the context otherwise requires," says § 2-106(1). Why? Beard says that this is here because the world is not divided into boxes. There is going to be some grey that needs to be covered.

Scope analysis:

1. What's the deal?
2. What's the subject of the deal?

Note that § 2-102 expresssly defines the scope of A2 as "transactions" in goods. So, don't forget this, especially as a potential argument.

- "Goods": § 2-105 says "goods" are all things movable at the time of sale.
  - Note that "goods" expressly includes specially manufactured goods and unborn young of animals and growing crops and other identified things attached to realty.
  - It expressly excludes the money in which the price is paid, investment securities, and things in action.
  - What's a "thing"? Well, it has a certain element of tangibility to it—that's how the courts have seen it, at least.
  - What is § 2-107(1) talking about? It's talking about things that are *not* movable at the time of contracting. This is a policy call—we want the seller to sever because these things (minerals, oil, structures) are so much like realty that they almost *are* realty.
    - Note that what's a "structure" could vary from jurisdiction to jurisdiction.
    - What's "removal"? That meaning becomes clear from the caption, which mentions "severed"—"removed" is like "severed."
  - What about § 2-107(2)? This covers a whole bunch of things:
    - Growing crops: it's a sale of goods no matter who severs.
    - Other things attach to realty, capable of severance without material harm, and *not* described in § 2-107(1): it's a sale of goods no matter who severs.

Monday, August 30

Mixed transactions

When you buy a PC with preloaded software, what did you buy? More importantly, if something doesn't work, what's your recourse?

- How do we know what to do with mixed transactions? What's the best way to find out if the Code applies?
  - First, see if the nature of the deal is obviously one or the other.
  - Then, if not obvious, see if the deal is divisible in some way.
  - If not, then you have to pick a test and apply it.
    - The predominant purpose test:
      - Holistic approach—determine what the predominant purpose of the transaction is by looking at the transaction as a whole.

- Factor-based approach (*Pass*)—determine what the predominant purpose of the transaction is by looking at aspects of the transaction in turn:
    - Language
    - Nature of the provider's business
    - Result sought (the reason the parties entered into the K)
    - The relative amounts charged for goods versus services
- The gravamen of the action test: look at what aspect of the transaction the complaint goes to.

- How important is expertise in determining if a business is a service provider or a dealer in goods? Hmm...
- N.b. that uncertainty in transactions is a bad thing—the parties will want to know which law they're dealing with.

Wednesday, September 1

Interpretive guidelines

The interpretive guidelines are the guts of A2. These are what have allowed the UCC to remain viable in the face of rapid technological change.

- What's the source of authority for the purposes of the UCC (§ 1-102)? It is *not* just policy—it is *law*. So, if you have two arguments—one that will further the purposes and one that won't—the one that will wins.

Wednesday, September 8

Article 2 is an "open-ended, standards-based statute," Beard says. That's one reason why A2 has remained relevant after so many years.

- A3 is a "train wreck" statute—you turn to it when things go wrong.
- A9 is a "planning" statute—you turn to it at the outset of your enterprise.

A2 is both a "train wreck" *and* a "planning" statute.

Usage evidence: Beard's term "usage evidence" means CoD + CoP + UoT.

- Is usage evidence mandatory? Well, it *can* be disclaimed, but it has to be disclaimed in a *very* deliberate way to be effectively disclaimed.

Open price terms (§ 2-305): note that price setting (or not) is risk allocation. Ask, in each case, Who bears the risk of a rising market? Who bears the risk of a falling market?

Contract formation

Firm offers (§ 2-205): these rules are different than the common law.

- Note that § 2-205 requires a fairly high level of assurance that the offer is not revocable.

Monday, September 13

- Why do we have § 2-207? Well, for one thing, there's an *anti-welcher* purpose. It's here to get rid of the mirror-image rule and *save contracts* from death.
- What's the reality of § 2-207 transactions? There's lots of boilerplate that nobody really reads. (What do people read? The dickered terms.)

Formation generally (§ 2-204)

- What actually *will* prevent a K from being formed? Well, § 2-204(3) says that there has to be a basis for an appropriate remedy (although there can be an open price term (§ 2-305)). So, § 2-204 is a loosening, but not a jettisoning of the definiteness requirements.

Offer and acceptance (§ 2-206)

- Is "offer" defined anywhere? No. So its definition must be found in the common law.
- What about "acceptance"? Nope. Common law.

- Can the offeror protect himself? Yes—he *remains* the master of the offer, because § 2-206 starts with "unless otherwise unambiguously indicated." So, the offeror can unambiguously indicate whatever he wants, more or less. (But he often won't, because the offeror *wants* the deal to go through.)
- Note that "seasonably" is defined in § 1-204(3) and "notify" is defined in § 1-201(26). And note the disctinction between notify/notice and know/knowledge.

§ 2-207

- § 2-207 is meant to handle two situations:
  1. The battle of the forms.
     - What *is* a "definite and seasonable expression of acceptance"? Well, first of all, there has to be some measure of fundamental agreement. § 2-204 tells us this much.
  2. Written confirmations.
     - Why is this provision in § 2-207(1)? It's here so we can invoke § 2-207(2) when we have a written confirmation. (Note that you can't revoke a K with a confirmation. So, this provision just gives us the benefit of § 2-207(2) when a confirmation is used. That's all it does.)

So, how can a contract be upset, under the UCC?

1. The offferor can protect himself, § 2-206(1).
2. There can be no fundamental agreement, § 2-204.
3. The offeree can protect himself, § 2-207(1) "unless" clause.
4. Performance could do it, maybe, § 2-207(3).

Wednesday, September 15

What do you ask yourself when you're looking at a § 2-207 problem?

1. Is there a contract?
2. if so, what are its terms?

- Can an offeree protect himself? Sure, using the § 2-207(1) "unless" clause.
  - There are two caselaw formulations of how you have to do this:
    1. *Construction Aggregates*: you just have to condition your acceptance.
    2. *Dorton*: you have to actually condition your acceptance on actual assent by the offeror. That is, you have to phrase your conditional statement in a way that demands actual participation by the offeror.

    Note that it's this way even though the offeree may want the same thing in both cases.

Electronic transactions, n.b.

Monday, September 20

- § 2-207(3): this is (1) knockout + (2) gap fillers.
  - N.b. that § 2-207(3) applies to the writings (plural) of the parties. So, if you have just *one* writing, § 2-207(3) won't apply, Beard says. In that case, you need to look elsewhere, like to § 2-206. (But see § 1-102(5)(a), which says plural includes singular and vice versa.)

- § 2-207(2)
  - Non-merchants: additional terms are *only* proposals for addition. They become part of the K only upon express agreement.
  - Note comment 6—is silence assent?! Not always, despite this comment. Silence is *not* assent, e.g., if there are materially altering terms (§ 2-207(2)(b)).
  - Material alteration: the rule of thumb here is unreasonable surprise or hardship (see comments 4 and 5). Ask, Was this something that reasonably could be expected (or accommodated)?
  - "Different" versus "additional": § 2-207(2) doesn't address "different" terms. §

2-207's caption doesn't mention "different" terms. But § 2-207(1) does mention them, as does comment 3. Why?

- Because § 2-207(1) is trying to kill the mirror image rule, and to kill it as dead as possible.

And so § 2-207(2) conflicts with comment 3. The statute controls.

- § 2-207(2)(c): note the possibility of *implied* objection when there's change in a dickered term. Or, a change in a dickered term might materially alter the agreement, de facto. Or, you could apply the *Daitom* knockout/comment 6 approach. Or you could say that you never even *get* to § 2-207(2) and the offeror's terms control.

Monday, September 27

- *Hill v. Gateway*: Beard thinks the result here is absurd. I mean, what Gateway had changed the price!!? Geez...

Wednesday, September 29

Is there a battle of the forms under amended A2? No. (!) We have a clear knockout rule here. So:

- We're not going to have any Ks based on disagreement.
- We're not going to have a K with terms that one party manifestly disagrees to.

The statute of frauds

- Note that the "price" in § 2-201(1) could be payment in services. In such a case, those services will have to be valued. A court will likely consider the value of the goods exchanged as evidence of the services' value.

- The Code says its purpose in having a SoF is to "afford a basis for believig that the offered oral evidence rests on a real transaction" (comment 1).

- § 2-201(3)(c): if there's a part payment, then just apportionment must be made.
  - This is a problem if the K isn't divisible. Courts have said that if the payment is significant enough, they're willing to enforce the K.

What's the upshot of the SoF? Beard says it's *early exit* from a K suit.

Monday, October 4

Note the differences between "knowledge," "notice," and "learn."

Wednesday, October 6

- "Reason to know" in § 2-201(2) means that you (if you're a merchant) *could* have known the writing's contents.

- Is common law estoppel still available under § 2-201?
    - Well, on the one hand, § 1-103 says that the common law supplements unless displaced by the Code.
    - On the other hand, § 2-201(1) says "except as otherwise provided in this *section*" you need a writing.

    This looks like estoppel arguments not contemplated by § 2-201 should *not* be allowed under the UCC (however, they might be allowed under amended A2, because there's no "except as otherwise provided in this section" clause there).

Merchants

- Practices merchants—it's *not* enough to simply know a lot about something. You have to hold yourself out *by your occupation* before you're a practices merchant.

Monday, October 11

Determining whether someone is a merchant is a purely *objective* determination. There is not subjectivity to it. (In fact, there's no subjectivity to the UCC at all, unless it's express in the statutory language.)

Wednesday, October 13

- Farmers as merchants: are we really going to say that farmers are no in business?! Beard thinks this is old-fashioned thinking.

Implied warranties

First, lets look at UCC warranties generally:

1. Is there a warranty?
    - Express? Or implied?

        - Disclaimed? Excluded?
        - Scope of the warranty?
    2. Has the warranty been breached?
    3. Has the breach caused some harm?
    4. Is the party injured? Is the party entitled to recovery?

- Note that you are *always* going to have these three causes of action in your complaint regarding a purportedly defective good:
    1. Breach of implied warranty.
    2. Negligence.
    3. Strict liability in tort.

- Note that the warranty provisions in the UCC run from §§ 2-312 to 2-318.

Monday, October 18

- IWoF: note that you can play to the jury on the "reasonably reliance" requirement here.
- IWoM: at bottom, "merchantability" is a question of policy, Beard thinks.
    - Sometime, a court will *require* a disclaimer (e.g., with prescription meds). In that case, if there's no labeling, then it's unmerchantable (under § 2-314(2)(f), for one).
    - Guns? Alcohol? Cigarettes? Are these unmerchantable? Should they be?
        - N.b., strict liability in tort. There's a comment to a restatement somewhere that says lawn darts are "inherently dangerous." This, even though they do exactly what they're supposed to do.
    - Merchant buyers? Should be the same analysis, Beard thinks. However, there's always a human aspect to all of this, especially with juries involved.

Wednesday, October 20

- What can a seller do to prevent the IWoF from arising? He can say "I don't have that expertise." (But can he do that and keep his client? Instead, they could say, "I don't know, but I'll find out." Then, once they find out, they won't have anyh problem standing behind the good for the particular purpose.)

With warranties, we're asking:

1. What do we expect sellers to do?
2. What's fair to expect sellers to do?

Warranties are *anything* but black and white. This is a very gray area.

Express warranties

§ 2-313

- Comment 4: What is is seller is selling? (What is it buyer is buying?)
- Comment 6: What statements can be fairly viewed as becoming part of the K?

While not all courts require reliance, you still shold be preparing to prove it. Why? Because assessing the seller's statement is going to be thoroughly informed by buyer's level of reliance.

Monday, October 25

Puffing: in determining whether something is puffery or not, one good question to ask is: What would the warranty be if it was one? I.e., what's its scope? What's its content?

- What's a sample? What's a model? See comment 6 to § 2-313: a sample is an example from a bunch of stuff. A model is something like a prototype.
    - It's pretty reasonable to rely on a sample. With a model, the seller might have some more waffle room.

Wednesday, October 27

Warranty disclaimers

- There is disclaiming a warranty, and then there is limiting remedies. They're two different things.
- Even if warranties are disclaimed, keep in mind other claims the party might have, like fraud or misrepresentation.
- Express warranties can *not* be disclaimed. You can construe express warranty "disclaimers" as consistent with the express warranty, but otherwise they're not disclaimable.
    - So, what can you do?
        - You can use the parol evidence rule to keep the express warranty out.
        - You can tell your client to keep his mouth shut.

§ 2-316

- First of all, (3) trumps (2).
- (2):
    - IWoM disclaimer:
        - It has to mention "merchantability."
        - *If* it's in writing, then it has to be conspicuous.
    - IWoF disclaimer:

        - It has to be in writing.
        - It has to be conspicuous.
        - But, unlike IWoM disclaimer, there aren't any magic words required.
    - What about this last sentence, which seems to apply only to IWoF disclaimers? Beard thinks the language here might be able to used to disclaim *all* possible non-IWoM warranties.
- (3):
    - "As is" language can disclaim *all* implied warranties.
    - Buyer's full inspection of refusal to inspect disclaims all implied warranties.
    - CoD, CoP, and UoT can disclaim or modify implied warranties.

So:

- (2) is a safe harbor provision.
- Look at (3) only if someone screwed up and failed to use the (2) safe harbor.

- How can a seller get around the conspicuousness requirement? You can make sure the buyer has *actual knowledge* of the disclaimer language.
- How can a buyer get around "as is" language?
    - He can find some "circumstances indicat[ing] otherwise."
    - Caselaw—but not the Code itself—has required that "as is" language be conspicuous.

Monday, November 1

Magnuson-Moss

- Nothing in MM *requires* a warranty. It just governs written warranties, is all.
- *If* you have a written warranty, then MM works to limit the warrantor's ability to disclaim the warranty or limit remedies.
- MM only applies to consumer goods—but this is a *product*-based test, not a transaction-based test. It doesn't matter, therefore, if both parties are merchants. It just matters whether the good is a consumer good or not.
- If MM applies:
    - Warranty language must be clear, and not in legalese.
    - Any breach of MM leads to:
        - Federal jurisdiction.
        - Statutory damages.
        - Attorney's fees.
    - UCC § 2-316(2) and (3) is *changed* by MM—under MM you *can't* disclaim implied warranties. You can only limit their duration.
- What's a "one year warranty," e.g., under MM? This just means that you have

one year to find the defect. You still have to prove that the defect existed at the time of sale.

Third-party warranty beneficiaries

Note that property and personal injury will often be covered by strict liability in tort. The big fights wrt. 3PBs will be over *economic loss*.

Wednesday, November 3

The parol evidence rule

The PER analysis

- Is there a writing of the parties? That's intended as final? As to the terms in the writing?
  - No—then § 2-202 is not applicable, and the evidence will be allowed in.
  - Yes: The proffered evidence—is it evidence of a prior agreement of a contemporaneous oral agreement?
    - No—then the evidence will be allowed in.
    - Yes: Does the parol evidence *contradict* a written term?
      - Yes—then the evidence will not be allowed in (unless you can get it in as usage evidence).
      - No: Is there a merger clause?
        - Yes—then the evidence will not be allowed in (unless you can get it in as usage evidence).
        - No—then the evidence will be allowed in to explain or supplement terms set forth in the writing.

- Note these exceptions and gaps in § 2-202:
  1. Conditions precedent to the deal;
  2. Evidence of fraud;
  3. Evidence of interpretation/clarification (i.e., when you *don't* have CoD, CoP, UoT evidence);

  all of this can *always* come in.

  And *usage evidence* can *always* come in.

N.b. *Nanakuli* (p176); and the cart at problem 12-7.

Monday, November 8

- Note that if you have CoP evidence, look at §§ 2-208 and 2-209 in addition to the PER.

Merger clauses

- What's the effect of a merger clause? It keeps out everything but usage evidence. So, it even keeps out consistent terms in parol evidence.
  - Note, though, that an opposing party can argue that the term in question is *explanatory*. If that's well-argued, it might get the term in.
- How do we know if we have a merger clause? Look at the parties' *intention*, § 2-202(b) tells us.

Performance

Aspects of performance

- "Identification," which means just that, usually.
  - N.b. that the buyer gets "special property" upon identification.
- Tender of delivery. Here, look at the particular delivery term that the parties use (but note that these delivery terms are gone in amended A2).
  - N.b. § 2-503 comment 5: the default is a shipment K.
  - Keep in mind, too, that buyers or sellers might have long-term Ks with certain carriers.
- Risk of loss (§ 2-509). This depends on "What's the seller's obligation?" ("At seller's cost/risk and expense" is a magic phrase.)
- Freight/transport. That is, who's reponsible for paying for the transport *ultimately*?
- Passage of title (§ 2-401). Identification is a prerequisite, and you also have to know whether you've got a shipment or a destination K.
- Power to convey title.

- F.O.B. and F.A.S. terms (§§ 2-319 and 2-320): these are *delivery* terms (unless otherwise agreed).
- What's "tender" versus "due tender"?
  - With "tender," you could have non-conforming goods.
  - "Due tender" means, though, that you've fulfilled *all* obligations.

  See § 2-503 comment 1. Also, usually "tender" is going to mean "due tender."

Wednesday, November 10

Risk of loss: to determine where risk of loss shifts:

1. Is it a destination or a shipment K?
2. Where does the seller's "expense and risk" end? (Look at the *code*!)

3. What are the intentions of the parties?

Power to convey title (§ 2-403):

- Voidable title—look for just a nanosecond of intention on the part of the seller to part with the item.
- Void title—this is where you can't find even that nanosecond.
    - And, n.b., once you have a void title, you always have a void title (with the exception of § 2-403(2) and (3)).

This is just the common law or property (and that's pretty uniform across jurisdictions).

- Entrustment: entrustment can be *any* delivery or acquiescence to a merchant dealing in goods of the kind. So, e.g., if I give a bike to a merchant for *repair*, but the merchant sells it, then I can't get that bike back—that's entrustment, and the merchant can pass my title.
    - But note that the entrustee doesn't get *any* title at all—just the *power* to convey the rights that the entruster had.

Monday, November 15

[Skipped class.]

Wednesday, November 17

Remedies

- Policies and principles:
    - For one thing, formulae can obscure the correct result.
    - § 1-106 ("Remedies to be liberally administered")—which could be the single most important remedial provision in the code, says Beard.

Buyer's remedies

- What's the context?
    - Buyer has the goods but doesn't want them: §§ 2-601 and 2-608.
    - Buyer doesn't want the goods seller offers: §§ 2-712, 2-713, and 2-715.
    - Buyer has and keeps the goods: §§ 2-714, 2-717, and 2-715.
    - Buyer doesn't have the goods but wants them: §§ 2-502 and 2-706.

    And always keep § 2-711 in mind.

- Rejection:
    - Acceptance precludes the right to reject. § 2-606 spells out the three

circumstances that give rise to acceptance.
    - Acceptance also ends seller's right to cure.
  - Buyer must give notice of breach, or else he risks losing all his rights.
  - *Never* do any revocation analysis until you've determined that there's been acceptance.
- Revocation (§ 2-608): to revoke, you have to have grounds to revoke on (unlike with rejection).
  - Revocation involves both objective and subjective aspects.
  - You have to have a reason why you didn't reject.

Monday, November 29

With remedies issues, always start at § 1-106. This is the policy section that governs it all.

- But note that nowhere in the Code is mitigation announced as a policy. Rather, that's built in to the several specific remedies sections. And it's implicit in the good faith requirement.

Basic remedies ideas:

- Buyer: cover/market less contract price.
- Seller: contract price less resale/market.
  - There's no express allowance to sellers for consequential damages.

And any expenses saved are always taken off recovery.

Direct versus consequential damages

- Or, another way to split the universe up is:
  - Personal injury damages
    - These are always consequential damages. By definition (§ 2-715 (2)).
  - Property damages
    - These, too, are always consequential (§ 2-715(2)).
  - Economic loss
    - Damage to the good *itself*.
    - Other economic *consequential* damages, like lost profits. § 2-715(2) and *Hadley v. Baxendale*.

    These are the ones that parties are worried about—these can get pretty huge.
- Incidental damages, by the way, are direct damages.

Wednesday, December 1

Seller's remedies

- Resale (§ 2-706): this is seller's parallel to cover. The Code prefers this remedy because it's the best measure of the damage amount (since it uses a real market).
    - The seller must give notice that he intends to resell (§ 2-706(3)).
    - Sellers' resales are usually private sales. So, sellers need to be careful to act commercially reasonably.
    - *But*, seller is under no obligation to resell.
        - This is different than with buyer—if buyer covers, he *can't* get market damages. But there's no analogous limit on the seller. (!) See § 2-713. (At least not an express limit—§ 1-106 will operate to keep seller from getting a windfall.)
- Market damages (§ 2-708): seller's market damages are measured at the place for tender. Always. (This is different from buyer, who measures his market damages where he would most likely have covered.)
- Lost volume sellers: they can measure their damages by profits—the don't have to subtract the resale credit.
- Sellers can't get consequential damages in the current UCC. (They can in the AUCC.)
- § 2-704: an absolutely crucial remedy for sellers.
    - (1): allows the seller to identify the goods, in order to exercise the preferred remedy of resale.
    - (2): or, the seller can continue to build the goods (!!), as long as he satisfies the conditions in this provision.

      And it doesn't matter if, in hindsight, doing what he did wasn't the best idea, after all. (Except, that could be evidence of commercial unreasonableness.)
- Action for the price (§ 2-709): seller can get the price only in three, limited circumstances:
    1. The goods were accepted
    2. Conforming goods were lost/damages after risk of loss shifted
    3. Identified goods aren't resellable (this is parallel to buyer's specific performance remedy)
- Lost profits (§ 2-708(2)): seller's formula is:
  profit + overhead + incidentals + costs incurred – resale credit

Modification and limitation of remedies

- Distinguish remedy modifications/limitations from warranty disclaimers.
- The essential purpose test (§ 2-719): if an exclusive remedy fails its essential purpose, then the party gets *all* the default remedies.

- Consequentials can be disclaimed (§ 2-719(3)) (and they often are), *unless* such a disclaimer is unconscionable. A disclaimer of personal injury damages is prima facie unconscionable.