

Sales outline, Fall 2004. Professor Beard.

I. The Scope of Article 2

A. "Sales" (2-106(1))

B. "Goods" (2-105)

1. Movable goods (2-105)

2. Nonmovable, but severable goods (2-107)

- a) Minerals and the like (2-107(1))
- b) Structures to be removed (2-107(1))
- c) Growing crops (2-107(2))
- d) Timber (2-107(2))
- e) Other things attached to realty (2-107(2))

3. Smart goods

- a) A2-103(1)(k)

C. Mixed transactions

1. Divisibility tests

- a) **Assent:** did the parties give a single assent to the whole contract? If so, it looks less divisible. If they gave separate assents to several things, then it looks more divisible.
- b) **Price:** was there a unified price paid for the whole transaction? If so, it looks less divisible. If there was separate consideration for different performances, then it looks more divisible.

2. Divisible transactions: if the contract is divisible, then you analyze the goods part under Article 2, the other part(s) under the appropriate body of law.

3. Non-divisible transactions: if the contract isn't divisible, then you've got to select a body of law to apply to it. Courts have adopted several tests for making this selection.

a) Predominant purpose test

(1) Factor approach (*Pass*)

- (a) Language
- (b) Nature of the business
- (c) Result sought
- (d) Relative costs

(2) Holistic approach: select the body of law to apply based on the overall thrust of the contract, looking at the "reasonable totality of the circumstances." You still might want to keep the *Pass v. Shelby* factors in mind if you do this one, however.

b) Gravamen of the action test: select the body of law to apply based on what portion of the transaction the complaint is based on.

D. "Merchants" (2-104)

1. Goods merchants: someone who deals in goods of the kind, or who holds himself out by *his occupation* as having the knowledge or skill of someone who deals in goods of the kind (or who has an agent that does one of those things).

a) Applicable sections:

- (1) Warranty of No Infringement (2-312)
- (2) Implied Warranty of Merchantability (2-314)
- (3) Entrustment derivative title powers (2-403)
- (4) Protection from seller's creditors (2-402)
- 2. **Practices merchants:** someone who holds himself out *by his occupation* as being in business, basically.
 - a) Applicable sections:
 - (1) SoF confirmations (2-201(2))
 - (2) Firm offers (2-205)
 - (3) 2-207(2)
 - (4) Certain modifications (2-209(2))
- 3. Sections applicable to all merchants:
 - a) Merchant good faith (2-103(1)(b))
 - b) Certain RoL passage (2-509(3))
 - c) Special rejection duties (2-603(1))
 - d) Special particularization of defects after rejection (2-605(1)(b))

II. Statutory construction

A. Policies

B. Definitions (1-201 and 2-103)

C. Default terms

1. Limits on mutability

- a) Good faith
 - (1) Regular good faith
 - (2) Merchant good faith
- b) Unconscionability

2. Taxonomy of defaults

III. Formation

A. Modes of formation

- 1. **Generally (2-204):** a contract be be formed in *any* manner--as long as it shows agreement by the parties recognizing the existence of the contract. And conduct is good enough.
 - a) Definiteness: the Code abandons common law definiteness requirements. Rather, there just has to be a reasonably certain basis for providing an appropriate remedy. That's all (unless the SoF requires a writing, in which case you're going to need a quantity).
- 2. **Offer and acceptance**
 - a) **Policies (2-206)**
 - b) **Battle of the forms (2-207)**
 - (1) "Definite and seasonable expression of acceptance"
 - (2) Expressly conditional acceptance
 - (a) *Construction Aggregates* rule: acceptance is "expressly conditional" if conditional on the additional or different terms.

(b) *Dorton* rule: acceptance is "expressly conditional" only if it "clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms."

(3) Different terms: which are not exactly expressly covered by 2-207(2).

Jurisdictions are split on what to do with them:

(a) Offeror's terms control: what the offeror says, goes.

(b) Treat them as additional terms: and apply 2-207(2). And so in almost every case--if not every single case--the different terms would not come in because they would "materially alter" the contract.

(c) Apply 2-207(3): knockout differing terms and fill those gaps with the Code's default terms (*Daitom*).

c) **Firm offers (2-205)**

3. **Conduct (2-207(3))**

B. **Confirmations (2-207)**

C. **The statute of frauds (2-201)**

1. Basic requirements (2-201(1)): if the price is \$500 or more (valuing exchanged goods or services as necessary), then:

a) There has to be a writing that shows that the parties made a contract for sale.

b) The writing has to be signed by the *other* party.

c) The writing, basically, has to indicate a quantity. Because the writing isn't enforceable beyond the quantity stated in the writing.

2. Confirmations between merchants (2-201(2)): if both parties are merchants, a confirmation might satisfy the SoF even if it doesn't satisfy the basic requirements:

a) Both parties must be merchants.

b) The confirmation has to be a writing.

c) The confirmation has to satisfy the basic requirements--but only against the *sender* (i.e., the sender has to have signed it).

d) The confirmation has to be received by the *other* party within a reasonable time.

e) The receiving party has to have reason to know its contents.

f) The receiving party can defeat the confirmation's SoF effect if he gives written notice of objection to the confirmation's *contents* within 10 days of receiving it.

3. Estoppel provisions (2-201(3)): in certain cases, you can satisfy the SoF, no matter who you are, even if you don't have a writing that satisfies the basic requirements:

a) Specially manufactured goods: you satisfy the SoF without a sufficient writing if:

(1) Seller is specially manufacturing goods for the buyer.

(2) Those goods aren't suitable for sale to others in the ordinary course of the seller's business.

(3) The seller makes either a substantial beginning to making the goods or makes commitments for procuring the goods...

(4) ...and does that before notice of repudiation.

(5) The circumstances show that the goods are for the buyer.

b) Admittance: if the *other* party admits that a contract was made, and does it in court, then the contract is enforceable up to the quantity of goods he admitted.

- c) Acceptance: if the payment has been made and accepted, or if the goods have been received and accepted, then you satisfy the SoF.

D. The parol evidence rule (2-202)

IV. Warranties

A. Method of warranty analysis

1. Is there a warranty?
 - a) Was it created?
 - b) Was it disclaimed?
2. Does it go to the claimant?
3. Was the warranty breached?
4. Did the breach cause the claimant harm?
5. What's the remedy?
 - a) Was the remedy limited?
 - (1) Liquidated damages?
 - (2) Limitation?

B. Taxonomy of warranties

1. **Warranty of Title (2-312(1))**
2. **Warranty of No Infringement (2-312(x))**
3. **Implied warranties**
 - a) **Implied warranty of merchantability (2-314)**
 - b) **Implied warranty of fitness for a particular purpose (2-315)**
 - c) **Other implied warranties**: other implied warranties can arise from usage of trade and course of dealing (2-314(3)).
4. **Express warranties (2-313)**: these can be created by affirmations, descriptions, or samples or models. But those things have to become part of the basis of the bargain.
 - a) Basis of the bargain: courts are split on how to determine this:
 - (1) Reliance jurisdictions: buyer must prove that he decided to buy the goods in part because of the seller's representation.
 - (2) Comment 3 jurisdictions: the presumption is that the representation is part of the basis of the bargain, but the seller can rebut this by showing that the buyer did not, in fact, rely on it.
 - (3) Non-reliance jurisdictions: buyer only has to prove that the seller made the representation during the process of marketing the goods.
 - (4) Special rules for advertising (Cipollone): the *Cipollone* court adopted a three-part approach for representations made in advertising:
 - (a) If the buyer can show that he had read, heard, or seen the ad before his purchase, he gets a presumption that he relied on the representation.
 - (b) The seller can rebut that presumption by showing that the buyer either knew the representation wasn't true or did not in fact rely on the representation.
 - (c) The buyer can counter-rebut by showing that he didn't believe the representation, but relied on it anyway.
 - b) Puffing (2-313(2)): the rule of thumb question is: what kind of warranty would it

be, and what would its scope be?

(1) Factors to consider:

- (a) Specificity of the statement.
- (b) Hedginess of the statement.
- (c) Opinion?
- (d) Medium of communication.
- (e) Experimental goods?
- (f) What does the statement refer to--a consequence of buying the goods, or an aspect of the goods themselves?

- c) Remote sellers: 2-313 does expressly not hold remote sellers to their express warranties. However, 2-313 also expressly allows caselaw to extend express warranties from remote sellers to buyers. And, in fact, many courts do extend them--especially when the remote seller knew that his warranties would be carried on to the end-user.

C. Disclaimers (2-316)

Comment: See also remedy limitations.

1. **Express warranties (2-316(1)):** which cannot generally be disclaimed. To effectively "disclaim" them, use the PER to keep evidence of their creation out.

2. **Implied warranties**

a) Safe harbor provisions (2-316(2))

(1) Implied warranty of merchantability

- (a) Must mention merchantability
- (b) Writing not required: but if a writing is used, it must be conspicuous
 - i) "Conspicuous" (1-201(x))

(2) Implied warranties of fitness

- (a) Writing required
- (b) Conspicuousness required
 - i) "Conspicuous" (1-201(x))

b) Other possibilities (2-316(3))

- (1) Examination by buyer
- (2) Buyer's refusal to examine after seller's demand
- (3) Usage (2-316(3)(c)&(a))
 - (a) "As is" clauses (2-316(3)(a))

3. **Magnuson-Moss**

D. Conflict of warranties (2-317)

E. Third party warranty beneficiaries (2-318)

1. **UCC provisions (2-318)**

- a) **Alternative A:** Idaho is an alternative A state.

(1) Coverage

- (a) Natural persons;
- (b) in the buyer's family and household, or guests of the buyer;
- (c) reasonably expected to be harmed

- (d) who suffer personal injury
- (2) No limitation permitted.

b) **Alternative B**

- (1) Coverage
 - (a) Natural persons
 - (b) reasonably expected to be harmed
 - (c) who suffer personal injury
- (2) No limitation permitted.

c) **Alternative C**

- (1) Coverage
 - (a) All persons (natural and entities)
- (2) Limitation allowed, but *not* wrt. personal injury.

2. **Caselaw:** 2-318 does *not* limit advances beyond it in caselaw. So, always check to see whether caselaw carries third-party beneficiary coverage further than the state's 2-318 alternative does.

V. Performance

A. Identification (2-501)

1. **Manner of identification:** is different depending on the situation. (And if the seller is doing the identification by himself, he can substitute until he notifies the buyer that identification is final.)
 - a) Goods already exist and are identified: identification occurs when the contract is made.
 - b) Future goods, generally: identification occurs when the goods are shipped, marked, or otherwise designated by the seller.
 - (1) Crops to be harvested within 12 mos. or before the next normal harvest: identification occurs when the crops are planted or otherwise become growing crops.
 - (2) Young to be born within 12 mos.: identification occurs when the young are conceived.
2. **Consequences of identification:**
 - a) Buyer gets an insurable interest in the goods (2-501(1)).
 - b) Buyer gets the right to inspect the goods at any reasonable place and time and in any reasonable manner (2-513(1)); unless it's a C.O.D., in which case the buyer has to pay first (2-513(3)).
 - c) Buyer gets a special property in the goods (2-501(1)); that just means he can recover them from the seller *if* 2-502 is satisfied.
 - d) Buyer can replevy the goods if the seller doesn't deliver and the buyer can't cover (2-716(3)).
 - e) Seller can get the price from the buyer *if* 2-719(1)(b) and (2) are satisfied.
 - f) Risk of loss can automatically shift to the buyer to the extent that seller underinsured them (2-510(3)).

B. Risk of loss

1. No breach

- a) **Shipment contracts:** generally, the RoL passes when the seller duly delivers the goods to the carrier. (Shipment contracts are the default (2-503 cmt. 5 and 2-507)).
 - (1) **Seller's duties in shipment contracts** (2-504): the buyer can only reject, however, if seller's failure to meet his duties causes undue delay or loss of the goods
 - (a) Contract for transport to the buyer.
 - (b) Send buyer documents.
 - (c) Notify buyer of shipment.
 - (2) **Taxonomy of shipment contracts**
 - (a) F.O.B. place of shipment (2-319(1)(x)): seller bears the RoL until he's put the goods in possession of the carrier at the place of shipment. (Seller must ship the goods at the place of shipment (by contracting for transport, sending buyer documents, and notifying the buyer).)
 - (b) F.A.S. vessel (2-319(2)): seller bears the RoL until he's put the goods alongside the vessel. Buyer, though, has to name the port or dock and the berth in the vessel.
 - (c) C.I.F. / C.F. (2-320): seller bears the RoL until he's put the goods in possession of the carrier at the port for shipment, obtained a bill of lading, loaded the goods and gotten a receipt, prepared an invoice, forwarded and tendered the documents to the buyer, (and bought insurance if it's C.I.F).
 - b) **Destination contracts:** generally, the RoL passes when the goods are duly tendered at the destination so that the buyer can take delivery.
 - (1) F.O.B. destination (2-319(1)(x)): seller bears the RoL until he's transported the goods to the destination.
 - c) **Warehouse contracts:** the RoL passes when either the buyer gets a negotiable document of title, the bailee acknowledges the buyer's right to possession, or the buyer gets a non-negotiable document of title that he doesn't object to.
 - d) **Other contracts:** it's different here depending on whether the seller is a merchant or not.
 - (1) Merchant sellers: the RoL doesn't pass until the buyer actually receives the goods.
 - (2) Non-merchant sellers: the RoL passes when the seller tenders delivery.
- 2. Breach**
- a) **By the seller:**
 - (1) If the buyer can reject, then the RoL stays on the seller until the seller cures or the buyer accepts.
 - (2) If the buyer rightfully revokes and he doesn't have enough insurance, he can treat the RoL as having been on the buyer since the beginning (but only to the extent that the buyer is underinsured).
 - b) **By the buyer:** if the buyer breaches before the RoL passes to him, and the seller doesn't have enough insurance, then the seller can treat the RoL as being on the buyer for a commercially reasonable time (but only to the extent that the seller is underinsured).

C. Tender of delivery (2-503)

1. Seller's tender duties:

- a) Seller has to "put and hold" conforming goods at the buyer's disposition (2-503(1)).
- b) Seller has to give the buyer notification so that buyer can take delivery (2-503(1)).
- c) Seller has to tender at a reasonable hour (2-503(1)(a)).
- d) Seller has to keep the goods available for a reasonable amount of time so that the buyer can take possession (2-503(1)(a)).
- e) Special duties with shipment contracts (2-504):
 - (1) Seller has to give the goods to the carrier (2-504(a)).
 - (2) Seller has to make a contract for transport of the goods (2-504(a)).
 - (3) Seller has to give the buyer an necessary documents (2-504(b)).
 - (4) Seller has to promptly notify the buyer of the shipment (2-504(c)).
 - (a) But, if seller doesn't notify buyer, buyer can only reject if the lack of notification causes material delay or a loss.
- f) Special duties with destination contracts: seller has to do all the regular duties and tender any necessary documents, too (2-503(3)).

2. Buyer's tender duties:

- a) Buyer has to furnish facilities for receiving the goods (2-503(1)(b)).

D. Inspection (2-513): generally, the buyer is entitled to a reasonable opportunity to inspect the goods before accepting them (2-606(1)(b)). Unless the delivery is a C.O.D. or something similar, the buyer gets to inspect before he has to pay. Inspection can be at any reasonable place and time, and can be in any reasonable manner.

1. Factors in determining what a "reasonable opportunity" to inspect is:

- a) Contract terms
- b) Trade usage
- c) Course of dealing
- d) Circumstances of delivery
- e) Availability of inspection facilities
- f) Nature of the goods
- g) Nature of the defect
- h) Nature of the buyer
- i) Whether the seller promised or tried to make repairs

E. Acceptance (2-606): once goods are accepted, they can't be rejected (2-607(2)).

1. Modes of acceptance (2-606)

- a) Buyer inspects and signifies that the goods are conforming.
- b) Buyer inspects and signifies that he will take the goods despite any non-conformance.
- c) Buyer has had a reasonable opportunity to inspect and has failed to effectively reject.
- d) Buyer acts inconsistently with seller's ownership of the goods.

- (1) Wrongful inconsistent acts: if the inconsistent act is wrongful against the seller, then it's only an acceptance if the seller ratifies the acceptance. What's a wrongful inconsistent act? Well, exercise of ownership after a rejection is one.

F. Title

1. **Passage of title (2-401)**: generally, (1) buyer gets a "special property" upon identification and (2) title passes at the time and place that seller completes his performance wrt. physical delivery.
 - a) Shipment contracts: title passes at the time and place of shipment.
 - b) Destination contracts: title passes on tender at the destination.
 - c) Warehouse contracts: title passes when seller delivers the documents to the buyer.
 - d) Seller's POB contracts: if the goods are identified at the time of contracting, title passes then and there.
2. **Power to convey title (2-403)**: generally, a purchaser gets all the title that his transferor had (or had power to convey).
 - a) Voidable title: people holding voidable title have the power to convey good title to any good faith purchaser for value. Period.
 - b) Entrustment (2-403(2)&(3)): you "entrust" something if you deliver or acquiesce your possession to somebody. Period. And if you entrust possession to a goods merchant (2-104), that goods merchant has the power to convey *your* title (whatever it was) to a "buyer in the ordinary course of business."
 - (1) Buyer in the ordinary course of business (1-201(9)): a good faith buyer who buys in the ordinary course from any goods merchant (except a pawnbroker). Buying in the "ordinary course" means that the sale is a normal one, basically..

VI. Remedies

A. Policies

1. **1-106**: which states that remedies should be liberally administered so that the aggrieved party is put in as good a position as he would have been had the other party fully performed.
2. **Mitigation**: this policy is not express in the Code, but it is infused into the individual remedy provisions.
3. **Good faith (1-203 and 2-103(1)(c))**
4. **Underlying policies of contracts remedies**
 - a) No double recovery.
 - b) No windfalls.
 - c) Reasonable certainty in damage amounts.
 - d) Mitigation.
 - e) Preference for the aggrieved party over the breaching party.

- B. Buyer's remedies (2-711 through 2-717)**: buyer must notify seller of breach--or else he loses all his remedies! (2-607(3)). Also, buyer can deduct any damages the seller owes him from the price the buyer owes the seller (2-717).

Comment: Buyer's remedies index section: 2-711.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this Article (Section 2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

1. Unaccepted goods

a) Rejection (2-601): if the goods or the tender don't conform, the buyer can reject the whole shipment, or he can reject whatever commercial units he doesn't accept.

(1) Manner of rejection (2-602):

(a) Buyer has to reject within a reasonable time after the delivery or tender. (But the buyer also gets to have a reasonable opportunity to inspect the goods (2-513); still, rejection has to occur soon enough to protect the seller's interests.)

(b) Buyer has to notify the seller of the rejection. And do it seasonably.

(2) **Buyer's rejection duties:** if the buyer doesn't live up to these, it's a wrongful rejection and the seller has remedies under 2-703 *et seq.*

(a) All buyers (2-602):

i) Buyer has to not exercise ownership of the goods (2-602(2)(a)).

ii) If the buyer took physical possession of the goods before he rejected them, he has to hold them with reasonable care. And he has to do it for a time sufficient for the seller to come and get them (2-602(2)(b)).

iii) Non-merchant buyer's options (2-604): non-merchant buyers, if the seller doesn't tell them what to do within a reasonable time after being notified of the rejection, can--if they want to--either:

a. Store the goods for the seller.

b. Reship the goods to the seller.

c. Sell the goods for the seller.

1) If they do this, they can get reimbursement as a merchant buyer would, under 2-603(2).

(b) Merchants (2-603): if the seller doesn't have an agent where the rejection occurs, then the buyer has to:

i) Follow any reasonable instructions that the seller gives him wrt. the goods.

ii) If he doesn't get any instructions and the goods are perishable or might rapidly lose value, then the buyer has to make reasonable efforts to sell the goods.

- a. If the buyer sells the goods, he can get reasonable expenses and a commission (whatever's usual, or if nothing's usual, 10% or less).
- (3) **Seller's cure (2-508):** seller can cure *if* he meets several requirements:
 - (a) Buyer must have rejected (because tender or delivery was nonconforming).
 - (b) There must be still be time for performance.
 - (c) The seller must notify the buyer of his intention to cure. And do it seasonably.
 - (d) Seller's cure must be a conforming delivery within the contract time.
 - i) Surprise rejection: if the seller had "reasonable grounds to believe" his tender was going to be acceptable, he can get an extension of time for curing. He has to seasonably notify the buyer, though. And the extension is a reasonable time.
- b) **Revocation (2-608):** once a buyer has accepted the goods in certain situations. If he rightfully revokes, he's got the same rights he would have if he'd rejected.
 - (1) **Requirements for revocation (2-608)(1):**
 - (a) The goods must have a non-conformity that substantially impairs their value to the buyer.
 - (b) The buyer must have accepted either because:
 - i) He reasonably assumed that the non-conformity would be cured. And then, he can only revoke if the non-conformity has not been seasonably cured.
 - ii) He didn't discover the non-conformity before accepting and that was because it was difficult to discover before acceptance.
 - iii) He didn't discover the non-conformity before accepting and that was because the seller assured him of stuff.
 - (2) **Manner of revocation (2-608(2)):**
 - (a) The buyer has to revoke within a reasonable time after he discovers (or should have discovered) the non-conformity.
 - (b) The buyer has to revoke before there's any substantial change in the condition of the goods that's not caused by the defects themselves.
 - (c) Revocation isn't effective until the buyer notifies the seller about it.
- (3) **Seller's cure (2-508):** cure after revocation is not expressly allowed by 2-508. Some courts, however, have said that sellers *can* cure after revocation and use 2-508 as the guide for how seller can do that. This position is bolstered by the fact the AA2 allows cure after revocation in non-consumer contracts (A2-508).
- c) **Cancellation (2-711):** the buyer may cancel the contract (2-106).
- d) **Recovery of the price (2-711):** the buyer may recover whatever portion of the price that he's paid.
- e) **Cover (2-712):** the buyer can cover, and he gets: (cover cost - contract price) + (incidentals + consequential) - expenses saved.
 - (1) Cover requirements: cover is not valid unless:
 - (a) The buyer covered in good faith (1-203, and 2-103(1)(b) for merchants).

- (b) The buyer covered without unreasonable delay.
- (c) The cover purchase was reasonable.
- (d) The cover purchased is in substitution for the contract goods.
- (2) Exclusivity: if the buyer chooses to cover, he cannot then get market damages (2-713 cmt. 5). (Note that this is different than with the seller, who can resell and still get market damages.)
- f) **Market damages (2-713)**: if the buyer *did not cover*, then he can get market damages.
 - (1) Formula:
 - (a) Buyer couldn't cover: (market price - contract price) + (incidentals + consequential) - expenses saved.
 - (b) Buyer could have covered but didn't: then the buyer can *not* get consequential that could have reasonably been prevented by cover. So: (market price - contract price) + (incidentals + limited consequential) - expenses saved.
 - (2) Measuring the market: generally, measure the market at the time when the buyer learned of the breach (or a commercially reasonable time afterwards (2-723)), and where the buyer *would have* covered, if he had covered (2-713 cmt. 1). The goods you look at are goods of the same kind, in the same branch of trade (2-713 cmt. 2).
 - (a) Before tender: measure the market at the place of tender.
 - (b) After rejection or revocation: measure the market at the place of arrival.
- g) **Recovery of the goods**: the buyer can recover the goods from the seller in certain situations:
 - (1) Seller's insolvency (2-502)
 - (2) Specific performance (2-716(1)&(2)): the buyer can get specific performance if the goods are unique *or* in "other proper circumstances."
 - (3) Replevin (2-716(3)): the buyer can replevy the goods in certain situations. (And if he bought the goods for personal, family, or household purposes, he gets the right to replevy as soon as he gets "special property"--which is when the goods are identified, generally.)
 - (a) If he can't cover.
 - (b) If it looks like he won't be able to cover.
 - (c) If the goods were shipped under reservation and the security interest has been satisfied.
- 2. **Accepted goods (2-714)**: if the buyer accepted the goods (and gave notification of breach), he can still get damages.
 - a) Generally: the buyer can get damages for any non-conformity. He only gets damages, though, for loss that resulted in the ordinary course of events, from the breach (2-714(1)).
 - b) Breach of warranty (2-714(2)): with a breach of warranty, the buyer gets: (value of the goods as warranted) - (value of the goods as accepted). And that's measured at the time and place of acceptance. (But, if there are special circumstances that show damages of a different amount, the Code expressly

provides that buyer should get that amount.)

c) Incidentals and consequentials (2-714(3)): buyer can get these in a "proper case."

C. Seller's remedies (2-702 through 2-710): the seller can't get consequential damages!

Also, a breaching buyer can recover any deposit he's made *less* liquidated damages (or, if no liquidated damages, the smaller of \$500 or 20% or the contract price) (2-718(2)). And if the seller proves damages or unjust enrichment, it's less those, too (2-718(3)).

Comment: Seller's remedies index section: 2-702.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (Section 2-705);
- (c) proceed under the next section respecting goods still unidentified to the contract;
- (d) resell and recover damages as hereafter provided (Section 2-706);
- (e) recover damages for non-acceptance (2-708) or in a proper case the price (2-709);
- (f) cancel.

1. Resale (2-706): the seller can resell, and he gets: (contract price - resale price) + incidentals - expenses saved.

a) Resale requirements: a resale is not valid unless:

- (1) The seller resold in good faith (1-203, and 2-103(1)(c) for merchants).
- (2) The seller resold in a commercially reasonable time.
- (3) The resale must be commercially reasonable--method, manner, time, place, and terms.

2. Market damages (2-708): the seller can get market damages. (Arguably, he can resell and *still* get market damages. But, under AA2, he loses consequentials that could have reasonably been prevented by reselling.)

a) Formula:

- (1) Standard formula (2-708(1)): (contract price - market price) + incidentals - expenses saved.
- (2) Lost profits formula (2-708(2)): LP = (profit + overhead + incidentals + costs incurred) - resale.
 - (a) Lost volume sellers formula: lost volume sellers don't have to subtract the resale amount. Because, of course, they couldn't resell--they lost volume.

b) Measuring the market: measure the market at the time (plus a commercially reasonable time, maybe (2-723)) and place of tender. Seller can measure using a substitute market if there's no current market at the time and place of tender.

3. Proceed (2-704): if the buyer breaches, the seller can do some pretty weird and cool things here, the idea being that the Code prefers measuring seller's damages by resale.

- a) He can identify goods that weren't already identified (but they have to be in his possession at the time of the breach).
- b) If he has goods that have demonstrably been intended for the contract, he can treat them as the subject of resale--even if they're unfinished.
- c) And, in fact, if he's got unfinished goods, he can go ahead and finish them or he can sell them for scrap and recover the difference as resale damages under 2-706 (or, he can do any other thing that's reasonable). But, to do this, he has to satisfy

certain requirements:

(1) His decision to go ahead and finish has to be a commercially reasonable decision.

(2) He has to have made the decision because he wants to avoid loss and realize their value.

4. **Action for the price (2-709):** if they buyer doesn't pay, the seller can recover the price (plus incidentals) from the buyer in certain very limited situations. If the seller sues for the price, he's got to hold the goods for the buyer (but he can resell them if the opportunity arises).
 - a) If the goods were accepted.
 - b) If conforming goods were lost or damages within a commercially reasonable time after the RoL passed to the buyer.
 - c) If the seller makes a reasonable effort to resell but can't resell (identified goods only).
 - d) If it really looks like the seller won't be able to resell (identified goods only).
5. **Stoppage of delivery (2-705):** if the seller finds out that the buyer's insolvent, he can stop delivery. And if the buyer repudiates or fails to make a payment, he can stop delivery, too--but only of large shipments.
6. **Withhold delivery (2-703(a)):** the seller can, generally, withhold delivery when the buyer breaches.
7. **Recovery of the goods (2-702):** if the seller finds out the buyer was insolvent but received the goods on credit, he can reclaim the goods. But he's got to make a demand within 10 day after the buyer received the goods, generally. And if the seller reclaims, he has no other remedy.
8. **Cancellation (2-703(f)):** the seller may cancel the contract (2-106).

D. Remedy limitation

1. **Liquidated damages (2-718):** the parties are limited on liquidating damages. Unreasonably large liquidated damages are void.
 - a) The liquidated damages amount has to reasonable in light of the anticipated actual harm.
 - b) They have to be reasonable in light of difficulties of proof of loss.
 - c) And they have to be reasonable in light of how hard it will be to obtain an adequate remedy otherwise.
2. **Limitation of remedies (2-719):** the parties can agree to add remedies, to substitute remedies, to limit remedies, or to change damage measures.
 - a) Exclusivity (2-719(1)(b)): the Code prefers remedies to be cumulative. So, unless the parties *expressly* agree that a remedy is exclusive, it's not.
 - b) Essential purpose test (2-719(2)): if, because of the circumstances, an exclusive or limited remedy "fails of its essential purpose," then *all* the Code remedies are available.
 - c) Unconscionability (2-719 cmt. 1 & 2-302): at the very least, there has to be a minimum adequate remedy. Otherwise, the remedy limitation is unconscionable and will be deleted. A disclaimer of personal injury damages is *prima facie* unconscionable (2-719(3)).