**Commercial Law: Sales**

*Outline Fall 2010*

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# Scope

**UCC in General**

§ 1-103(b) – Unless displaced by a particular provision of the UCC, the principles of law and equity supplement its provisions.

## The Scope of Article 2

**Sale of Goods**

* §2-201. Scope – Transactions in goods, unless context indicates otherwise or unless intended as only a security transaction.
	+ §2-106 – Sale = passage of title for a price.
	+ §2-105 – Goods = all “things” which are “movable” at the time of contracting. Includes unborn animals and 2-107.
	+ §2-107 – Things attached to but severable from realty are considered goods but: (i) minerals only if severed by seller and (ii) crops or timber if separated by either party.
	+ Exludes: Money, Investment Securities, and other “things in action”
		- Thing in action is a term of art inherited from English law. Means a right to recover money; a claim or cause of action; the right to sue. (e.g. intellectual property right?, inherited causes of action, ‘sold’ causes of action, goodwill of a business, intangibles)
	+ Some courts have held that anything which can be measured by a flow meter (e.g. electricity, water, natural gas) is a good for purposes of the UCC.

**Hybrid Transactions**

* The UCC offers no guidance, so the courts have developed the following:
* Dominant Purpose Test – The transaction is characterized as a sale of goods or a contract for services based upon whichever dominates the purpose of the agreement.
	+ ***Milau Associates, Inc. v. North Avenue Development Corp.*, 368 N.E.2d 1247 (N.Y. 1977)** {p.4}
		- Pipe in plaintiff’s warehouse burst, causing water damage.
	+ ***Analysts Intern. Corp. v. Recycled Paper Products, Inc.*, 1987 WL 12917 (N.D. Ill. 1987)** {p.11}
		- Design and implementation of software system governed by UCC.
	+ Majority Rule.
* Gravamen Test – Is the alleged injury a result of defective goods or defective workmanship? If defective goods, then UCC applies.
	+ ***Anthony Pools v. Sheehan*, 455 A.2d 434 (MD Ct. App. 1983)** {p.15}
		- Pool diving board defective, thus UCC controlled
	+ Minority Rule
* Segregated Approach – goods/service ratio calculated and applied.
	+ Minority Rule

## The Scope of Article 2A

**Lease of Goods**

* §2A-102 – Article 2A applies to any transaction that creates a lease.
	+ §2A-103(1)(j) – A lease is a transfer of a right to possession and use of goods for a term in return for consideration.
	+ A lease does not transfer title, only usage rights.
	+ Lessor retains a *residual interest* in the goods and holds title thereto.

**Leases vs. Sales with Security Interest**

* §1-203. Lease Distinguished from Security Interest – Transactions in the form of a Lease.
	+ (b) – The “Economic Realities” Test
		- It’s a sale with a security interest if: (i) the lessee has the right to possession and use of the good for the term of the lease; (ii) lessee cannot unilaterally terminate; ***and*** (iii) one of the following factors is present:
			* (1) term of the lease > = remaining economic life of goods
			* (2) lessee bound to renew for remaining economic life or to become owner
			* (3) lessee has option to renew for REL or become owner for no additional consideration or for nominal additional consideration (see subsection (d)).
	+ (c) list of factors which do not necessarily create security interest
* This determination is extremely determinant on the facts of the case.
* The reason this matters is for certain tax and accounting reasons, as well as filing requirements under Art. 9 if a security interest.

## The Scope of the CISG

**International Sale of Goods**

* Applies to (i) contracts for sale (ii) of goods (iii) between parties whose “places of business” are in different States (when the States are contracting States or the law of a contracting state applies). *Art 1*
* Exclusions – Art 2 & 3
	+ Does not apply to goods meant for personal use (like consumer goods)
	+ Does not apply to contracts which are predominantly for provision of services
* Place of Business - Article 10
	+ If a party has more than one place of business, the “place of business” for purposes of Article 1 is that which has the closest relation to the contract or its performance, taking into account circumstances known or contemplated by the parties any time up to the conclusion of the contract
* The CISG will presumptively govern transactions within the scope of the Convention.
	+ It pre-empts the UCC and any other U.S. state law.
	+ Even the CISG’s rules of interpretation trump those of the UCC.
* Many companies opt out of the CISG because it provides that private international law fills any gaps. Often overly burdensome for companies to be familiar with all of international law.

# Merchants and Their Treatment

* §2-104. Merchants are those who: (1) deal in goods of kind; (2) by occupation hold self out as having knowledge or skill as to practice or goods involved; or (3) employ an agent or intermediary who holds self out to have such knowledge or skill.
	+ **§§ 2-201(2), 2-205, 2-207, 2-209**: These sections rest on normal business *practices* which should be familiar to any person in business. Thus, almost every business person would qualify as a merchant under these sections.
	+ **§§ 2-314, 2-402(2), 2-403(2)**: These sections require a professional status as to particular kinds of *goods* (only merchants if deal in goods of kind)
	+ **§§ 2-103(1)(b), 2-603, 2-605, 2-609**: These sections apply to persons who are merchants under either the *practices* or the *goods* standards.
* A person making an isolated sale is not a merchant under the *goods* standard.
	+ ***Siemen v. Alden*, 341 N.E.2d 713 (Ill. App. Ct. 1975)** {p.24}
		- D sold P a used saw. Court held not liable for breach of implied warranty of merchantability because not merchant in goods of kind, despite knowledge of saws.
* Novice Merchants – there is no grace period for learning the trade, but courts tend to hold them to lesser standards.
* Farmers – held to be merchants although only sell goods once per year.
* §2-103(1)(b) – “Good Faith” for merchant = honesty-in-fact and the observance of reasonable commercial standards of fair dealing in the trade.
* §2-104(c) – “Between Merchants” means in any transaction with respect to which both parties are chargeable with knowledge or skill of merchants.”

# The Statute of Frauds

**The Statute of Frauds (§2-201)**

* Concerns whether contract *exists*, not its terms.
* A contract is enforceable under this section (above $500 threshold) if: (i) writing (ii) evidences contract for sale; and (iii) signed by the party against whom enforcement is sought. ((iv) and indicates *quantity*).
	+ A writing will not fail for indefiniteness where terms are omitted or incorrectly stated.
	+ A contract is unenforceable beyond the quantity indicated by the writing. (statute)
		- A contract is only enforceable if the writing indicates quantity (Official Comment 1)
		- Courts are split as to interpretation
	+ “Writing” has been interpreted by courts to include any record of the agreement, including a tape recording, etc. 2R-201 reflects this understanding.
* SoF is a complete defense.

**Exceptions**

* Specially Manufactured Goods (2-201(3)(a))
	+ If goods: (i) specially manufactured for buyer, (ii) not suitable for sale to others in ordinary course of seller’s business; and (iii) seller has substantially begun or made commitments for procurement. Then, contract enforceable despite SoF.
* Admission in Pleading, Testimony or Court (2-201(3)(b))
	+ Enforceable if existence of contract admitted by party against whom enforcement sought, but not beyond quantity admitted.
	+ Forced Admissions
		- If sworn denial and denial in pleadings 🡺 dismissal
			* Majority Rule. Unless voluntary sworn admission.
		- SoF must always be determined at trial, and conduct evidencing an agreement is all that is required to defeat the statute of frauds.
			* Minority Rule.
* Partial Performance (2-201(3)(c))
	+ If partial payment or partial acceptance of goods 🡺 enforceable.

**Between Merchants Exception (2-201(b))**

* A confirmation letter, if received within a reasonable time, constitutes a sufficient writing for SoF purposes so long as: (i) recipient has reason to know its contents and (ii) recipient doesn’t give written notice of objection within 10 days of receipt.
	+ The recipient need not read it for the writing to be sufficient for SoF.
	+ ***St. Ansgar Mills, Inc. v. Streit*, 613 N.W.2d 289 (Iowa 2000)** {p.36}
		- Timing need only be “reasonable” in relationship to the “nature, purpose and circumstances” of the action. Commercial practice can help construe what is “reasonable”.
* Need only be merchants with regard to normal business *practices*. Do not need to be merchants in goods of kind.

**Special Questions**

* Promissory Estoppel? Disagreement between courts due to §1-103(b) incorporating principles of equity and §2-201(a) “Except as otherwise provided *in this section*.”
* Quantity Required? Courts in disagreement b/c of inconsistency b/w statute and cmt.
* Electronic Writing? “Writing” and “Signed” are broadly interpreted.
	+ Federal Govt. resolved any controversy with E-Sign. States followed suit with UETA.
* Written contractual waiver of SoF requirements? Typically seen in trading-partner agreements meant to govern future dealings. Unknown enforceability.

**Leases (2A-201)**

* Threshold amount $1000.
* No between merchants or partial performance exception.

**Revised Article 2 (2R-201)**

* Threshold amount $5000.
* “Record”

**CISG (Articles 11, 12 & 96)**

* Does not require writing, but allows contracting parties to opt out of provision. Thus the CISG is silent on this issue and choice-of-law rules determine if SoF applies under domestic law.

# The Parol Evidence Rule

**The Parol Evidence Rule (2-202)**

* Concerned with the *terms* of the contract.
* PER is only concerned with prior agreements and contemporaneous oral agreements.
	+ Under §2-209, modification requires no consideration.
* If the contract is fully integrated, parol evidence is inadmissible.
	+ UoT, CoD, and CoP still admissible so long as do not contradict express terms, and so long as not expressly excluded by the writing. Also irregardless of merger clause.
		- ***Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971)** {p.46}
			* Unlike common law, contract need not be ambiguous to allow commercial practice evidence.
* If the contract is not fully integrated, parol evidence is admissible so long as it concerns consistent additional terms. Parol evidence cannot contradict the written agreement.
	+ Tests for consistency with agreement:
		- “Would Certainly Test” – Majority Rule
			* If the additional terms are such that, if agreed upon, they would certainly have been included in the document, they are inadmissible.
			* Seems to focus more on the subjective intent of the parties.
		- “Natural Inclusion Test” – Minority Rule
			* If the parties would have “naturally and normally” included the term in writing, then parol evidence thereof is inadmissible.
			* Seems to focus more on the objective reasonableness of inclusion/exclusion.
* Other Exceptions for admissibility of parol evidence:
	+ To prove non-existence of contract
	+ To show contract procured by duress, fraud, mistake, illegality
	+ To show the parties did not intend the writing to be binding until the occurrence of some condition or event
	+ To resolve ambiguities in the writing
	+ These rules apply even where the parol evidence would otherwise seem to contradict a term of the agreement.

**Merger Clauses**

* Merger clauses, attempting to create a fully-integrated contract, are usually a necessary element to a court’s finding of full integration but not sufficient. I.e. not dispositive.
* Merger Clause Likely Effective:
	+ Thorough and detailed, the product of negotiation between parties, and where the parties are equally sophisticated
* Merger Clause Likely Ineffective:
	+ Form contracts, where one of the parties is inferior, and where the merger clause looks like boilerplate language.

**CISG (Article 8)**

* Rejection of the PER. Intent of the parties is paramount. Commercial practice honored.

# Contract Formation: Offer and Acceptance

**Formation in General**

* §1-201(b)(3) – “Agreement” is the parties’ “bargain in fact.”
	+ Parties’s language + inferences from commercial practice
* Contract = Agreement + Legal Rules
* §2-204. Formation in General
	+ (1) A contract is formed by any manner sufficient to show agreement, including conduct of the parties
	+ (2) A contract will not fail for inability to pinpoint the moment of inception
	+ (3) A contract will not fail for indefiniteness so long as parties intended to form a K, and there is a “reasonably certain basis for giving an appropriate remedy.”
* §2A-204

**Offer & Acceptance (§2-206)**

* Basic rule: Offers may be accepted in any manner and by any medium reasonable under the circumstances unless unambiguously indicated otherwise.
	+ Any doubt as to what constitutes a reasonable manner/medium of acceptance is resolved in favor of the offeree.
* Shipment of non-conforming goods is an acceptance unless the seller seasonably notifies the buyer that it’s meant as an accommodation (i.e. counter-offer)
* If offeror not notified within a reasonable time, the offer is considered to lapse
* Mailbox rule theoretically would apply here (§1-103(b)), thus acceptance would be effective upon transmission, precluding offer revocation.
* 2A-206 is identical

**Firm Offer (2-205)**

* An offer by a merchant to buy or sell goods remains open if (i) a writing (ii) signed by the offeror (iii) gives assurances that it will be held open.
	+ No consideration is required.
	+ Remains open for the time indicated or, if none, for a reasonable time. In no event is the period of irrevocability longer than 3 months.
* 2A-205 is identical

# Contract Formation: Battle of the Forms

**The Battle of the Forms (§2-207)**

* Rejection of Common Law
	+ The UCC reverses the common law rule that the acceptance need be a “mirror image” of the offer, otherwise being considered a rejection and counter-offer.
	+ The UCC also rejects the “last shot rule” that the offeror’s terms trump upon acceptance.
* (1) A definite and seasonable expression of acceptance or a written confirmation sent within a reasonable time operates as an acceptance, regardless of additional or different terms, unless expressly made conditional on asset to the additional or different terms.
	+ Proviso language “expressly made conditional to acceptance of additional terms” must be included or the court will likely not find applicable.
		- ***Diamond Fruit Growers, Inc. v. Krak Corp.*, 794 F.2d 1440 (9th Cir. 1986)** {p.54}

If the offeror does not give specific and unequivocal assent [to the offeree’s different or additional terms] but the parties act as if they have a contract, the provisions of §2-207(3) apply to fill in the terms of the contract. Application of §2-207(3) is appropriate in that situation because by going ahead with the transaction without resolving their dispute, both parties are responsible for introducing ambiguity into the contract.

* + - * If the seller truly does not want to be bound unless the buyer assents to its terms, it can protect itself by not shipping until it obtains that assent.
	+ No contract is formed under this section if the parties’ documents cannot be reconciled so as to produce one. In which case either party can back out of the deal prior to beginning performance. After performance, see subsection (3).
		- Parties’ contracts are irreconcilable where they cannot come to agreement on key terms.
* (2) Additional terms are considered proposals for addition to the Contract.
	+ “Different” terms
		- Majority Rule – different terms are “knocked-out” and UCC fills gaps
		- Minority Rule – different terms are proposals, like additional terms
			* Conforms with OC 3
* (3) If no contract exists under subsection (1), a contract can still be formed by the conduct of the parties which evidences the existence of a contract. (e.g. performance)
	+ The terms are those on which the writings of the parties agree, plus any other terms provided by the UCC.
	+ Statutory “knock-out” rule applies to both additional and different terms, unlike (2)
	+ ***Leonard Pevar Co. v. Evans Products Co.*, 524 F. Supp. 546 (D. Del. 1981)** {p.68}
		- You can’t have a contract arising under both subsection (1) and subsection (3).

**Battle of the Forms Between Merchants**

* Same as non-merchants with regard to formation of contract. The contrast is in how the different or additional terms are treated.
* (2) Between merchants, additional terms become part of the contract unless:
	+ (a) the offer expressly limits acceptance to the terms of the offer;
	+ (b) the terms materially alter the contract; or
	+ (c) notification of objection is given within a reasonable time
		- OC 6 – where acceptance sent back with a term directly conflicting with an additional term, this is sufficient notification of objection.
* “Knock-out” rule applies to different terms, like for non-merchants.
* Materiality
	+ *See* Official Comment 4 for examples of material terms; 5 for examples of immaterial.
	+ The key test is whether the additional/different terms would cause the other party “surprise” and “hardship”
	+ ***Bayway Refining Co. v. Oxygenated Marketing and Trading A.G.*, 215 F.3d 219 (2000)** {p.60}
		- Test is one of “surprise and hardship”
			* The party contesting immateriality bears the burden of proving:
				+ That the party actually didn’t know (subjective element); and
				+ That it wasn’t something the party should have known (objective element).
		- Posner has opined that hardship is irrelevant if no surprise. Surprise must be established, then we see if hardship (i.e. materiality?). This is a growing minority view.

**Revised Article 2 and CISG**

* §2R-207
	+ You have to read the revision to 2-207 along with the revision to 2-206 because some language from §2-207(1) moved to §2-206(3).
		- Notice that no proviso language
	+ Caption changed
	+ Contract is only that which the parties agree, as supplemented by UCC.
	+ Revised section applies to all contracts, not just BOF.
* CISG Art. 19
	+ (1) An acceptance with additions or modifications is a counter-offer—the common law mirror image rule
	+ (2) Exception: if the additional terms do not materially alter the terms of the offer, the reply constitutes an acceptance unless the offeror objects orally or in writing
	+ (3) Types of material alterations. Encompasses pretty much anything.
	+ One of the most litigated provisions of the CISG

# Standard Form Consumer Contracts

**Concerns**

* Customers don’t read contracts because:
	+ No point. Consumers have little bargain power. Take it or leave it. And all sellers the same.
	+ Vendors will usually repair or replace, regardless of contract terms.
	+ Assumption that the law will protect against unfair terms
	+ Boilerplate language is incomprehensible (consumers only care about price and quantity anyway)
* CL presumes that consumers have read and understand the terms of standard form consumer contracts.

**Common Law**

* Common law would generally say that such terms (e.g. shrink-wrap or click-wrap) are not part of K because no assent to be bound, meeting of the minds, etc.
* (1) Doctrine of Reasonable Expectations
	+ Seller have reasonable expectation that buyer would agree to post-sale terms?
	+ Common law courts recognize, but apply narrowly. Most common w/ insurance policies.
* (2) Implied Condition in Original Sale that Consumer Agrees to Post-Sale terms
	+ Not often used.
* (3) Contract Modification Theory
	+ Consumer, after having an opportunity to read the terms, has decided to keep and use the good, and therefore has agreed to the post-sale terms.

**Uniform Commercial Code**

* *Pro-CD v. Zeidenberg*, (7th Cir. 1996)
	+ Shrink-wrap terms enforceable
* ***Hill v. Gateway*, 105 F.3d 1147 (7th Cir. 1997)** {handout}
	+ Rolling acceptance theory. K not accepted by buyer until 30-day return period elapsed. So in-box terms formed part of K.
	+ §2-207 doesn’t apply except where 2 forms.
	+ This ruling is all-around highly suspect.
* ***Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000)** {p.74}
	+ Court applied §2-207 despite no battle of the forms. Decided that Gateway’s acceptance of Klocek’s offer to buy was not conditioned upon acceptance of additional terms using the proviso language. Therefore, in-box terms mere proposals.

# Warranties Generally

* Warranties arise once customer accepts the *goods* (distinct from acceptance of offer).
* This is the same point at which the buyer has an obligation to pay for the goods (2-607)
* At this point the buyer has the right to inspect and choose to reject the goods, if it’s evident on delivery that the goods are non-conforming in some way
	+ Though oftentimes quality problems are latent defects, not ascertainable at time of acceptance of goods.
* After the goods have been accepted, it is the buyer’s burden to prove that the warranty has been breached.

**Cumulation and Conflict of Warranties Express or Implied (§2-317)**

* Warranties are, where possible, shall be construed as consistent with each other and cumulative.
* Where not possible, the intent of the parties shall determine which warranty is dominant. Considering: (i) technical displaces general; (ii) sample displaces general description; and (iii) express warranties displace inconsistent implied warranties, except for the implied warranty of fitness.

CISG Article 35 is intl law’s analog to express warranty and implied warranties of merchantability and fitness.

# Warranties of Title

**Warranties of Title (§2-312)**

* Allows good-faith purchasers to sue sellers for breach of warranty of title.
* (1) A sale of goods is presumed to transfer good and rightful title in the goods, without competing third-party claims and without encumbrances,
	+ Except where purchaser has actual knowledge of encumbrances; or
	+ (2) Except where the purchaser has “reason to know” (via specific language or circumstances) that vendor is not conveying full title. This applies to exclusions and modifications.
		- ***Moore v. Pro Team Corvette Sales, Inc.*, 786 N.E.2d 903 (Ohio App. 2002)** {p.87}
			* A general disclaimer of the warranty of title, or of seller’s liability thereunder, is not sufficiently specific. The contract must indicate to the buyer the scope of title transferred.
			* Example of sufficient wording:“Seller makes no warranty as to the title to the goods, and buyer assumes all risks of non-ownership of the goods by seller.”
			* Minority position, but worth knowing.
		- Broad “as is” language does not disclaim warranty of title. Only warranties of quality.
* (3) If vendor is a merchant regularly dealing in goods of the kind, unless otherwise agreed, he warrants the goods are free of infringement and the like
	+ BUT if buyer orders specifications, the buyer indemnifies seller against any IP infringements that may result..
* The warranty of title is not an implied warranty. Exclusion and modification is governed exclusively by §2-312(2).
* 2R-312
	+ Any colorable claim by a third party exposes seller to liability

**§2-403 – Shelter Rule; Voidable Title; Entrustment.**

* Shelter Rule (2-403(1))
	+ Adopts the common law rule that a seller can only convey the title he owns. The good-faith purchaser has a superior claim to all the world but the true owner (thus the true owner is “sheltered”). Buyer’s recourse is against seller for breach of warranty of title. Seller could vouch-in his seller under §2-607(5)(a).
* Voidable Title (2-403(1)
	+ A person with voidable title has the power to transfer good title to a good faith purchaser for value.
	+ Voidable title exists where: (a) seller deceived owner as to purchaser’s identity; (b) seller paid owner with bad check; (c) transaction agreed to be a ‘cash sale’; or (d) seller deceived owner through fraud.
* Entrustment Doctrine (2-403(2))
	+ Deviation from common law shelter rule
	+ Entrusting of goods to a merchant in goods of the kind grants merchant power to transfer all rights of the “entrustor” to a buyer in the ordinary course of business.
		- Entrustment – any delivery and acquiescence in retention of possession regardless of any condition expressed between the parties and regardless of larceny.
		- Example: I give my watch to a jeweler (who repairs watches as well as sells them) for repairs. He sells my watch, in contravention of our agreement for repair only. Purchaser still has good title (or whatever title original owner had).
		- Buyer in ordinary course (1-201(b)(9))– person who *in good faith*, and without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind.

**Vouching-In (2-607(5)(a))**

* Gives vouched-in party notice of suit in which they have an interest and binds them to the ruling in the case if they don’t come and defend themselves.
* Can be used by buyers against their sellers.
* In scope of warranty of title, most significant where third-party sues for title or infringement. Buyer could vouch-in seller (and possibly avoid attorney’s fees thereby).

**Lessor’s Warranty Against Interference and Infringement (§2A-211)**

* Basic Rule: The lessor warrants that no third party holds a claim or an interest that arose from an act or omission of the lessor that will interfere with the lessees quiet enjoyment of the leased goods.
	+ Fairly restricted because applies (i) only for the lease term and (ii) only for the acts and omissions *of the lessor*.
* (2) Where Merchant regularly dealing in the goods of the kind, also warrants that the good is free of the rightful claim of a third person by way of infringement or the like
* (3) Lessee specifications indemnify lessor, as in §2-312.
* Disclaimer (2A-214(4))
	+ Writing must be specific, by writing, and be conspicuous, unless the circumstances give the lessee reason to know that the goods are being leased subject to a claim or interest of another person
* 2A-304. Double Lease.
	+ Where lessor with an existing lease makes lease to second lessee for same goods, the second lessee takes the lease subject to the lease terms in existence with the first lessee, unless lessor is a merchant
* 2A-305. Sub-Lease.
	+ Existing lessee subleases the goods or sells them.
	+ (1) A buyer/sublessee cannot have any rights superior to the rights of the existing lessee
	+ (2) except where lessee is a merchant of the goods of that kind and purchaser is a buyer/sublessee in the course of business, wherein the purchaser would gain title to the goods, irrespective of the conditions of the lessee’s limitations.

# Express Warranties of Quality

**Express Warranties of Quality (§2-313)**

* Basic Rule: Sellers create express warranties to buyers by affirmation of fact or promise, by descriptions, or by samples or models which relate to the goods and become part of the basis of the bargain. (§2-313(1)).
	+ No specific reference to “warranty” or “guarantee” is necessary. But warranties are a term of the contract, and therefore, the parties must have agreed on it.
	+ Mere opinion or “puffery” do not rise to the level of express warranty.
	+ The most actionable statements (i.e. most likely to be construed as express warranties) are: (i) specific; (ii) written; (iii) in response to the buyer; (iv) not consequences (e.g. testimonials); (v) not hedged; (vi) not opinion language; or (vii) objectively verifiable.
* Basis of the Bargain. Three approaches:
	+ (1) No Reliance is necessary. Basis of the bargain is automatic, even if the buyer didn’t know about it. It must still be reasonable, however.
		- Minority Rule
	+ (2) Burden Shifting. There is a rebuttable presumption that the representation formed a basis of the bargain. Seller can defeat by presenting clear and convincing evidence that the buyer did not rely (e.g. did not know)
		- Majority Rule
	+ (3) Reliance. Buyer must prove reliance on the representation for it to be binding.
		- Minority Rule.
* Breach of the Express Warranty must have caused injury
* §2A-210 – more or less identical

**Remote Purchasers**

* It would seem that express warranties would apply to remote purchasers who see advertisements.
* Revised Article 2 expressly provides for “obligations” to remote purchasers where:
	+ Obligation created by a record packaged with goods (§2R-313A)
	+ Obligation created by advertisement of which buyer had knowledge at time of purchase (§2R-313B)
* See Privity subsection in ***Seller’s Defenses to Warranty Actions*.**

**Disclaiming Express Warranties**

* §2-316(1) – Disclaimers of Express Warranties
	+ Warranty disclaimers for express warranties are rarely given effect.
	+ Express words trump disclaimers.
	+ Subject to the parol evidence rule
		- Basically the express warranty will be considered a consistent additional term so long as it isn’t in direct conflict with a specific provision.
			* E.g. “I’ll put racing stripes on your car if you buy it.” Written says nothing, or maybe tries to disclaim “all express warranties.” Admissible.
* Courts have resolved the express warranty problem in the following ways:
	+ (1) Ignore PER language in 2-316(1)
	+ (2) Find the disclaimer fraudulent
	+ (3) Find the disclaimer unconscionable and strike it under 2-302
	+ (4) Find the writing not a final expression of the parties’ agreement (i.e. not fully integrated)
	+ (5) Post-contract disclaimers are offers which the buyer did not accept
		- This circles back to the discussion on standard form contracts
* ***Bell Sports, Inc. v. Yarusso*, 759 A.2d 582 (Del. 2000)** {p.107}
	+ Dirt-bike helmet case.
	+ “A clause generally disclaiming ‘all warranties, express or implied’ cannot reduce the seller’s obligation with respect to such description. . . .” Cmt. 4
	+ “Express warranties rest on ‘dickered’ aspects of the individual bargain, and go so clearly to the essence of that bargain that words of a disclaimer in a form are repugnant to the basic dickered terms.” Cmt 1 §2-313

# Implied Warranties

* Implied warranties form part of parties’ agreements by operation of law unless expressly disclaimed under §2-316.
* Rejection of the common law doctrine of *caveat emptor*.
* Courts’ application of implied warranty remedies often reflective of the products liability regime in their jurisdiction. Sort of a sliding scale.
* See Privity subsection in ***Seller’s Defenses to Warranty Actions*.**

## Implied Warranty of Merchantability

**The Implied Warranty of Merchantability (2-314)**

* (1) Warranty of merchantability implied in a contract for sale of goods if the seller is a merchant with respect to goods of that kind.
	+ ***Siemen v. Alden*, 341 N.E.2d 713 (Ill. App. Ct. 1975)** {p.24}
		- The definition of merchant within §2-314 is a narrow one, and the warranty of merchantability is applicable only to a person who, in a professional status, sells the particular kind of goods giving rise to the warranty.
* (2) Goods are warranted, *inter alia*, to: be within the expected range of quality and variation within the trade, be fit for the ordinary purposes for which such goods are used; be adequately packaged and labeled; and conform to any promise or affirmation made on the packaging.
	+ Ordinary purposes usually extend to the intended and reasonably foreseeable uses of the goods.
	+ Some courts have imported the Hand formula (B<P\*L) to determine whether a particular design defect made the product unfit for its ordinary purposes.
* (3) Other implied warranties may arise from CoD and UoT
* Fitness for Ordinary Purpose:
	+ ***Shaffer v. Victoria Station, Inc.*, 588 P.2d 233 (Wash. 1978)** {p.93}
		- Wine glass shatters during normal use.
		- The warranty of merchantability extends also to a good’s packaging or container.
		- The sale of food or drink in a restaurant is a sale of goods.
	+ ***Daniell v. Ford Motor Co.*, 581 F. Supp. 728 (D. N. Mex. 1984)** {p.98}
		- Suicidal woman locks self in trunk.
		- IWM requires fitness for ordinary use. No reliance necessary on skill or judgment of seller.
	+ ***Webster v. Blue Ship Tea Room, Inc.*, 198 N.E.2d 309 (Mass. 1964)** {p.102}
		- Fish bone in fish chowder.
		- Tests of fitness for ordinary purpose for food:
			* “Natural” Test - If the object is natural to the food, there is no breach of implied warranty of merchantability. Minority rule.
			* Reasonable Expectations Test – Would the consumer have reasonably expected to find this object in the food? Majority rule.
* §2A-212. – substantially similar

## Implied Warranty of Fitness

**The Implied Warranty of Fitness of a Particular Purpose (2-315)**

* Policy
	+ Buyers and sellers have asymmetric information. In Fitness situation, buyer is the low-cost information provider. We want buyers to be able to find the goods they need quickly, but we also want sellers to stand behind their representations.
* Goods are warranted fit for the buyer’s particular purpose where: (i) the seller has reason to know the particular purpose and (ii) the seller has reason to know the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods.
	+ The buyer must actually rely on the seller’s skill or judgment.
	+ The seller’s reason to know of buyer’s reliance can be implied by the fact that the buyer purchased the goods after receiving representations from the seller as to the particular purpose. Most courts have not required actual knowledge.
* Proving Breach of Warranty of Fitness
	+ Elements for warranty satisfied, plus good unfit & unfitness caused injury to buyer.
* §2A-313 – substantially similar to 2-315.

## Disclaiming Implied Warranties

**Disclaiming Implied Warranties Generally (§2-316(3))**

* The point of stringent rules regarding disclaimer of warranties is protection of buyer from surprise
* Special rules for Disclaiming both implied warranties (§ 2-316(3)):
	+ (a) “As is” rule—“As is,” “with all faults,” or other language which in common understanding calls the buyer’s attention to the disclaimer of all warranties, will disclaim all implied warranties.
		- Practical point: use the language suggested by the statute.
		- Statute does not require conspicuousness, but courts have implied.
	+ (b) Examination Rule
		- If the buyer examined the goods or had the opportunity to do so yet *refused*, then implied warranties are disclaimed with regard to defects he should reasonably have discovered.
	+ (c) Commercial Practice Rule
		- Course of performance, course of dealing, or usage of trade could disclaim or modify the warranty.
* ***Bowdoin v. Showell Growers, Inc.*, 817 F.2d 1543 (11th Cir. 1987)** {p.123}
	+ Terms in box didn’t form basis of bargain and thus are unenforceable.
* ***Rinaldi v. Iomega Corp.*, 41 UCC Rep. Serv. 2d 1143 (Del. Sup. 1999)** {p.127}
	+ This court followed *ProCD* and *Hill v. Gateway 2000*, holding that the in-the-box terms were effective and thus disclaimed.
		- “The commercial practicalities of modern retail purchasing make it eminently reasonable for a seller of a product . . . to place a disclaimer of the implied warranty of merchantability within the plastic packaging. The buyer can read the disclaimer after payment . . . and then later have the opportunity to reject the contract terms, if the buyer so chooses.”

**Disclaiming the Implied Warranty of Merchantability**

* To disclaim the implied warranty of merchantability, the seller must mention the word “merchantability. *If* in writing, the disclaimer must be conspicuous. §2-316(2).
	+ §1-201(b)(10) – “Conspicuous” includes: heading, different font, different color, bigger text, separate paragraph, etc.
		- Purpose of the conspicuousness requirement is to protect buyers from surprise.
* ***Cate v. Dover Corp.*, 790 S.W.2d 559 (Tex. 1990)** {p.115}
	+ “When the buyer is not surprised by the disclaimer, insisting on compliance with the conspicuousness requirement serves no purpose. . . . The extent of the buyer’s knowledge of a disclaimer of the implied warranty of merchantability is thus clearly relevant to a determination of its enforceability.”
	+ The court here read-in (i.e. made up) an exception to the conspicuousness requirement where the purchaser had actual knowledge of the disclaimer. *See* Cmt. 1.

**Disclaiming the Implied Warranty of Fitness for a Particular Purpose**

* To disclaim the implied warranty of fitness for a particular purpose, it must be: (i) in writing and (ii) conspicuous.
	+ “There are no warranties which extend beyond the description on the face hereof” is sufficient to disclaim a warranty of fitness.
	+ §1-201(b)(10) – “Conspicuous”

**Article 2A and Revised Article 2**

* § 2A-214
	+ Although this provision borrows heavily from 2-316, there are a couple differences that are more protective of buyers:
		- (2) Disclaimer of the implied warranty of merchantability in a lease contract *must* be in writing.
		- The exemplary language for disclaiming the implied warranty of fitness. Here “There is no warranty that the goods will be fit for a particular purpose.”
* §2R-316
	+ Major changes apply to contracts that qualify specifically as “consumer contracts.” Consumer contract is a defined term in the revised article 2 § 2R-103(1)(c)-(d).
	+ “As is” and “with all faults” must be within a record and must be conspicuous.

# Limiting Remedies For Breach of Warranty

* The question of limited remedy only arises after we’ve determined that there was a warranty and after we’ve determined if/how the warranties are disclaimed or modified.

**Buyer’s Default Remedies for Breach of Warranty (§§ 2-711, 2-714, 2-715)**

* 2-711. Buyer’s Remedies in General
	+ Where the (i) the seller fails to make delivery or repudiates or (ii) where the buyer rightfully rejects or revokes, then the buyer may cancel the contract and receive restitution. (i.e. can recover anything paid plus any costs resulting from delay)
* 2-714. Buyer’s Damages for Breach in Regard to Accepted Goods
	+ (1) If buyer accepts non-conforming goods, buyer can get expectation damages. (i.e. puts the buyer in position would have been in if goods conforming).
	+ (2) Damages = the difference between the value of the defective goods and the goods bargained for, at the point and time of acceptance. (assumes goods retained)
	+ Buyer can get incidental and consequential damages under 2-715.
* 2-715. Incidental and Consequential Damages.
	+ Lost revenues, opportunity costs, lost good will, injury to persons & property, etc.
* 2-609 – Buyer can seek assurances (in fact either party can) where reasonable ground for insecurity.

**Limiting Remedies for Breach of Warranty (§2-719)**

* (1)(a) The parties’ agreement may provide for modified or limited remedies, including repair & replacement.
	+ (b) Unless expressly agreed to be “exclusive”, the modified or limited remedy is considered optional.
	+ No mention of conspicuousness, but about half of the courts require.
* (2) Where circumstances cause the exclusive or limited remedy to fail of its essential purpose, standard remedies will apply instead.
	+ Where there are persistent defects, which repeated repairs have been unable to correct, courts are likely to find a failure of essential purpose.
		- Also where repair and replace agreement but seller fails to replace within reasonable time.
	+ ***Wilson Trading Corp. v. David Ferguson, Ltd.*, 244 N.E.2d 685 (N.Y. 1968)** {p. 133}
		- As explained by official comment 1, “where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.”
* (3) Consequential damages may be limited or excluded unless unconscionable.
	+ Limitation in context of consumer goods is prima facie unconscionable.
		- This presumption has rarely, if ever been overcome.
	+ ***Pierce v. Catalina Yachts, Inc.*, 2 P.3d 618 (Alaska 1999)** {p.139}
		- Courts will consider foreseeable risks in their unconscionability analysis.
		- Seller bad faith can influence the analysis.
* Any limitation or modification must be *part of the bargain*, i.e., an agreed-upon term.
	+ Post-sale terms depend on jurisdiction.
* Harmonizing §§2-719(2) & (3)
	+ Courts have taken three approaches:
		- (1) Dependant approach – Failure of essential purpose 🡺 consequential damages limitation automatically fails. No unconscionability analysis.
		- (2) Independent approach – Analysis is separate for failure of essential purpose and unconscionable limits on consequential damages.
			* Majority. Applied in *Pierce v. Catalina Yachts, Inc.*
		- (3) Case by Case Approach.
	+ The courts discuss that the remedy limitation and the consequential damages limitation must be separate terms. However, case law seems to suggest that they are not referring necessarily to physically separate terms. They can be two sentences within the same paragraph.
* 2A-503 – Substantially Similar
* CISG is silent on remedy limitations.

**Unconscionability (§2-302)**

* Unconscionability is judged at the time the contract was made. (but includes foreseeable risks)
* Unconscionability is always a ground for striking a remedy under this section.
	+ In addition to standard unconscionability analysis, buyer must also have at least a “fair quantum of remedy for breach” (i.e. minimum adequate remedy)
* See comment 1 to §2-302 for the Code’s succinct definition of unconscionability.
* Two-Pronged Test
	+ Procedural Element – Gross inequity of bargaining power
	+ Substantive Element – Terms are so unfair and unfair so as to shock the conscience.
* Most courts consider the procedural-substantive test a sliding scale
	+ Posner says only the substantive element matters, and it must be strongly inequitable.
* Courts can strike the clause, limit the clause, or invalidate the contract.
* Sales contracts are rarely found unconscionable. Most common with arbitration clauses.

# Seller’s Defenses to Warranty Actions

**Seller’s Defenses**

* Seller’s Defenses include: buyer’s failure to give adequate notice of non-confomrity, plaintiff’s lack of privity, statute of limitations, and buyer’s fault.
	+ The first three are covered below.
	+ The effectiveness of the buyer’s fault defense depends on whether comparative negligence or contributory negligence regime.

## Notice

**The Buyer’s Duty to Give Adequate Notice of Breach (§2-607(3))**

* Basic Rule: After acceptance, buyer must give seller notice of breach within a reasonable time after buyer discovers or should have discovered the breach.
	+ The court will dismiss *with prejudice* otherwise.
	+ Reasonable time is a question of fact
		- ***Fitl v. Strek*, 690 N.W.2d 605 (Neb. 2005)** {p.146}
			* Mickey Mantle baseball card. 2 years later reasonable time.
	+ Formal notice is always necessary.
	+ Notice need only be sufficient to let seller know that a breach has occurred.
		- Some courts require the word “breach”
		- Need not be particularized, as in §2-605
		- Filing a complaint is not sufficient notice.
* Purposes of the rule
	+ To prevent and defeat “commercial bad faith” of buyers. (OC4 §2-607)
	+ To preserve seller’s right to inspect & cure. (§§2-515, 2-508)
	+ To facilitate settlement.. (OC4 §2-607, last sentence.)
	+ To protect seller against unfair surprise (SoL argument)
* Notice & Privity
	+ Unclear whether third-party beneficiaries need give notice. See OC 5 to 2-607.
		- §2-103 – “Buyer”
	+ Buyer can use vouching-in provision to give notice up the chain of distribution. §2-607(5)(a).
	+ Who the “seller” is may depend on who is breaching. A manufacturer may be the “seller” for purposes of an express warranty on the box.
* 2A-516(3) – substantially similar, but requires notification of lessor *and* supplier, if one.

## Privity

**Third-Party Beneficiaries (§2-318)**

* Alternative A – Family members and guests if reasonable to expect may be injured by goods.
	+ Majority adoption. Codification of common law.
* Alternative B – All “natural persons” who may be reasonably expected to use, consume or be affected thereby and who is injured as a result.
	+ Fewer than 10 states adopted. Codification of more progressive case law.
* Alternative C – Protects even property damage and non-natural persons (e.g. corporations) reasonably expected to use, consume or be affected and who is injured as a result.
	+ Fewer than 10 states adopted. Meant to reflect where law is headed.
* Regardless of the alternative adopted by the states, the judiciary continues to extend through its decisions.
	+ Comment 3 of §2-318 seems to contemplate this sort of judicial expansion. Seems to allow for the continued development of the case law.
	+ ***Reed v. City of Chicago*, 263 F. Supp. 2d 1123 (N.D. Ill. 2003)** {p.153}
		- Suicide by hanging with isolation gown. Example of judicial expansion.
* §2R-318
	+ Expands the section to include remote purchasers under §§ 2R-313A and 2R-313B. Otherwise, the alternatives remain the same.
* 2A-216
	+ Basically the same as §2-318.
	+ Adds the following to each alternative: “This section does not displace principles of law and equity that extend a warranty to or for the benefit of a lessee to other persons.” Seems redundant in light of §1-103(b).

## Statute of Limitations

**Statute of Limitations (§2-725)**

* (1) Action must be brought within 4 years of accrual of cause of action.
	+ Parties can limit down to 1 year but cannot expand beyond 4 years.
* (2) Accrual occurs at time of breach, regardless of party’s lack of knowledge.
	+ Breach occurs upon delivery
	+ Exception: where a warranty “explicitly extends to future performance of the goods,” the cause of action accrues when the breach is or should have been discovered.
		- E.g. where 7-year warranty, if in year 6 the buyer discovers or should have discovered breach, accrual occurs at that time and goes until year 10.
		- Implied warranties do not fall in this exception and accrue on delivery
		- ***Poli v. Daimler Chrysler Corp.*, 793 A.2d 104 (N.J. Super. 2002)** {p.297}
			* While this court construed this “repair and replace” warranty as a warranty for future performance, many courts construe such warranties as ordinary warranties, not privy to the exception for future performance.
		- Manufacturer implied warranties begin to run when delivered to retailer (majority rule).
		- Some courts will apply tort SOL (2 yrs) in case of personal injury from the time of injury rather than UCC’s 4 yrs from delivery.
* (4) CL on tolling not altered (e.g. in case of fraud)
* SOL is an affirmative defense, which must be pled and proved.
* § 2A-506. Statute of Limitations.
	+ (1) Allows limitation of SoL down to one year, but is silent as to expansion.
	+ (2) Applies a more liberal standard of accrual. Accrual is at the later of (i) the breach or (ii) when the buyer should have known of the breach.
* CISG – Most litigated articles:
	+ - Art 38 – Buyer must examine the goods or cause them to be examined
		- Art 39 –Buyer must give notice to seller within a reasonable time, else lose right to seek remedy.

# Filling Gaps in Sales Contracts

**Omitted Terms in a Contract (§§ 2-305–11)**

* Remember that a contract will not fail for indefiniteness so long as the parties intended to make a contract *and* there is a “reasonably certain basis for giving an appropriate remedy.” §2-204(3)
* None of the following “gap-filling” provisions would apply where UoT, CoD or CoP supply the answer, since commercial practice forms part of the contract.
* §2-305 – price is “reasonable price” if: (a) not included in K, (b) left to be agreed upon and not agreed upon, or (c) is fixed in terms of a mechanism which later fails.
	+ (3)Where price left to be fixed by one of the parties and that party fails to do so through fault, the other may fix the price or cancel.
	+ Commercial practice can guide. Any specification must be in good faith.
* 2-306 – output & requirement K’s require good faith and proportionality with any estimate or normal/prior performance. Exclusivity agreement requires “best efforts”
* 2-307 – default is a single delivery, upon which payment is due.
	+ If multiple deliveries, payment on each delivery.
* 2-308 – place of delivery is seller’s place of business. If goods elsewhere, POD is where goods are.
* 2-309 – default time for performance is reasonable time. Termination of agreement requires reasonable notification (invalid if unconscionable).
* Shipment of Goods (§§ 2-503, 2-504)
	+ Applicable only where parties have agreed seller will deliver goods to buyer.
* Payment of Goods
	+ 2-310 – payment is due at time and place of receipt of goods. Exception when documents exchanged.
	+ 3-511 – Payment is condition of delivery and permissible in any normal tender.
	+ 2-513 – buyer has right to inspect before payment or acceptance in any reasonable time/place/manner.
* § 2-311. Options and Cooperation Respecting Performance.
	+ (1) Agreements do not fail for lack of definiteness merely because they leave particulars of performance to be specified by one of the parties.
	+ (2) By default, assortment of goods is the buyers option, while shipping arrangements are the seller’s option.
	+ (3) Where specifications are unseasonable and where they materially alter the other’s performance, the other (a) is excused of delay in performance, and (b) may proceed reasonably or may extend the time for completion, in addition to other remedies.

# Perfect Tender Rule & Cure

**The Perfect Tender Rule (§2-601)**

* The PTR allows the buyer to reject goods for any non-conformance whatsoever.
	+ §2-106(2) – “conforming goods”
* Exceptions
	+ Exception is where delivery method fails and buyer provides commercially reasonable substitute under §2-614(1).
	+ Under the common law, there was an exception for substantial performance; no such exception exists under the UCC.
* The PTR is a default rule that can be contracted around. (e.g. §2-719)

**Cure (§2-508)**

* (1) Basic Cure Rule: Seller has right to cure properly rejected goods if seasonably notifies buyer and if cured within contract period. (continues CL)
* (2) Surprise Rejection Rule: Seller has right to cure where seller had reasonable grounds to believe the goods would be acceptable (with or without money allowance) and the seller seasonably notifies buyer. Seller then may cure within a further reasonable time.
	+ Seller must have a specific reasonable basis to believe that the specific buyer would have accepted. Thus this remedy is probably not available to seller in consumer transactions because seller doesn’t know buyer.
* Courts are in disagreement whether rightful revocation allows cure.
* The seller’s right to cure is a default rule which can be contracted around. (e.g. §2-719)
* Shaken Faith Doctrine
	+ If a core component fails or repeated attempts to cure/repair the buyer can be said to have “shaken faith” in the future performance of the good and the buyer may be granted rescission.
	+ Not applied uniformly or universally. Very hard to predict how will come out.
* ***Wilson v. Scampoli*, 228 A.2d 848 (D.C. App. 1967)**{p.215}
	+ Color TV case.
	+ “While [there is] no mandate to require the buyer to accept patchwork goods or substantially repaired articles in lieu of flawless merchandise, . . . minor repairs or reasonable adjustments are frequently the means by which an imperfect tender may be cured.”
* ***Ramirez v. Autosport*, 440 A.2d 1345 (N.J. 1982)** {p.219}
	+ Van trade-in case. Seller repeatedly tried to cure. Shaken faith (and outside scope of cure provisions) so rescission.
* §2R-508
	+ Allows seller to cure in case of revocation as well as rejection.

# Acceptance & Rejection

**Acceptance (§2-606)**

* The law assumes acceptance. So acceptance if communicated or if do nothing, so long as reasonable opportunity to inspect. Effective in spite of known non-conformities.
	+ ***Plateq Corp. of North Haven v. Machlett Laboratories, Inc.*, 456 A.2d 786 (Conn. 1983)** {p.227}
		- Acceptance occurs, in spite of known non-conformities, where the buyer “after a reasonable opportunity to inspect the goods signifies to the seller that . . . he will take or retain them in spite of their non-conformity.” §2-606(1)(a).
* Acceptance if buyer performs any act inconsistent with seller’s ownership.
	+ If “wrongful against the seller” then it is an acceptance only if ratified by seller.
* Acceptance of any part of a commercial unit is acceptance of the whole.
* Consequences of Acceptance (§2-607)
	+ Buyer must pay the contract price (subsection 1)
	+ Buyer cannot reject goods (subsection 2), but can revoke under 2-608.
		- Acceptance does not preclude remedy for non-conformance.
	+ Buyer has burden to prove non-conformity (subsection 4)
	+ Buyer must notify seller (of breach) or be barred from remedy

**Rejection (§§ 2-602, 2-603, 2-604)**

* §2602
* (1) Rejection must be within a reasonable time and buyer must seasonably notify seller.
	+ Notification must be specific (“reject”). See also §2-605 on waiver.
* (2) Subject to §§ 2-603 & 2-604:
	+ Any exercise of ownership by buyer after rejection is wrongful against seller.
	+ Buyer has duty after rejection to hold any rejected goods with reasonable care so the buyer may remove them, but the buyer has no further duties with respect to goods rightfully rejected.
		- Unless buyer has security interest under §2-711(3), in which case buyer, in which case he may sell the goods to recover his interest.
* Merchant Buyer’s Duties (§2-603)
	+ When (i) rightful rejection, and (ii) seller has no place of business or agent in the market of merchant buyer 🡺 buyer must follow seller’s reasonable instructions.
	+ Same circumstances but (iii) no instructions, and (iv) perishable goods 🡺 merchant buyer must make reasonable efforts to sell.
		- Merchant buyer entitled to reimbursement for (i) expenses of caring for and selling goods, (ii) commission in amount usual in trade or reasonable commission not to exceed 10%.
	+ Merchant held to good faith and good faith conduct.
	+ Acceptance does not result. Conversion does not result.
* Buyer’s Option to Salvage of Rightfully Rejected Goods (§6-204)
	+ Subject to 2-603.
	+ If seller give no instructions within reasonable time after notification of rejection, buyer may (i) store the goods, (ii) ship them back, or (iii) resell the goods on sellers account with reimbursement as in 2-603.
	+ Acceptance does not result. Conversion does not result.

**Waiver of Objections (§2-605)**

* If buyer fails to inform seller, in connection with a rejection, of defects ascertainable by reasonable inspection, he can’t later rely on those defects to support rejection or breach if:
	+ (a) seller could have cured them; or
	+ (b) between merchants and seller had made a request in writing for a full description of defects.

**Improper Rejection or Revocation (§2-703)**

* Where the buyer wrongfully rejects or wrongfully revokes acceptance of goods or fails to make payment, etc., then the seller becomes entitled to the remedies identified in 2-708.

# Revocation of Acceptance

**Revocation (§ 2-608)**

* (1) Buyer may revoke goods (in whole or part) after acceptance if non-conformity substantially impairs their value to him.
	+ (a) If goods were accepted with known non-conformity, goods cannot be revoked therefor, unless acceptance was based on a reasonable assumption of seasonable cure. §2-607(2).
	+ (b) The non-conformity must not have been discovered at the time of acceptance either because of the difficulty of discovery or by seller’s assurances.
* (2) Revocation must occur within a reasonable time after buyer discovers or should have discovered the non-conformity. Further, it can only occur prior to any substantial change in the condition of the goods (not caused by non-conformity).
	+ Revocation is not effective until the buyer notifies the seller of revocation.
		- Cmt. 5 – More generally required than notification of breach (2-607(3)), but less generally required than waiver of buyer’s rights (2-605). Also generally less required where buyer is a non-merchant.
* (3) A buyer who so revokes has the same rights and duties as if rejected.
* Substantial Impairment
	+ Cmt. 2 seems to indicate a subjective test.
	+ Courts have applied a two-part test with a subjective and objective element.
		- Subjective Element – Is the value of the good substantially impaired in the eyes of the buyer?
		- Objective Element – Would a reasonable person with buyer’s peculiarities reasonably find the value of the good substantially impaired?
	+ ***Waddell v. L.V.R.V. Inc.*, 125 P.3d 1160 (Nev. 2006)** {p.232}
		- RV case with engine overheating, battery dying, door opening, etc.
		- A nonconformity effects a substantial impairment of value if it “shakes the buyer’s faith or undermines his confidence in the reliability and integrity of the purchased item.
		- Supports the two-part test.
* Consequences of Revocation and Seller’s right to cure.
	+ A buyer who revokes has the same rights and duties with regard to the goods involved as if he had rejected him. This means that the buyer has all the remedies available under §2-711, just like rejection.
	+ Buyer must follow duties under §§2-602 – 2-604.
	+ Seller right to cure?
		- Some courts have said that although there is not an express right to cure under §2-608, the right to cure is implied. These courts say seller gets at least one chance after receiving notice of revocation.
		- Other courts have been reluctant to read in a right to cure.
		- Revised §2-508 does provide for seller right to cure after valid revocation
* Revocation vs. Rescission
	+ Llewellyn adopted the term “revocation” as a conscious divergence from the common law doctrine of rescission.
	+ Under revocation, the buyer can get his money back *plus* can follow up with a case for consequential damages. Unlike rescission, which would only provide refund