

Notre Dame Law School

NDLScholarship

Indiana Continuing Legal Education Forum
2023

Indiana Continuing Legal Education Forum

1-1-2023

A Deep Dive Into The UCC

Indiana Continuing Legal Education Forum (ICLEF)

Follow this and additional works at: https://scholarship.law.nd.edu/iclef_2023

Recommended Citation

Indiana Continuing Legal Education Forum (ICLEF), "A Deep Dive Into The UCC" (2023). *Indiana Continuing Legal Education Forum 2023*. 13.

https://scholarship.law.nd.edu/iclef_2023/13

This Article is brought to you for free and open access by the Indiana Continuing Legal Education Forum at NDLScholarship. It has been accepted for inclusion in Indiana Continuing Legal Education Forum 2023 by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

A Deep Dive Into The UCC

December 12, 2023

<i>ICLEF Electronic Publications.</i>	4
<i>MANUAL - A Deep Dive Into The UCC (And You Thought Law School Was Over) - December 12, 2023.</i>	5
<i>Program Overview.</i>	8
<i>Faculty.</i>	8
<i>Faculty Bios.</i>	9
<i>PROFESSORS PANGBURN AND HAROLD'S - FINAL EXAM.</i>	11
<i>Slide Presentation - A Deep Dive Into The UCC (And You Thought Law School Was Over).</i>	11
Slide 1: A Deep Dive into the UCC (And You Thought Law School Was Over!).	16
Slide 2: BUT FIRST, A LEGAL DISCLAIMER:	17
Slide 3: BACKGROUND TO THE UCC.	18
Slide 4: The UCC always supplants the common law of contracts.	19
Slide 5: Answer: FALSE!	20
Slide 6: All courts treat the Official Comments to the UCC as binding authority.	21
Slide 7: Answer: FALSE!	22
Slide 8: Karl Llewellyn, the "Godfather" of the UCC, wanted juries of expert merchants to decide what was commercially reasonab.	23
Slide 9: Answer: TRUE!	24
Slide 10.	25
Slide 11: Answer: MOSTLY TRUE!	26
Slide 12: A seller can limit vertical privity by agreement.	27
Slide 13: Answer: FALSE!	28
Slide 14: If the express terms of a contract conflict with course of performance, the express terms still apply.	29
Slide 15: Answer: TRUE, but	30
Slide 16: SCOPE OF THE UCC.	31
Slide 17: A defect must manifest itself within the duration of the implied warranty for there to be a viable implied warranty claim.	32
Slide 18: Answer: TRUE everywhere BUT California!	33
Slide 19: Parties can agree to have the UCC apply to a contract even if it does not involve goods.	34
Slide 20: Answer: TRUE!	35
Slide 21: Goods covered by the UCC include bitcoin.	36
Slide 22: Answer: TRUE if Bitcoin is the not the medium of payment.	37
Slide 23: CONTRACT FORMATION.	38
Slide 24: An email from a dealer confirming an order with an OEM, if not objected to within 10 days, is enough to satisfy the statute of	39
Slide 25: Answer: TRUE!	40
Slide 26: A contract is not enforceable under the UCC unless the precise moment it was formed can be identified.	41
Slide 27: Answer: FALSE!	42
Slide 28: The "Battle of the Forms" in UCC 2-207 is straightforward and very easy to understand.	43
Slide 29: Answer: FALSE!	44
Slide 30: The Battle of the Forms generally favors the buyer.	45
Slide 31: Answer: TRUE!	46
Slide 32: No contract can be formed if the buyer's purchase order and the seller's order confirmation contradict each other.	47
Slide 33: Answer: FALSE!	48
Slide 34: An RV manufacturer and its dealer must have consideration to make an agreement to modify their dealer agreement enforce	49
Slide 35: Answer: FALSE!	50
Slide 36: WARRANTIES.	51
Slide 37: A buyer who does not rely on an express warranty cannot enforce the warranty because it did not form the basis of the barg	52
Slide 38: Answer: PARTLY TRUE, PARTLY FALSE!	53
Slide 39: A remote manufacturer cannot create an implied warranty of fitness for a particular purpose.	54
Slide 40: Answer: FALSE!	55
Slide 41: If a buyer refuses to examine the vehicle before acceptance, the buyer loses his implied warranty claim.	56
Slide 42: Answer: SOMEWHAT TRUE, SOMEWHAT FALSE!	57
Slide 43: If a warranty is not a future performance warranty, then any breach of warranty accrues on the date of delivery.	58
Slide 44: Answer: TRUE!	59
Slide 45: To enforce a term in an express warranty, a buyer must first have received and read the warranty.	60
Slide 46: Answer: FALSE but	61
Slide 47: A disclaimer of the implied warranty of fitness for a particular purpose does not need to be conspicuous.	62
Slide 48: Answer: FALSE!	63

A Deep Dive Into The UCC

December 12, 2023

Slide 49: In its warranty, a seller can define when notice of breach must be given if the definition is reasonable.....	64
Slide 50: Answer: TRUE!.....	65
Slide 51: A buyer who gives the seller specifications for manufacturing a good has no implied warranty claim related to those specifica	66
Slide 52: Answer: TRUE!.....	67
Slide 53: An express warranty addressing a truck's chassis displaces inconsistent implied warranties as to that chassis.....	68
Slide 54: Answer: TRUE!.....	69
Slide 55: A disclaimer that disclaims "all warranties, both express and implied" is sufficient to disclaim the implied warranty.....	70
Slide 56: Answer: FALSE!.....	71
Slide 57: Under the pre-sale availability rule, an RV manufacturer is required to give its express warranty to the dealer so it can be disp	72
Slide 58: Answer: TRUE!.....	73
Slide 59: MAGNUSON MOSS.....	74
Slide 60: A seller can disclaim implied warranties if it does not give an express warranty.....	75
Slide 61: Answer: TRUE but.....	76
Slide 62: The Magnuson-Moss Warranty Act allows an RV manufacturer to limit the scope of any implied warranty to only those por.....	77
Slide 63: Answer: SHOULD BE TRUE!.....	78
Slide 64: The Magnuson-Moss Warranty Act requires any provision excluding consequential damages to be on the face of the warrant	79
Slide 65: Answer: TRUE, but.....	80
Slide 66: PERFORMANCE.....	81
Slide 67: A buyer who never takes delivery of an RV but has custom cabinets installed will be deemed to have accepted the RV and c	82
Slide 68: Answer: TRUE! But.....	83
Slide 69: Unconscionability under the UCC is a fact issue for the trier of fact.....	84
Slide 70: Answer: FALSE!.....	85
Slide 71: A hearing on the issue of unconscionability is required if requested.....	86
Slide 72: Answer: TRUE!.....	87
Slide 73: Two chances is not a reasonable opportunity to cure an RV's defects such that an express warranty on an RV fails of i.....	88
Slide 74: Answer: TRUE!.....	89
Slide 75: A buyer need not give an RV manufacturer an opportunity to cure a defect in an RV before suing for breach of an implied wa	90
Slide 76: Answer: IT DEPENDS.....	91
Slide 77: An RV manufacturer does not have a right to cure after a Buyer gives notice of revocation of acceptance.....	92
Slide 78: Answer: IT DEPENDS.....	93
Slide 79: A buyer is not obligated to give a seller notice of a breach of warranty if the seller has actual knowledge of the breach.....	94
Slide 80: Answer: TRUE!.....	95
Slide 81: A dealer in California can avoid the Song-Beverly Consumer Warranty Act by requiring delivery to take place outside of CA..	96
Slide 82: Answer: MAYBE.....	97
Slide 83: REMEDIES.....	98
Slide 84: Reducing the statute of limitations in a warranty to a period of not less than one year after the date of delivery does not viola	99
Slide 85: Answer: TRUE But.....	100
Slide 86: The purpose of the special circumstances clause in UCC 2-714(2) is to allow a buyer to obtain revocation of acceptance whe	101
Slide 87: Answer: FALSE BUT SOME COURTS THINK IT IS TRUE.....	102
Slide 88: There is no provision in the UCC allowing sellers to recover consequential damages.....	103
Slide 89: Answer: TRUE!.....	104
Slide 90: The UCC does not define what consequential damages are.....	105
Slide 91: Answer: FALSE!.....	106
Slide 92: A seller can limit remedies for breach of an implied warranty to a remedy that is not contained in the UCC.....	107
Slide 93: Answer: TRUE!.....	108
Slide 94: An RV manufacturer making a written warranty can agree with its buyer to having a third-party arbiter be the sole authority a	109
Slide 95: Answer: TRUE!.....	110
Slide 96: The UCC expressly requires a buyer to mitigate consequential damages.....	111
Slide 97: Answer: TRUE!.....	112
Slide 98: An RV manufacturer can limit the buyer's remedies but must state that the remedies offered are exclusive of the UCC r.....	113
Slide 99: Answer: TRUE!.....	114
Slide 100: An RV manufacturer can force a buyer to exhaust more than one remedy before the buyer can seek any other UCC remedy	115
Slide 101: Answer: TRUE!.....	116
Slide 102: A seller is responsible for consequential damages it properly excluded in a repair warranty if the repair remedy in the warra	117
Slide 103: Answer: IT DEPENDS IF IT IS DEPENDENT.....	118

A Deep Dive Into The UCC

December 12, 2023

Slide 104: A consumer is entitled to give an opinion on the value of the goods he owns.. . . .	119
Slide 105: Answer: TRUE BUT IT SHOULDN'T BE.	120
Slide 106: An expert can base his opinion on the diminished value of an RV based solely on his experience.. . . .	121
Slide 107: Answer: TRUE BUT BECOMING FALSER.	122
Slide 108: The Law of Commercial Sales taught by professors Pangburn and Harold is Notre Dame Law School's best UCC class offe	123
Slide 109: Answer: ABSOLUTELY 100% TRUE!.	124
Slide 110: THANK YOU! Any questions? UCC issues you'd like to discuss? mpangburn@thorindustries.com pharold@southbank.leg	125



ICLEF Electronic Publications

Feature Release 4.1

August 2020

To get the most out of your *ICLEF Electronic Publication*, download this material to your PC and use Adobe Acrobat® to open the document. The most current version of the Adobe® software may be found and installed by clicking on one of the following links for either the free [Adobe Acrobat Reader®](#) or the full retail version of [Adobe Acrobat®](#).

Feature list:

1. **Searchable** – All ICLEF Electronic Publications are word searchable. To begin your search, click on the “spyglass” icon at the top of the page while using the Adobe® software.
1. **Bookmarks** – Once the publication is opened using the Adobe Acrobat® software a list of bookmarks will be found in a column located on the left side of the page. Click on a bookmark to advance to that place in the document.
2. **Hypertext Links** – All of the hypertext links provided by our authors are active in the document. Simply click on them to navigate to the information.
3. **Book Index** – We are adding an INDEX at the beginning of each of our publications. The INDEX provides “jump links” to the portion of the publication you wish to review. Simply left click on a topic / listing within the INDEX page(s) to go to that topic within the materials. To return to the INDEX page either select the “INDEX” bookmark from the top left column or right-click with the mouse within the publication and select the words “*Previous View*” to return to the spot within the INDEX page where you began your search.

Please feel free to contact ICLEF with additional suggestions on ways we may further improve our electronic publications. Thank you.

Indiana Continuing Legal Education Forum (ICLEF)
230 East Ohio Street, Suite 300
Indianapolis, Indiana 46204
Ph: 317-637-9102 // Fax: 317-633-8780 // email: iclef@iclef.org
URL: <https://iclef.org>



A DEEP DIVE INTO THE UCC (AND YOU THOUGHT LAW SCHOOL WAS OVER!)

December 12, 2023

www.ICLEF.ORG

Copyright 2023 by Indiana Continuing Legal Education Forum

DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

The Indiana Continuing Legal Education Forum and contributing authors hereby disclaim any and all responsibility or liability, which may be asserted or claimed arising from or claimed to have arisen from reliance upon the procedures and information or utilization of the forms set forth in this manual, by the attorney or non-attorney.

Attendance of ICLEF presentations does not qualify a registrant as an expert or specialist in any discipline of the practice of law. The ICLEF logo is a registered trademark and use of the trademark without ICLEF's express written permission is prohibited. ICLEF does not certify its registrants as specialists or expert practitioners of law. ICLEF is an equal opportunity provider of continuing legal education that does not discriminate on the basis of gender, race, age, creed, handicap, color or national origin. ICLEF reserves the right to refuse to admit any person or to eject any person, whose conduct is perceived to be physically or emotionally threatening, disruptive or disrespectful of ICLEF registrants, faculty or staff.

INDIANA CONTINUING LEGAL EDUCATION FORUM

OFFICERS

LYNNETTE GRAY

President

HON. ANDREW R. BLOCH

Vice President

SARAH L. BLAKE

Secretary

HON. THOMAS A. MASSEY

Treasurer

ALAN M. HUX

Appointed Member

LINDA K. MEIER

Appointed Member

DIRECTORS

John B. Bishop

Jean M. Blanton

Sarah L. Blake

Hon. Andrew R. Bloch

Melanie M. Dunajeski

Lynnette Gray

Alan M. Hux

Dr. Michael J. Jenuwine

Jana M. Lange

Shaunda Lynch

Hon. Thomas A. Massey

Mark W. McNeely

Linda K. Meier

Amy K Nowaczyk

F. Anthony Paganelli

Richard S. Pitts

Jeffrey P. Smith

Teresa L. Todd

ICLEF

SCOTT E. KING

Executive Director

James R. Whitesell
Senior Program Director

Jeffrey A. Lawson
Program Director

A DEEP DIVE INTO THE UCC (AND YOU THOUGHT LAW SCHOOL WAS OVER!)



Overview

The journey begins with an "exam" of the six major areas of commercial sales:

1. The Background Rules
2. The Scope of the UCC
3. Contract Formation
4. Warranties (including Magnuson Moss)
5. Contract Performance
6. Remedies

Our goal is to have you not only informed but perhaps even entertained as well. Attorneys Paul E. Harold, *Litigation Team at SouthBank Legal*, and T. Michael Pangburn, *General Counsel for Thor Motor Coach, Inc.*, lead and facilitate the instruction. Paul and Michael are adjunct professors at Notre Dame Law School, who co-teach The Law of Commercial Sales during the Spring Semester.

Faculty

Mr. Paul Edgar Harold
SouthBank Legal
100 East Wayne Street, Suite 300
South Bend, IN 46601
ph: (574) 968-2628
e-mail: pharold@southbank.legal

Mr. T. Michael Pangburn
General Counsel
Thor Motor Coach, Inc.
2426 Rivera Drive
Mishawaka, IN 46544
ph: (574) 361-4389
e-mail: mpangburn@thorindustries.com

December 12, 2023

www.ICLEF.ORG

Paul Edgar Harold, SouthBank Legal, South Bend



Paul Harold focuses his practice on solving complex legal disputes and is a member of SouthBank Legal's Chambers-ranked litigation team. Having appeared in hundreds of federal and state lawsuits, Paul is a seasoned litigator with experience in a wide range of complex cases, including multimillion-dollar tort cases, constitutional claims, trade secret and intellectual property theft disputes, complex contractual and warranty matters, defense of white-collar investigations, and litigation involving fraud and breach of fiduciary duty. He also advises business clients on warranty and sales-related legal issues, assists several banks on commercial collection matters, and is a leader of SouthBank Legal's appellate practice. Paul clerked for four years at the federal trial and appellate levels and has taught commercial law at Notre Dame Law School for a decade.

Besides having extensive legal experience, Paul is easy to work with and is a good teammate. His ego-free approach has helped him successfully team up with corporate in-house counsel from Fortune 500 companies as well as with litigators from the top law firms in the country—like Williams & Connolly, Kirkland & Ellis, and Winston & Strawn, to name a few. Paul's focus is not on burnishing his own resume but on helping the legal team best serve the client by meeting the client's objectives.

T. Michael Pangburn, Thor Industries, Inc., Mishawaka



Michael Pangburn is General Counsel of Thor Motor Coach, Inc., a wholly owned subsidiary of Thor Industries, Inc.

In his role as the GC, Michael partners with law firms to address a wide range of legal matters effectively and successfully, primarily focusing on warranty and product liability cases, franchise law, and contract review. He provides legal advice to all departments of the corporation.

Key Accomplishments

- ? Generated net savings of \$400,000 per year by reducing the reliance on outside counsel.
- ? Successful and cost-effective defense of product liability lawsuits.
- ? Drafted written warranties providing cutting-edge legal defenses that reduce defense costs.
- ? Established favorable warranty and consumer protection case law.
- ? Presenter at Defense Research Institute and Recreational Vehicle Industry Association conferences addressing the Uniform Commercial Code and the Magnuson Moss Warranty Act, as well as consumer protection issues.

NOTRE DAME LAW SCHOOL, Notre Dame, IN 2018 – Present

Adjunct Law Professor teaching Commercial Sales

Uniform Commercial Code: Articles 1, 2, 2A, and the Magnuson Moss Warranty Act

PROFESSORS PANGBURN AND HAROLD'S

FINAL EXAM

Instructions:

- A. You have twenty minutes to complete this exam.
- B. This exam is closed book. You may not refer to any laptop, smart phone, iPhone, Blackberry, pager, telephone, telegraph, calculator, notebook, book, smoke signals, or abacus in answering these questions.
- C. This exam is true-false. Each question must be answered either "true" or "false." Other acceptable answers are "partially true, partially false," "somewhat true and somewhat false," "I wish it were true," or "it should be true if the courts didn't screw it up."
- D. Lastly, have fun and remember that all the tricky questions were written by Pangburn, not Harold.

Questions:

Answers:

- | | |
|--|-------|
| 1. The UCC always supplants the common law of contracts. | _____ |
| 2. All courts treat the Official Comments to the UCC as binding authority. | _____ |
| 3. Karl Llewellyn, the "Godfather" of the UCC, wanted juries of expert merchants to decide what was commercially reasonable—not juries of random people. | _____ |
| 4. The UCC allows parties to vary the terms of the UCC by Agreement. | _____ |
| 5. A seller can limit vertical privity by agreement. | _____ |

Questions:

Answers:

6. If the express terms of a contract conflict with course of performance, the express terms still apply. _____
7. A defect must manifest itself within the duration of the implied warranty for there to be a viable implied warranty claim. _____
8. Parties can agree to have the UCC apply to a contract even if it does not involve goods. _____
9. Goods covered by the UCC include bitcoin. _____
10. An email from a dealer confirming an order with OEM, if not objected to within 10 days, is enough to satisfy the statute of frauds even if the OEM never responds in writing to the dealer. _____
11. A contract is not enforceable under the UCC unless the precise moment it was formed can be identified. _____
12. The “Battle of the Forms” in UCC 2-207 is straightforward and very easy to understand. _____
13. The Battle of the Forms generally favors the buyer. _____
14. No contract can be formed if the buyer’s purchase order and the seller’s order confirmation contradict each other. _____
15. An RV manufacturer and its dealer must have consideration to make an agreement to modify their dealer agreement enforceable. _____
16. A buyer who does not rely on an express warranty cannot enforce the warranty because it did not form the basis of the bargain. _____
17. A remote manufacturer cannot create an implied warranty of fitness for a particular purpose. _____
18. If a buyer refuses to examine the vehicle before acceptance, the buyer loses his implied warranty claim. _____

Questions:

Answers:

19. If a warranty is not a future performance warranty, then any breach of warranty accrues on the date of delivery. _____
20. To enforce a term in an express warranty, a buyer must first have received and read the warranty. _____
21. A disclaimer of the implied warranty of fitness for a particular purpose does not need to be conspicuous. _____
22. In its warranty, a seller can define when notice of breach must be given if the definition is reasonable. _____
23. A buyer who gives the seller specifications for manufacturing a good has no implied warranty claim related to those specifications. _____
24. An express warranty addressing a truck's chassis displaces inconsistent implied warranties as to that chassis. _____
25. A disclaimer that disclaims "all warranties, both express and implied" is sufficient to disclaim the implied warranty of title. _____
26. Under the pre-sale availability rule, an RV manufacturer is required to give its express warranty to the dealer so it can be displayed at the point of sale. _____
27. A seller can disclaim implied warranties if it does not give an express warranty. _____
28. The Magnuson-Moss Warranty Act allows an RV manufacturer to limit the scope of any implied warranty to only those portions of an RV covered by the manufacturer's express warranty. _____
29. The Magnuson-Moss Warranty Act requires any provision excluding consequential damages to be on the face of the warranty. _____

Questions:

Answers:

30. A buyer who never takes delivery of an RV but has custom cabinets installed will be deemed to have accepted the RV and cannot reject it. _____
31. Unconscionability under the UCC is a fact issue for the trier of fact. _____
32. A hearing on the issue of unconscionability is required if requested. _____
33. Two chances is not a reasonable opportunity to cure an RV's defects such that an express warranty on an RV fails of its essential purpose. _____
34. A buyer need not give an RV manufacturer an opportunity to cure a defect in an RV before suing for breach of an implied warranty. _____
35. An RV manufacturer does not have a right to cure after a Buyer gives notice of revocation of acceptance. _____
36. A buyer is not obligated to give a seller notice of a breach of warranty if the seller has actual knowledge of the breach. _____
37. A dealer in California can avoid the Song-Beverly Consumer Warranty Act by requiring delivery to take place outside of CA. _____
38. Reducing the statute of limitations in a warranty to a period of not less than one year after the date of delivery does not violate the anti-waiver clause in the Song-Beverly Act. _____
39. The purpose of the special circumstances clause in UCC 2-714(2) is to allow a buyer to obtain revocation of acceptance when the buyer cannot satisfy the requirements for revocation of acceptance in UCC 2-608. _____
40. There is no provision in the UCC allowing sellers to recover consequential damages. _____

Questions:

Answers:

41. The UCC does not define what consequential damages are. _____
42. A seller can limit remedies for breach of an implied warranty to a remedy that is not contained in the UCC. _____
43. An RV manufacturer making a written warranty can agree with its buyer to having a third-party arbiter be the sole authority as to whether the RV is defective or not. _____
44. The UCC expressly requires a buyer to mitigate consequential damages. _____
45. An RV manufacturer can limit the buyer's remedies but must state that the remedies offered are exclusive of the UCC remedies. _____
46. An RV manufacturer can force a buyer to exhaust more than one remedy before the buyer can seek any other UCC remedy. _____
47. A seller is responsible for consequential damages it properly excluded in a repair warranty if the repair remedy in the warranty fails of its essential purpose. _____
48. A consumer is entitled to give an opinion on the value of the goods he owns. _____
49. An expert can base his opinion on the diminished value of an RV based solely on his experience. _____
50. The Law of Commercial Sales taught by professors Pangburn and Harold is Notre Dame Law School's best UCC class offered on a Monday morning at 9:00 a.m. in Room 2173 of the new law school building. _____

A Deep Dive into the UCC (And You Thought Law School Was Over!)

T. Michael Pangburn, Thor Industries, Inc.

Paul Edgar Harold, SouthBank Legal

BUT FIRST, A LEGAL DISCLAIMER:

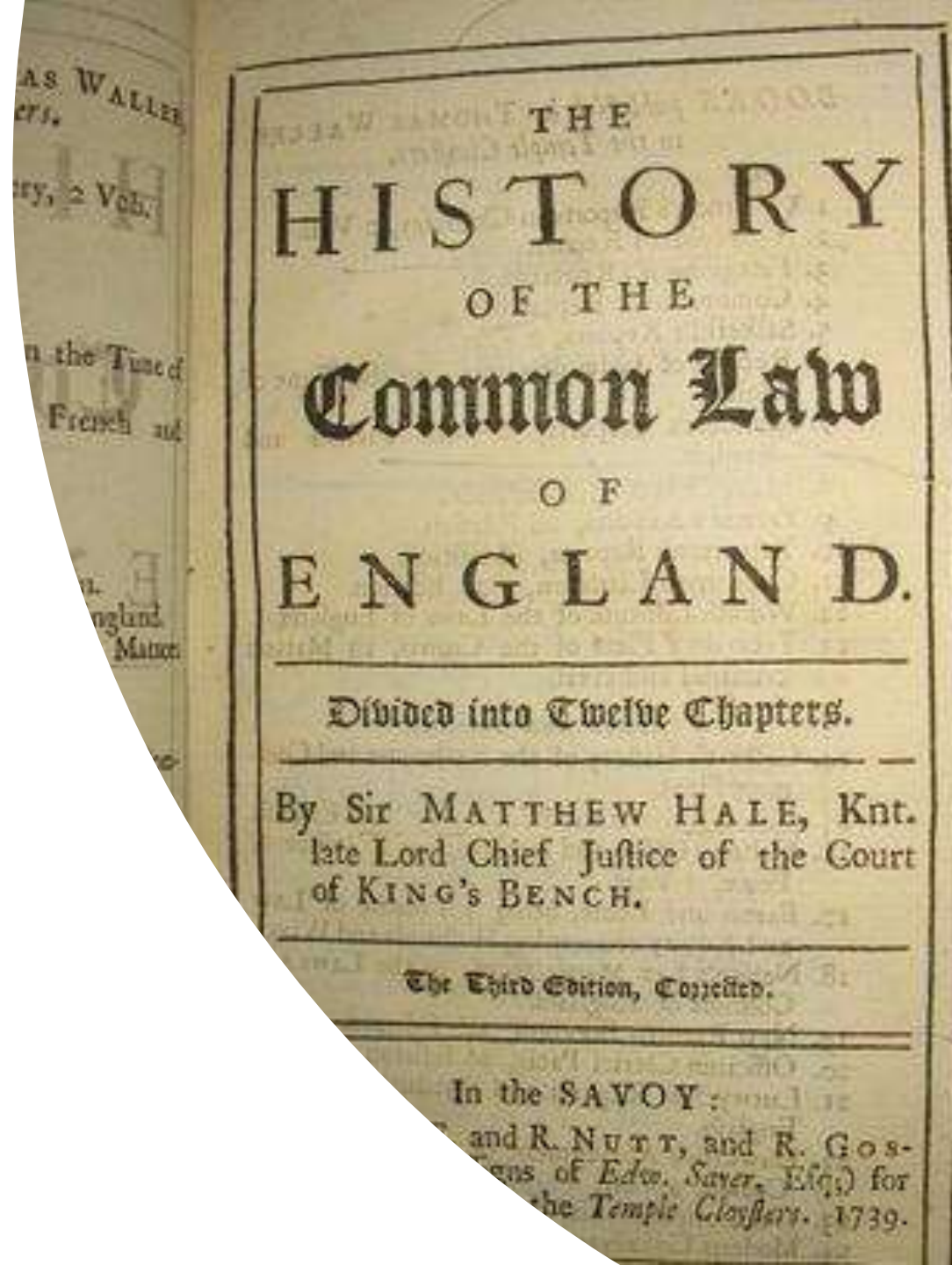
THE OPINIONS EXPRESSED IN THIS PRESENTATION ARE SOLELY THOSE OF THE PRESENTERS. THEY DO NOT PURPORT TO REFLECT THE OPINIONS OR VIEWS OF THOR INDUSTRIES, INC., SOUTHBANK LEGAL, NOTRE DAME LAW SCHOOL, OR THE MEMBERS OF ANY OF THOSE ORGANIZATIONS.

BACKGROUND TO THE UCC


The UCC always supplants the
common law of contracts.

Answer: FALSE!

- The UCC does preempt common-law rules that are inconsistent with provisions or purposes or policies of the UCC.
- But the principles of common law and equity may nevertheless *supplement* provisions of the Uniform Commercial Code. See UCC 1-103(b) and Cmt. 2 to UCC 1-103.



All courts treat the Official
Comments to the UCC as
binding authority.



Answer: FALSE!

- Some states have enacted the Official Comments as part of the statute, so in those states the Official Comments are binding.
- For the rest of the states, the Official Comments are only seen as *persuasive* authority.

Karl Llewellyn, the “Godfather” of the UCC, wanted juries of expert merchants to decide what was commercially reasonable—not juries of random people.

Answer: TRUE!



- The idea of merchant juries got eliminated during the drafting process, but vague standards like “commercially reasonable” remain.
- Imagine how much better life would be if, a jury of RV plant managers decided whether an RV was “fit for its ordinary purposes”?

The UCC allows parties to vary
the terms of the UCC by
Agreement.

Answer: MOSTLY TRUE!

- "Except as otherwise provided [in the UCC], the effect of provisions of the UCC may be varied by agreement." UCC 1-302(a).
- Obligations of good faith, diligence, reasonableness, and care may NOT be disclaimed (UCC 1-302(b)).
 - BUT agreement can define the standards for measuring those things as long as they standards are not "manifestly unreasonable"
 - E.g. "30 days is a reasonable period in which to notify the manufacturer after discovering a defect."



A seller can limit vertical
privity by agreement.



Answer: **FALSE!**

- Another one of those few things that cannot be contracted around in the UCC. (See UCC 2-318, Cmt. 1.)
- Vertical privity is established either by statute (UCC 2-318, Alternatives B and C) or judicial decision (e.g. *Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947 (Ind. 2005)).

If the express terms of a contract conflict with course of performance, the express terms still apply.

Answer: TRUE, but . . .



- UCC 1-303(f): express terms prevail over a course of performance.

- **But:**
 - Course of performance can be used to show a waiver of an express term (UCC 1-303(f)).
 - And maybe even a waiver of a no-waiver clause?

SCOPE OF THE UCC

A defect must manifest itself within the duration of the implied warranty for there to be a viable implied warranty claim.



Answer: TRUE everywhere
BUT California!

- Generally, a defect must arise within the duration of the implied warranty.
- However, California does it differently.
 - If a plaintiff can establish that the defect existed at the date of purchase, the plaintiff has as viable implied warranty claim *even if* the defect did not manifest itself during the warranty period.

Parties can agree to have the UCC apply to a contract even if it does not involve goods.

Answer: TRUE!

- When an issue arises, the parties may agree that the UCC applies. See *Lockheed Electronics Company, Inc. v. Keronix, Inc.* (1981) 114 Cal. App.3d 304.
- Parties may also agree in the contract that the UCC applies.
- Additionally, courts have applied the UCC by analogy to other contexts. See, e.g., *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cty.*, 266 P.3d 229, 237 (Wash. App. 2011).



Goods covered by the UCC
include bitcoin.



Answer: **TRUE** *if* Bitcoin is the not the medium of payment.

CONTRACT FORMATION

An email from a dealer confirming an order with an OEM, if not objected to within 10 days, is enough to satisfy the statute of frauds even if the OEM never responds in writing to the dealer.

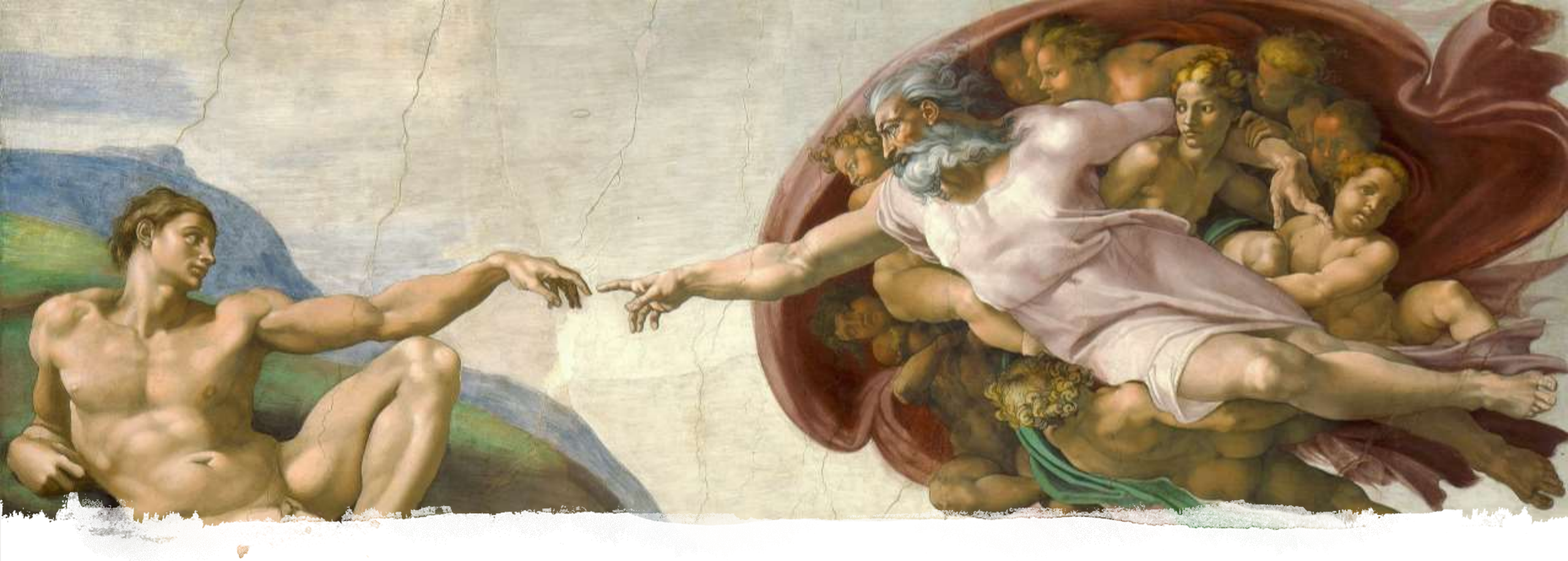
Answer: TRUE!

Under the “merchant exception” to the statute of frauds, a written confirmation is enough.

And the contents of the confirmation don't even have to accurately reflect the terms of the order!



A contract is not enforceable
under the UCC unless the
precise moment it was formed
can be identified.



Answer: **FALSE!**

A party need not identify the precise moment a contract was created.

UCC 2-204(2): "An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."

The “Battle of the Forms” in UCC 2-207 is straightforward and very easy to understand.



Answer: FALSE!

The Battle of the Forms
generally favors the buyer.

Answer: **TRUE!**

- Buyer is better off with more default terms: implied warranties, all UCC remedies, no limits on liability, etc.
- It is the seller who wants to disclaim warranties, limit remedies, and limit liability.



No contract can be formed if the buyer's purchase order and the seller's order confirmation contradict each other.

Answer: **FALSE!**

- Contracts under the UCC can be formed by conduct even when the parties' form terms contradict each other. (UCC 2-207(3))
- The contract becomes those terms on which the parties' forms agree, together with the default terms supplied by the Code.



An RV manufacturer and its dealer must have consideration to make an agreement to modify their dealer agreement enforceable.



Answer: FALSE!

- Unlike modifications to a contract under the common law, the UCC does not require consideration to modify a contract.
- The modifications have to be in writing, however, if the price is greater than \$500.

WARRANTIES

A buyer who does not rely on an express warranty cannot enforce the warranty because it did not form the basis of the bargain.

Answer: **PARTLY
TRUE, PARTLY
FALSE!**

- The UCC flip-flops on this question. (UCC 2-313, Cmt. 3)
- Some courts require it; others don't.



A remote manufacturer
cannot create an implied
warranty of fitness for a
particular purpose.



Answer: FALSE!

- As long as you are in a state where vertical privity is abolished, statements by an RV manufacturer can create a fitness warranty so long as:
 1. The manufacturer has reason to know of the buyer's particular purpose; and
 2. The buyer is relying on the manufacturer's recommendation in selecting the product. (UCC 2-315)
- Watch what those sales and customer service people say!

If a buyer refuses to examine the vehicle before acceptance, the buyer loses his implied warranty claim.

Answer: SOMEWHAT TRUE, SOMEWHAT FALSE!

- Seller must demand that Buyer examine the goods, and Buyer must refuse.
- But even then, there's still an implied warranty for latent defects. (UCC 2-316(3)(b)).



If a warranty is not a future performance warranty, then any breach of warranty accrues on the date of delivery.

Answer: TRUE!



- UCC 2-275(2):

“A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.”

To enforce a term in an express warranty, a buyer must first have received and read the warranty.



Answer: FALSE but . . .

- Have to take the good with the bad.
- A buyer who accepts the benefits of the express warranty should be bound by the terms of the warranty.
- Courts have little patience for buyers who sign statements acknowledging receipt and review of the warranty, only to turn around and claim that they never in fact reviewed the warranty.

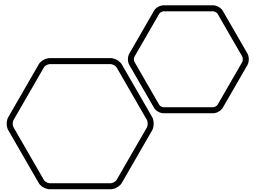
A disclaimer of the implied warranty of fitness for a particular purpose does not need to be conspicuous.



Answer: **FALSE!**

UCC 2-316(2):

“[T]o exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous.”



In its warranty, a seller can define when notice of breach must be given if the definition is reasonable.

Answer: **TRUE!**

UCC 1-302(b):

“Whenever the [UCC] requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.”



A buyer who gives the seller specifications for manufacturing a good has no implied warranty claim related to those specifications.

Answer: **TRUE!**

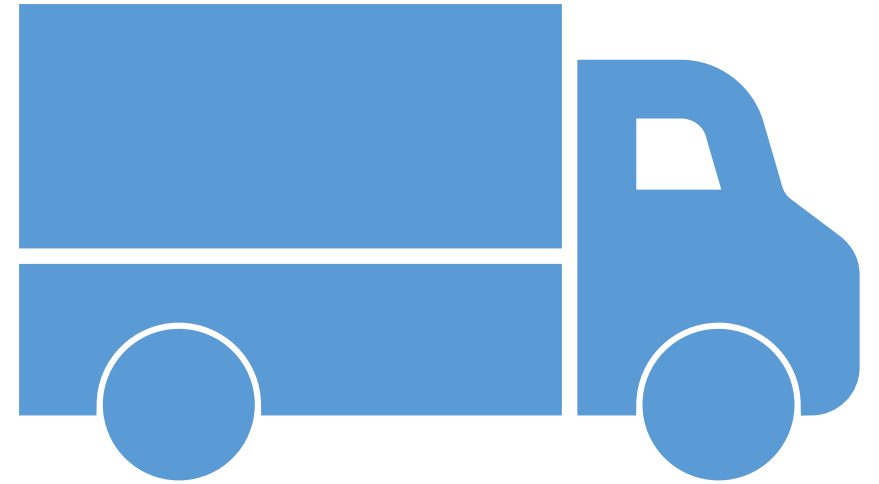
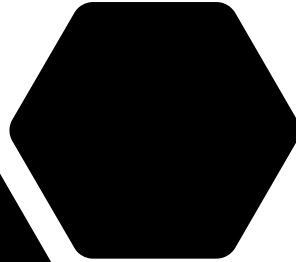
The warranty of fitness does not arise because there is no reliance on the seller by the buyer. (UCC 2-316, Cmt. 9).

And if the issue relates to the specifications provided by the Buyer (and not to the materials or workmanship of the Seller), there is no implied warranty of merchantability because the express warranty that the goods will be manufactured according to the specifications displaces it. (UCC 2-317(3)).

An express warranty addressing
a truck's chassis displaces
inconsistent implied warranties
as to that chassis.

Answer: TRUE!

- Warranties must be construed as consistent with each other and as cumulative if at all reasonable. (UCC 2-317)
- But where they are inconsistent, the express warranty displaces the implied warranty. (UCC 2-317(3))



A disclaimer that disclaims “all warranties, both express and implied” is sufficient to disclaim the implied warranty of title.

Answer: **FALSE!**

- The warranty of title may be excluded or modified “only by specific language or circumstances which give the buyer reason to know that the person selling does not claim title in himself” (UCC 2-312(2))

Under the pre-sale availability rule, an RV manufacturer is required to give its express warranty to the dealer so it can be displayed at the point of sale.



Answer: **TRUE!**

The FTC's Pre-Sale Availability Rule, 16 C.F.R. Part 702, requires that written warranties on certain consumer product be available to consumers before they buy.

MAGNUSON MOSS

MAGNUSON MOSS

A seller can disclaim implied warranties if it does not give an express warranty.

Answer: TRUE but . . .

The Magnuson-Moss Warranty Act, 15 U.S.C. 2308(a), only prohibits disclaiming or modifying an implied warranty if a written warranty is given to the consumer.

Several states, however, have anti-disclaimer statutes, so check your local listings.



The Magnuson-Moss Warranty Act allows an RV manufacturer to limit the scope of any implied warranty to only those portions of an RV covered by the manufacturer's express warranty.



Answer: **SHOULD BE TRUE!**

- Some courts have concluded that because Mag-Moss does not allow implied warranties on “consumer products” to be disclaimed or modified, attempts to exclude parts like the chassis from the RV manufacturer’s written warranty is invalid.
- **Those courts are wrong.**

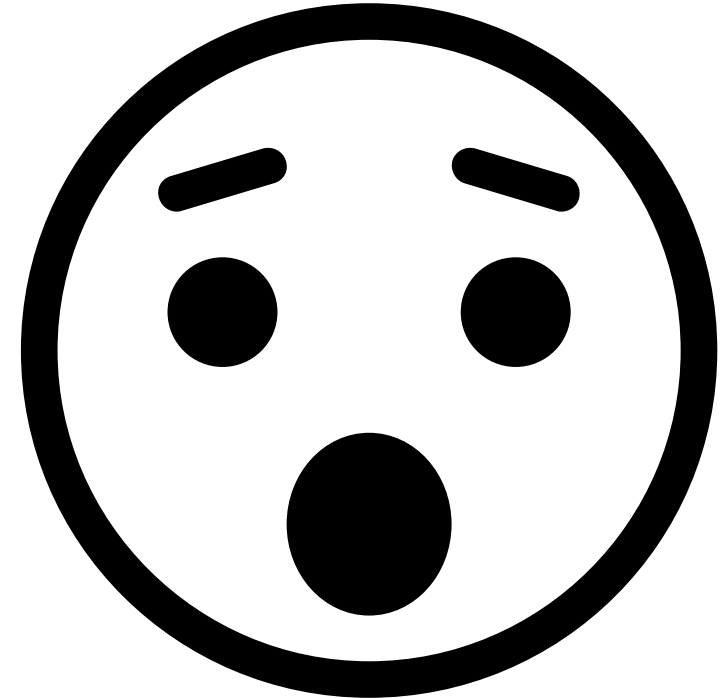
The Magnuson-Moss Warranty Act requires any provision excluding consequential damages to be on the face of the warranty.

Answer: TRUE, but . . .

For full warranties, consequential damages exclusions must appear conspicuously on the face of the warranty. 15 U.S.C. 2304(a)(3).

BUT there is no such requirement for limited warranties (i.e., those warranties that do not meet the federal minimum standards for warranties).

Nevertheless, can't hurt to put such exclusions on the face of limited warranties as well.



PERFORMANCE

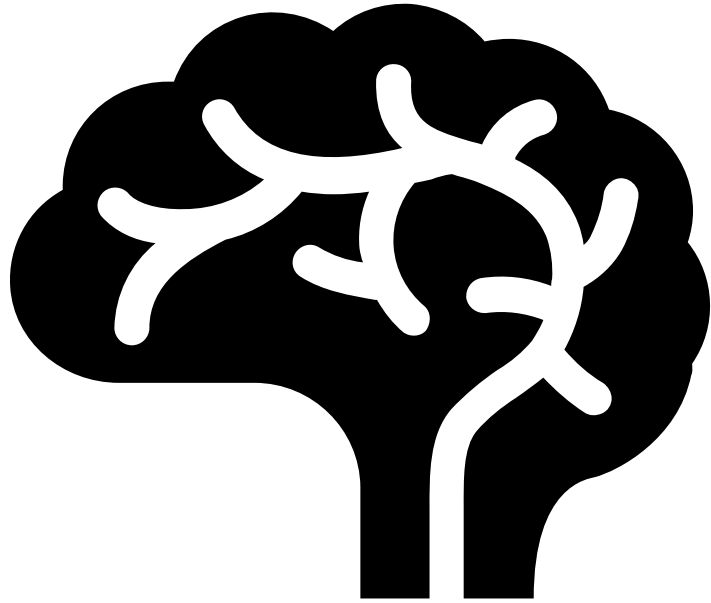
A buyer who never takes delivery of an RV but has custom cabinets installed will be deemed to have accepted the RV and cannot reject it.



Answer: TRUE! But . . .

- Among other ways, acceptance occurs when a Buyer “does any act inconsistent with the seller’s ownership” (UCC 2-606(1)(c))—like making a substantial change to the RV.
- **BUT** the parties can alter when acceptance occurs by contract.

Unconscionability under the UCC
is a fact issue for the trier of fact.



Answer:
FALSE!

Unconscionability is a matter of law for the court. (UCC 2-302(1))

A hearing on the issue of
unconscionability is
required if requested.

Answer: TRUE!

“When it is claimed *or appears to the court* that the contract or any clause thereof may be unconscionable the parties *shall be afforded* a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”

UCC 2-302(2) (emphases added)



Two chances is not a reasonable opportunity to cure an RV's defects such that an express warranty on an RV fails of its essential purpose.

Answer: TRUE!



“Under Indiana law, two chances is not a reasonable opportunity to cure the defects such that the warranty failed of its essential purpose.”

Mathews v. REV Rec. Grp., Inc., 931 F.3d 619 (7th Cir. 2019)

A buyer need not give an RV manufacturer an opportunity to cure a defect in an RV before suing for breach of an implied warranty.



Answer: IT DEPENDS

- Some courts say no.
 - California
- Others say yes.
 - Indiana*
 - Ohio
 - Mississippi
 - Kansas
 - Texas(?)

An RV manufacturer does not
have a right to cure after a
Buyer gives notice of revocation
of acceptance.

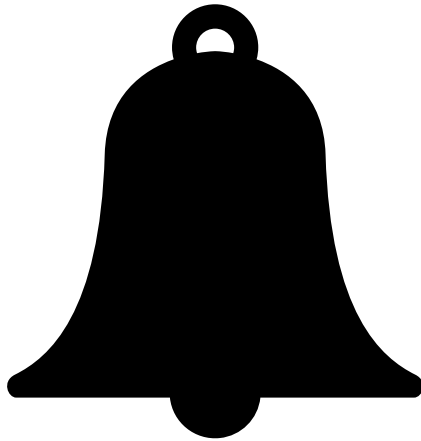
Answer: IT DEPENDS

If the Buyer is attempting to revoke based on a defect that the Buyer knew about at the time of sale, Buyer must give Seller a reasonable opportunity to cure.

But if Buyer is attempting to revoke acceptance based on a defect that was not known at the time of sale, a majority of courts have concluded that the seller does not have a right to cure.



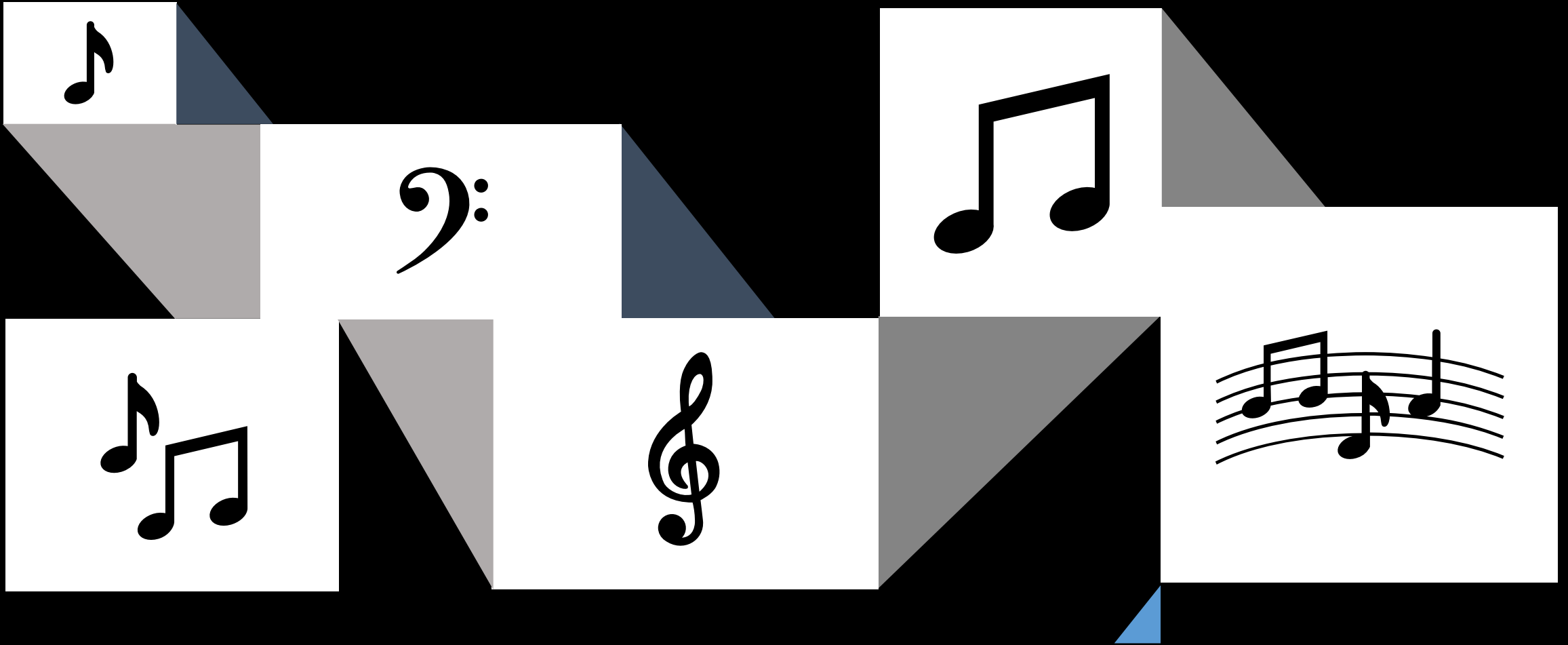
A buyer is not obligated to give a seller notice of a breach of warranty if the seller has actual knowledge of the breach.



Answer: TRUE!

- Courts find that direct notice is unnecessary when the Seller has actual notice of the defect in the product.
- *See, e.g. Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 782 (7th Cir. 2011)

A dealer in California can avoid the Song-Beverly Consumer Warranty Act by requiring delivery to take place outside of CA.



Answer: **MAYBE**

It depends on whether the contract is a shipment contract or a delivery contract.

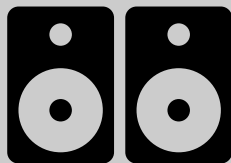
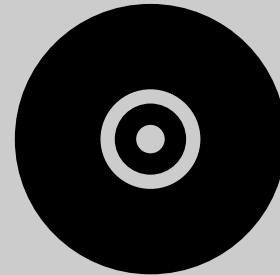
REMEDIES

Reducing the statute of limitations in a warranty to a period of not less than one year after the date of delivery does not violate the anti-waiver clause in the Song-Beverly Act.

Answer: TRUE But

Jury Instruction Form states
Presumably, this provision does not
apply to claims under the SBWA and
states “Buyer’s waiver of rights under
SBWA is unenforceable”

Waggoner vs. Thor Motor Coach
Decision.



The purpose of the special circumstances clause in UCC 2-714(2) is to allow a buyer to obtain revocation of acceptance when the buyer cannot satisfy the requirements for revocation of acceptance in UCC 2-608.



Answer: FALSE BUT SOME
COURTS THINK IT IS TRUE

Here's looking at you, Michigan and Idaho!

There is no provision in the UCC
allowing sellers to recover
consequential damages.

Answer:
TRUE!

While Buyers can get consequential damages under UCC 2-715, there is no provision in the UCC granting consequential damages to Sellers.

Because of this, Sellers often try to repackage consequential damages as incidental damages under UCC 2-710.

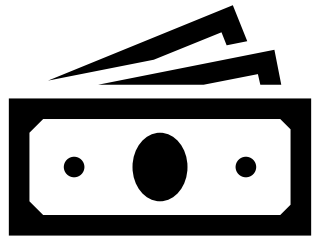
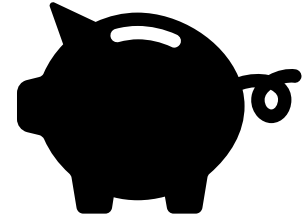
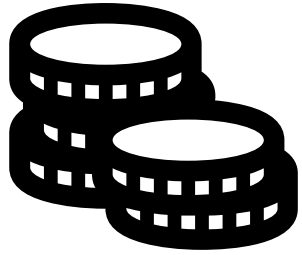
The UCC does not define what consequential damages are.



Answer: FALSE!

- UCC 2-715(2)(a) defines consequential damages as “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.”
- Consequential damages include injury to person or property proximately resulting from a breach of warranty.

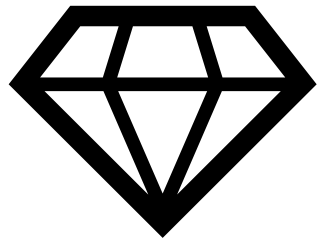
A seller can limit remedies for breach of an implied warranty to a remedy that is not contained in the UCC.



Answer: TRUE!

Example: A back-up remedy.

If a warrantor fails to cure a defect, the customer's "sole and exclusive remedy shall be limited to Warrantor paying you the costs of having an independent third party perform repair(s) to the defect(s)."



An RV manufacturer making a written warranty can agree with its buyer to having a third-party arbiter be the sole authority as to whether the RV is defective or not.



Answer: TRUE!

UCC 2-515: The parties may agree to a third party inspection to determine the conformity of the goods and may agree that the findings shall be binding upon them in any subsequent litigation.



The UCC expressly requires a
buyer to mitigate
consequential damages.



Answer: **TRUE!**

- Only those consequential damages that “could not reasonably be prevented by cover or otherwise” may be recovered. (UCC 2-715(2)(A))

An RV manufacturer can limit the buyer's remedies but must state that the remedies offered are exclusive of the UCC remedies.



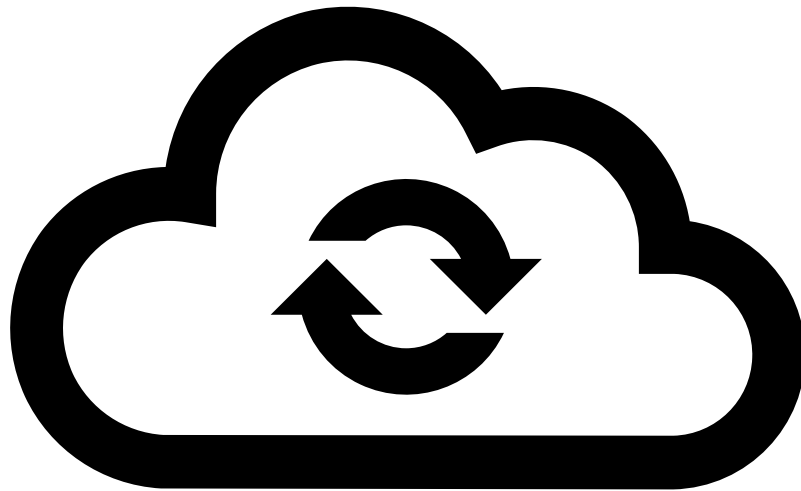
Answer: **TRUE!**

- UCC 2-719(1)(b): “resort to a remedy as provided is optional unless this remedy is expressly agreed to be exclusive, in which case it is the sole remedy.”

An RV manufacturer can force a buyer to exhaust more than one remedy before the buyer can seek any other UCC remedy.

Answer: TRUE!

Back-up remedies are allowed.



A seller is responsible for consequential damages it properly excluded in a repair warranty if the repair remedy in the warranty fails of its essential purpose.

- Some courts say yes—they take the “dependent” view.
- Other courts say no—they take the “independent” view.

[illegible][illegible]

A consumer is entitled to
give an opinion on the value
of the goods he owns.

Answer: TRUE
BUT IT
SHOULDN'T
BE



An expert can base his opinion on the diminished value of an RV based solely on his experience.



BEWARE
Lies, Lies & More Lies
NEXT EXIT 

Answer: TRUE BUT
BECOMING FALSER

- There is a growing body of caselaw across the country refusing to allow appraisers to resort to experience alone.
- *See, e.g., Castagna v. Newmar Corp.*, 2020 U.S. Dist. LEXIS 20121 (Feb. 3, 2020)

The Law of Commercial Sales
taught by professors Pangburn and
Harold is Notre Dame Law School's
best UCC class offered on a
Monday morning at 9:00 a.m. in
Room 2173 of the new law school
building.

THE LAW SCHOOL

Search



About

Academics

Admissions

Faculty & Scholarship

Student Life

Professional Life

News & Events

Contact

Resources For: [Current Students](#) [Faculty & Staff](#) [Alumni](#)

Answer: ABSOLUTELY 100% TRUE!

Educating a
Different Kind of Lawyer

THANK YOU!

Any questions?

UCC issues you'd like to discuss?

mpangburn@thorindustries.com

pharold@southbank.legal