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#### A Deep Dive Into The UCC

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## A Deep Dive Into The UCC December 12, 2023

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

December 12, 2023

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### 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

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December 12, 2023

#### 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:	
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:	
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:

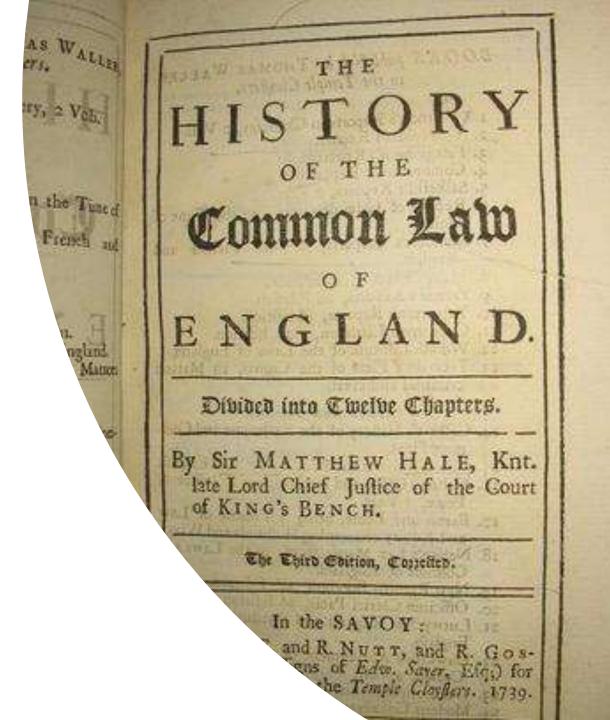
THE OPINIONS EXPRESSED IN THIS PRESENTATION ARE SOLELY THOSE OF THE PRESENTERS. THEY DO NOT PURPORT TO REFLECT THE OPINIONS OR VIEWS OF THOR INDUSTRIES, INC., SOUTHBANK LEGAL, NOTRE DAME LAW SCHOOL, OR THE MEMBERS OF ANY OF THOSE ORGANIZATIONS.

## 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.



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.



## ROBERT MERKIN

## 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.

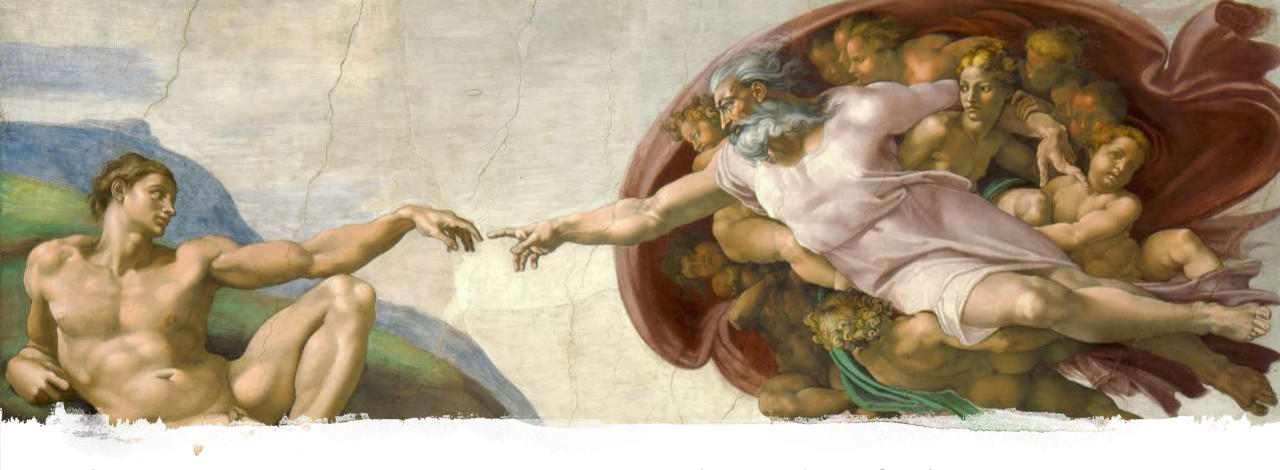
## Answer: TRUE!

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.

$$\left(\frac{a^2-c^2}{\sqrt{\kappa+a^2}}\right)\sqrt{\kappa+a^2}\sqrt{\frac{a^2-c^2}{\kappa+a^2}}\sqrt{\frac{a^2-c^2}{\kappa+a^2}}\sqrt{(\kappa+a^2)^2(\kappa+c^2)}+\kappa y^2$$

$$\int (\kappa + a^{2})^{2} (\kappa + c^{2}) \left[ -\operatorname{ArcSin} \left[ \frac{\sqrt{a^{2} - c^{2}}}{\sqrt{\kappa + a^{2}}} \right] \sqrt{\kappa + a^{2}} \sqrt{\frac{a^{2} - c^{2}}{\kappa + a^{2}}} + \sqrt{a^{2} - c^{2}} \sqrt{\frac{(a^{2} - c^{2})}{(\kappa + c^{2})^{2}}} \right] \sqrt{\kappa + a^{2}} \sqrt{\frac{a^{2} - c^{2}}{\kappa + a^{2}}} \sqrt{\frac{a^{2} - c^{2}}{\kappa + a^{2}}} \sqrt{\frac{(a^{2} - c^{2})(\kappa + c^{2})}{(\kappa + a^{2})^{2}}} \right] \sqrt{\kappa + a^{2}} \sqrt{\frac{a^{2} - c^{2}}{\kappa + a^{2}}} + \sqrt{a^{2} - c^{2}} \sqrt{\frac{(a^{2} - c^{2})(\kappa + c^{2})}{(\kappa + a^{2})^{2}}} \sqrt{\frac{a^{2} - c^{2}}{\kappa + a^{2}}} \sqrt{\frac{a^{2} - c^{2}}{\kappa + a^{2}}}} \sqrt{\frac{a^{2} - c^{2}}{\kappa + a^{2}}} \sqrt{\frac{a^{2} - c^{2}}{\kappa + a^{2}}}} \sqrt$$

## Answer: FALSE!

$$2 \operatorname{ArcSin} \left[ \frac{\sqrt{a^2 - c^2}}{\sqrt{\kappa + a^2}} \right] \sqrt{\kappa + a^2} \sqrt{\frac{a^2 - c^2}{\kappa + a^2}} z^2 +$$

$$2a^{2}\left(ArcSin\left[\frac{\sqrt{a^{2}-c^{2}}}{\sqrt{\kappa+a^{2}}}\right]\sqrt{\kappa+a^{2}}\sqrt{\frac{a^{2}-c^{2}}{\kappa+a^{2}}}\sqrt{\left(\kappa+a^{2}\right)^{2}\left(\kappa+c^{2}\right)+\left(\kappa+c^{2}\right)y^{2}+\left(-\kappa+a^{2}\right)^{2}}\right)$$

$$2\left(a^2-c^2\right)^2\sqrt{\left(\kappa+a^2\right)^2\left(\kappa+c^2\right)}$$

# 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.



• 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

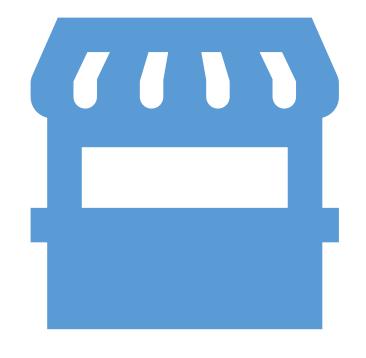
A buyer who does not rely on an express warranty cannot enforce the warranty because it did not form the basis of the bargain.

# 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; <u>and</u>
  - 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 <u>demand</u> that Buyer examine the goods, and Buyer must refuse.

• But even then, there's still an implied warranty for <u>latent</u> 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.

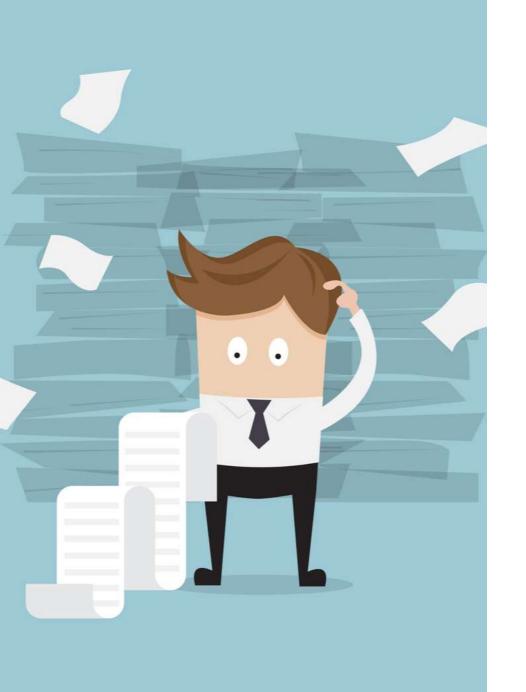
## Answer: TRUE!



• 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."

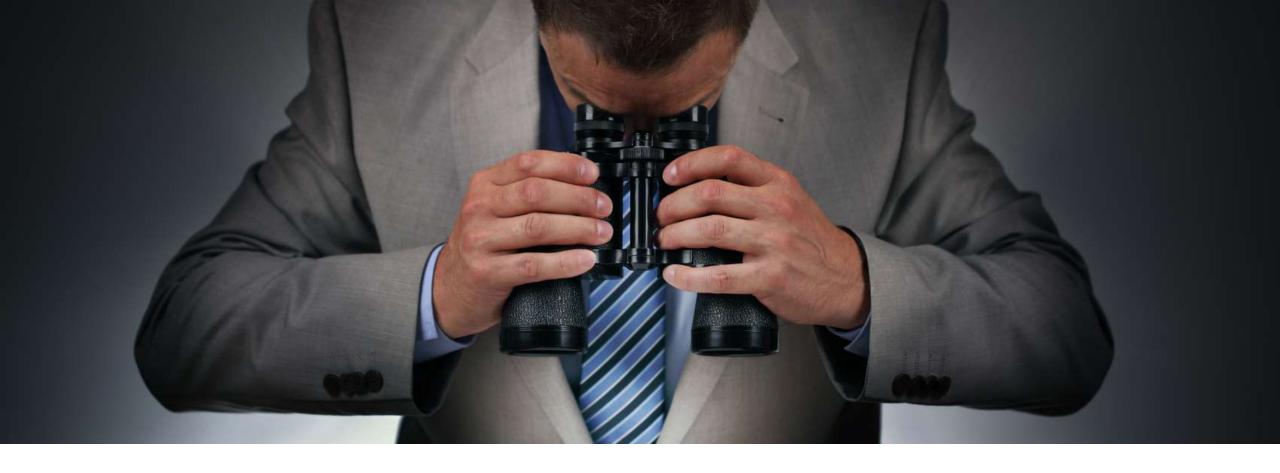
To enforce a term in an express warranty, a buyer must first have received and read the warranty.



## 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.

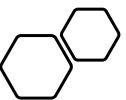
A disclaimer of the implied warranty of fitness for a particular purpose does not need to be conspicuous.



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.

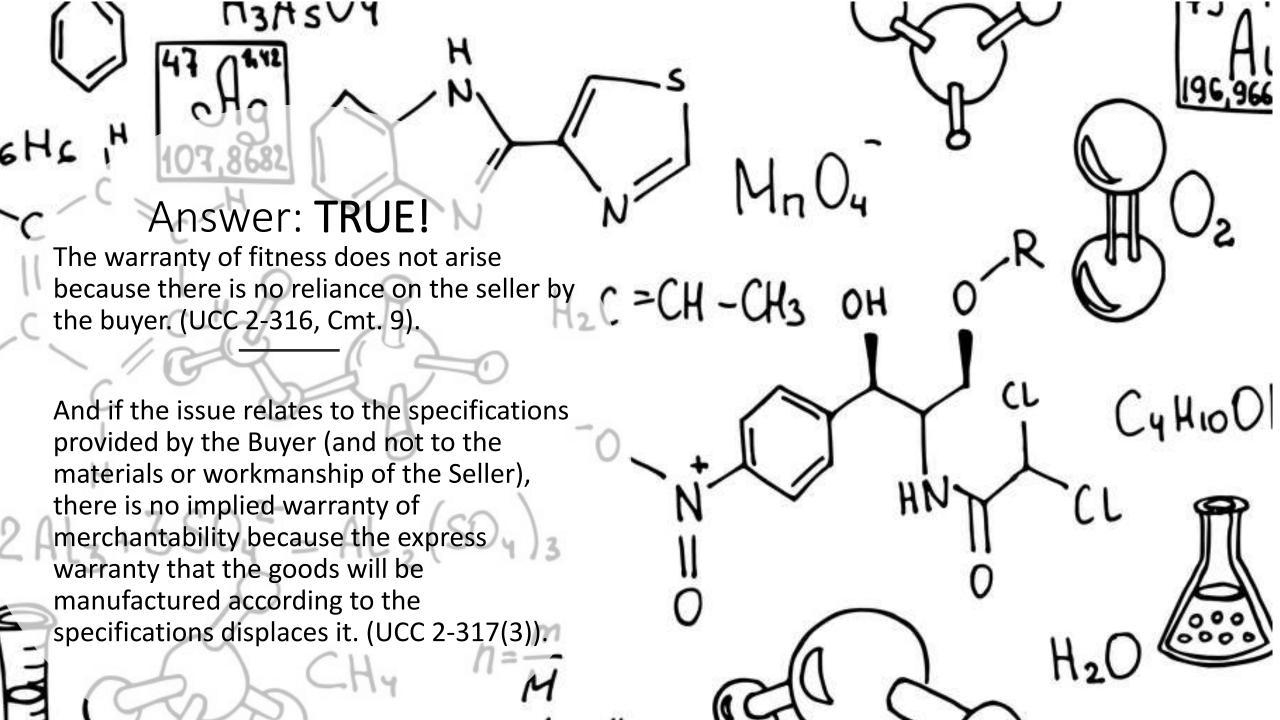
Answer: TRUE!

UCC 1-302(b):

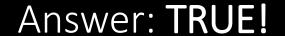
"Whenever the [UCC] requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement."



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



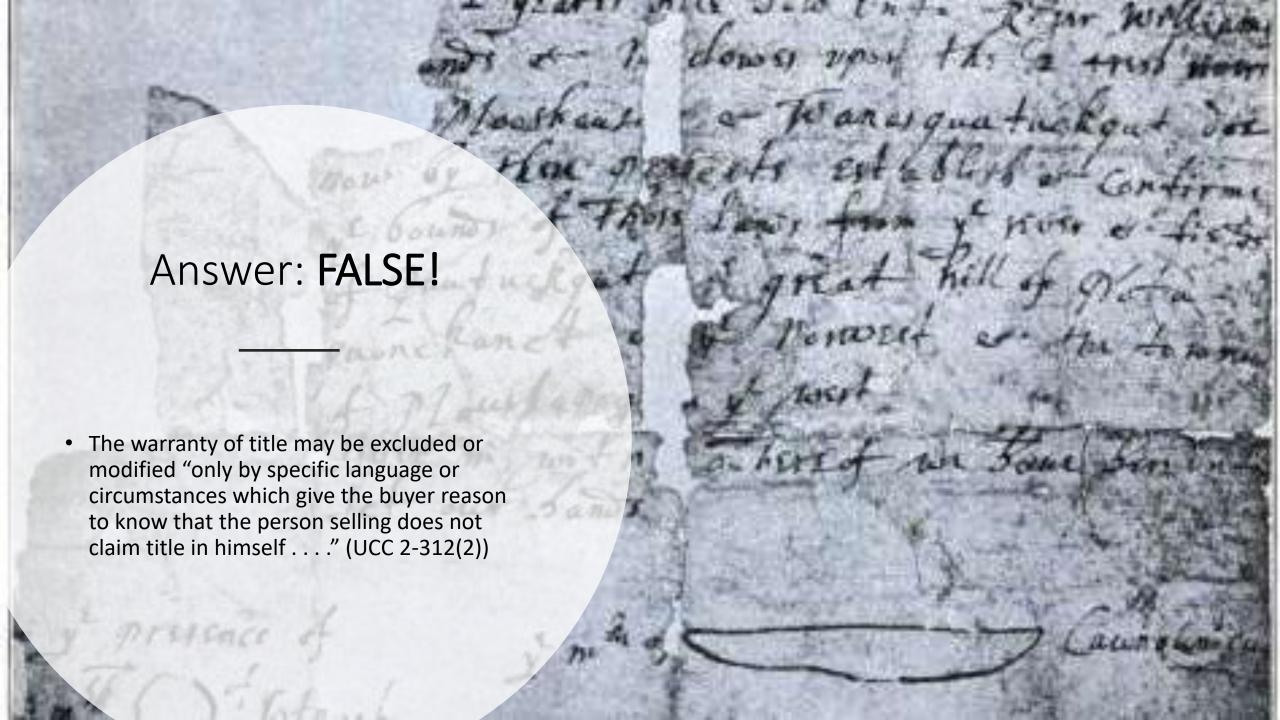
An express warranty addressing a truck's chassis displaces inconsistent implied warranties as to that chassis.



- 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.



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

# 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.



#### MAGNUSON MOSS WARRANTY ACT

Red Flags Checklist

Know what to look for to determine if you are being misled about your vehicle warranty. As a warrantie, you should receive a clear easy-to-understand warranty that includes who and what is covered an explanation of the warrantor's and your responsibilities, including where you may have your vehicle serviced, the expiration date, and ways to handle disputes with the warrantor if you have questions about your vehicle warranty contact the warrantor or dealership/manufactures.

#### Red Flags

- The warranty is difficult to read and comprehend, and you are uniuse of the specific terms that are outlined.
- You are unsure what is covered by the warranty.
- A representative insists that you service your vehicle at the dealership to keep your warranty intact.
- A representative is aggressive and refuses to release your vehicle if you do not have your vehicle serviced at the dealership.
- A representative explains that you must use original equipment manufacturer ICEM parts when having your whicle repaired to keep your warranty infact, or the dealer voids the warranty for using aftermarket parts.
- A dealer refuses your warranty coverage because you obtain services at another repair shop.
- A dealer will not put repair terms and costs in writing.

September 2006

www.MyFloridaCFO.com



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.



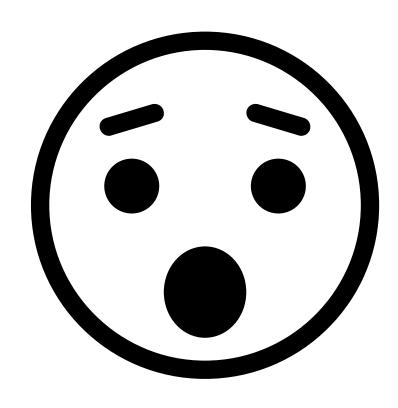
The Magnuson-Moss Warranty Act requires any provision excluding consequential damages to be on the face of the warranty.

#### Answer: TRUE, but . . .

For <u>full</u> 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 <u>limited</u> 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

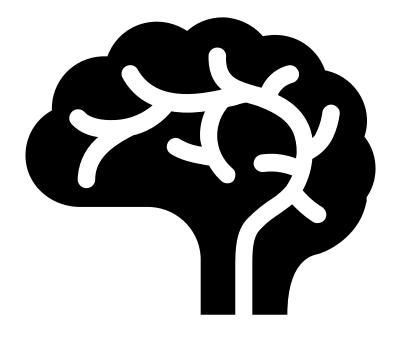
A buyer who never takes delivery of an RV but has custom cabinets installed will be deemed to have accepted the RV and cannot reject it.



#### 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.

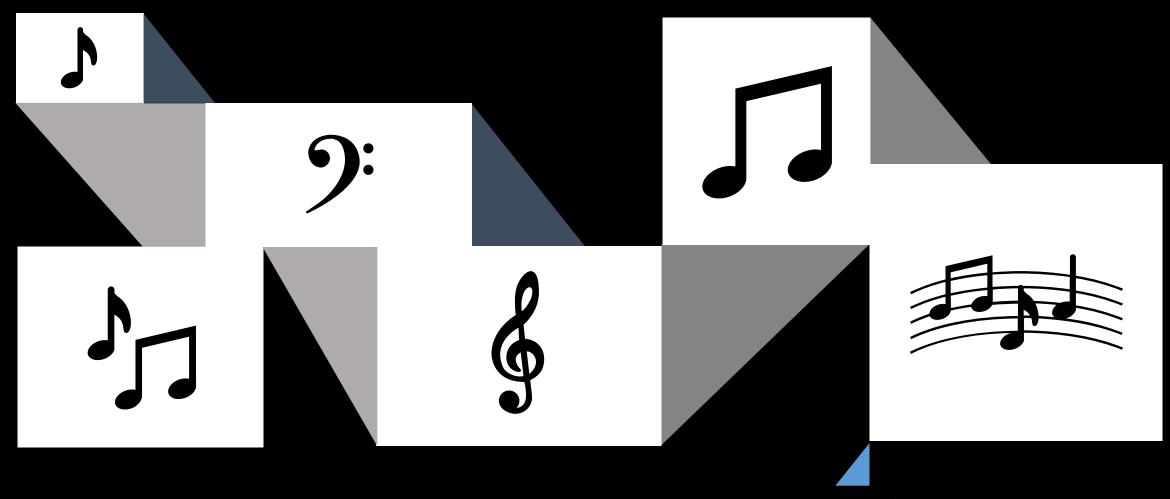




#### Answer: TRUE!

 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.



# 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.

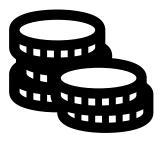
## The UCC does not define what consequential damages are.



#### 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.









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.



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.



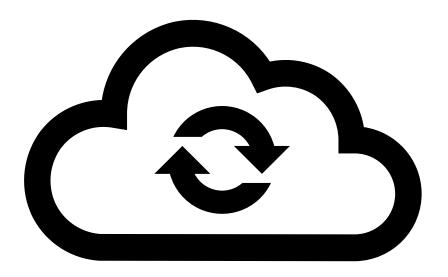
 Only those consequential damages that "could not reasonably be prevented by cover or otherwise" may be recovered. (UCC 2-715(2)(A)) An RV manufacturer can limit the buyer's remedies but must state that the remedies offered are exclusive of the UCC remedies.



• 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.

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.

## Answer: IT DEPENDS IF IT IS DEPENDENT

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

#### IN CONGRESS, JULY 4, 1776.

The unanimous Declaration of the thirteen united States of Homerica

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## 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.



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.

## THANK YOU! Any questions? UCC issues you'd like to discuss?

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