

PACE UNIVERSITY SCHOOL OF LAW

COMMERCIAL LAW (SALES)
PROFESSOR HUMBACH
FINAL EXAMINATION

May 16, 2006
TIME LIMIT: 3 HOURS

IN TAKING THIS EXAMINATION, YOU ARE REQUIRED TO COMPLY WITH THE SCHOOL OF LAW RULES AND PROCEDURES FOR FINAL EXAMINATIONS. YOU ARE REMINDED TO PLACE YOUR EXAMINATION NUMBER ON EACH EXAMINATION BOOK AND SIGN OUT WITH THE PROCTOR, SUBMITTING TO HIM OR HER YOUR EXAMINATION BOOK(S) AND THE QUESTIONS AT THE CONCLUSION OF THE EXAMINATION.

DO NOT UNDER ANY CIRCUMSTANCES REVEAL YOUR IDENTITY ON YOUR EXAMINATION PAPERS OTHER THAN BY YOUR EXAMINATION NUMBER. ACTIONS BY A STUDENT TO DEFEAT THE ANONYMITY POLICY IS A MATTER OF ACADEMIC DISHONESTY.

LIMITED PERMITTED MATERIAL:

The **only** material you may bring into the examination is your copy of the assigned book *Selected Commercial Statutes*, **provided it is not marked, except as allowed below.**

Allowable markings: Your copy of *Selected Commercial Statutes* may be highlighted, underlined, tabbed and annotated with **brief** notations, but **"no paragraphs,"** no bits of outlines and no sentences or sentence fragments exceeding a few words or so on the margins, backs, etc. of the printed material. *All materials brought into the examination will, in fairness to all, be subject to inspection, and students who are deemed to have violated this rule will have the material in question taken away, and they will be unable to refer to it during the examination.* A determination by me that you have exceeded the letter or spirit of this "limited marking" rule will be final, so *if in doubt, tear it out.*

GENERAL INSTRUCTIONS:

This examination presents of 4 fact situations with a total of 24 short-answer questions, followed by 10 multiple-choice questions. Answer the short-answer questions in the spaces indicated (unless you are using the Secure Exam laptop system). There is no official space limit, and you may continue answers on the back of the page (**clearly numbered**). However if you exceed the allotted space (about 7 lines for Secure Exam) you are probably including irrelevant information. A significant portion of a lawyer's skill, and your grade, depends on the ability to discern the relevant from the non-relevant.

Each short-answer question will have roughly equal weight, and the group of 10 multiple-choice questions will be weighted as roughly 2.5 short-answer questions. On the short-answers you will be graded more on the quality of the explanations that you give for your suggested resolutions than on how you think the issues would be resolved. If you think there is a strong argument or consideration weighing *against* the position you take, state it. Remember to keep your reasons **on point**. Do not circle around your point. Aim for the bull's eye. Otherwise, you will risk running out of time.

I.

Jasper Aircraft Co. manufactured small aerobatic airplanes and over the years purchased many of the needed fasteners and other hardware from Fillmore Foundry. When it recently received an order for several planes, Jasper sent an order to Fillmore for “50 gross of wingnuts, to be assorted between left and right-wingnuts as per instructions to follow, to be priced at list as of time of shipment.” (A “gross” is 144 items.) The delivery date was stated to be “2 weeks after receipt of instructions as to the assortment.” The day Fillmore received this order for the wingnuts it replied by sending out its standard “acknowledgement” form. The form contained the following:

“Section 19. Seller agrees to replace any goods sold hereunder that turn out to be defective but, except for such agreement, no warranties express or implied are given by seller in respect to the goods being sold hereunder, and buyer agrees that seller shall not be liable for consequential damages.”

Jasper expressed neither agreement nor objection to this language.

The wingnuts were later shipped, as per Jasper’s specifications concerning assortment, and they were accepted. However, due to an error in the composition of the metals from which the wingnuts had been made, their threading grooves were very weak. This caused the right wingnuts to loosen and strip spontaneously when subjected to vibration (such as on a small airplane). Wings attached using the wingnuts tended to loosen and fall off before the planes could even leave the ground.

As a result of the production delays caused by the defective wingnuts, the buyer cancelled the order for the planes, and Jasper suffered a loss of \$150,000 profits as a result.

1. Under the UCC, would Section 19 be a part of the contract for the wingnuts? (Do not talk about whether the disclaimer would be legally *effective*; that is asked later).

2. Suppose that Jasper and Fillmore were in different countries and the sale was subject to the CISG. Would Section 19 be a part of the contract for the sale of the wingnuts? (Again, do not talk about whether the disclaimer would be effective).

3. Assume that the sale is governed by the UCC and a court rules (perhaps based on some additional evidence) that Section 19 is a part of the contract. Would Section 19 be effective to disclaim the implied warranty of merchantability?

4. In the preceding question, would Section 19 be effective to exclude liability for consequential damages (even assuming it does not exclude all warranties)?

5. Suppose the wingnuts arrived and were accepted, but the very next day Jasper's technicians already realized that the metal was too soft to hold anything of consequence, and that the wingnuts could not be used. If, under the UCC, the quality of wingnuts was a breach of an effective warranty of merchantability, could Jasper now rightfully reject them?

8. Suppose that, a week before the scheduled delivery by Fillmore, Jasper sent a notice to Fillmore saying “We no longer need the wingnuts previously ordered and wish to cancel our order.” If there was a binding contract and Fillmore would like to keep the contract alive, if possible, what should it do under the UCC? Under the CISG? If Fillmore does not wish to keep the contract alive, what is it permitted to do under the UCC? (Do *not* discuss remedies here. That is for the next question).

9. Assume there was a binding contract and Fillmore received the notice described in the preceding question. Fillmore subsequently made sales involving many thousands of grosses of wingnuts like the ones ordered by Jasper, all at about the same price as Jasper would have paid. Jasper argues that Fillmore lost nothing due to Jasper’s breach (if any) since Fillmore must have sold, among those thousands of grosses, the 50 grosses that would have gone to Jasper, and that such sale was at about the same price as Jasper would have paid. Is Jasper’s argument correct?

II.

Larry Lawngrub went to the Springfield Garden and Nursery to get supplies for sprucing up his lawn, which had become pretty messed up. A sales clerk came up to Larry and said “Can I help you?” Larry replied that he was looking for seed that would produce a robust growth of grass under some large trees which, he said, shaded his yard from the sun for “all but 2-3 hours per day.”

“Our shady mixture would be just the thing,” the clerk replied, pointing out the several package sizes of the mixture that were stacked neatly on the shelves. Larry also asked about fertilizer and the clerk replied, “Right over here,” pointing to some large bags with a whitish foul-smelling powder sifting out on the floor and color pictures of hyper-think, ultra-green lawns printed on the outside.

Larry bought the shady mixture seed and fertilizer and took it home. He spread the seed according to the instructions and the grass came up great, at first. When, however, the spring leaves came out on his trees, the grass started thinning out and soon it had died out. Larry went back to the store, found the clerk he’d talked to before and complained. The clerk pointed out that on the backside of the seed bags was a statement:

WARRANTIES

This product is warranted to be live grass seed in the quantity marked on the bag. Because of the varying growing conditions under which this product may be used, no other warranties of any kind, express or implied, are given in connection with this sale, and the buyer agrees to take the product “as is” and to bear all risk associated with its use.

Also, the outside of the seed bag contained a statement: “Suitable for areas receiving at least 4 or more hours of direct sunlight per day.” Larry maintains, of course, that he had not read this statement or the “warranties” notice on the seed bag he bought (though a later check of the bag showed it was indeed there).

1. Springfield argues any statements made by the clerk relating to seed are not part of the contract of sale and, therefore, cannot form the basis of any action by Larry. True?

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2. Springfield argues that, in any case, statements made by the clerk relating to seed could not be treated as actionable because they were superseded by the “warranties” notice on the outside of the bag. True?

3. Springfield argues that any implied warranty of fitness for purpose (assuming there was one) would have been effectively disclaimed by the “warranties” notice on the bag. True?

4. Five months after using the fertilizer, Larry developed a severe lung condition, which caused him to miss several weeks of work. The condition was caused by an ingredient in the fertilizer. Springfield points to a statement on the bag: "Attention! Buyer agrees that seller shall in no case be liable for consequential damages resulting from the use of this product." Would this statement on the bag supply a defense to an action by Larry for lost wages and medical expenses?

5. While Larry was back at the store discussing the problems he was having with his grass seed and fertilizer, Larry saw some red and white azaleas and decided that azalea bushes would look nice around the foundation of his house. On impulse, Larry signed a "landscaping contract" with Springfield. Under this contract, Springfield was to landscape the area of Larry's property around his house, doing all necessary work and supplying the fertilizer, tools, plants, gardening accessories such as stakes, etc. Later that afternoon, the inventory manager went out to the nursery lot and tagged 25 azalea plants "for the Larry Lawngrub job." That night a freak frost hit, killing all 25 of the tagged plants and many of the others, creating great problems for Springfield in fulfilling its many pending contracts. Is the contract with Larry covered by article 2 of the UCC?

6. In the preceding question, if the contract with Larry is covered by article 2 of the UCC, can Springfield escape the obligation to Larry on the ground that the freak frost killed lots of azaleas and, in particular, “his” 25 azaleas no longer exist?

III.

Harold Klipping owned a suburban house with a large lawn. After many years with a push mower, Harold decided to treat himself to a riding lawnmower. He went to Town & Country Farm Store and examined a number of “demonstrator” models that were on display there. He finally selected one that seemed to exactly fill his needs. Klipping was not, of course, buying the demonstrator itself, but one like it that T&C kept in its warehouse, a few miles away. According to the salesman, Klipping would receive his mower, delivered by a T&C truck, on the following Tuesday. Sure enough, on Tuesday the mower arrived and, with Klipping’s help, it was off-loaded, started up and driven by Klipping to his garage.

It wasn’t until the next day that Klipping actually tried to cut grass with the machine and it was then, when he hit the lever to drop the blades, that he first realized something was wrong. The blades were dull and did not cut any but the tenderest shoots in Klipping’s lawn. The mower was also uncomfortable to ride on since it had a perforated metal seat. Klipping distinctly remembered that the demonstrator mower at the store had a sheepskin covered seat, or something that looked like that. Anyway, after several fruitless efforts to make the thing work, Klipping walked into his house, disgusted, and phoned up T&C.

Fortunately, Klipping was able to speak to the salesman who sold him the mower. The salesman told Klipping that the blade edges sometimes would become corroded during the long sea voyage from China, where the mowers were manufactured. But the salesman added that he’d send a technician right over to Klipping’s home to sharpen up the blades. “Once he’s done, they’ll cut your grass first rate,” the salesman said.

As for the seat, that was something else again. The salesman said that the sheepskin was a \$150 “option.” If Klipping wanted it, the technician could bring one over, along with the sharpening tools and, of course, a bill for the additional \$150. At that, Klipping’s disgust began to approach ballistic levels, and he responded: “Look, tell you what. Why don’t you just come and pick up your mower. It’s out in front of my house. I don’t want to see the &@#%^\$ thing again.” The salesman said “okay.”

It rained hard that afternoon before T&C got around to picking up the mower, and rainwater got into the fuel tank. It eventually cost T&C \$300 to repair the resulting damage to the innards of the engine.

1. Did T&C make a conforming tender on Tuesday of the goods required by the contract of sale?

2. Was Klipping in a position to rightfully reject the mower when he said “come and pick it up”?

2. Now suppose that the contract is governed by article 2 of the UCC. If Escondido manages to buy two bushels of conforming strawberries locally and to tender them—along with the 98 bushels—before the close of business on June 15, but Socorro wrongfully rejects the tender, what basic measures of damages would be available to Escondido if Escondido then decided to just let the 100 bushels rot by the roadside?

3. In the preceding question, what basic measures of damages would be available to Escondido if Escondido resold the 100 bushels to another buyer in Catron County for \$62 per bushel in a sale that complied with the UCC requirements for a “private sale.” For purposes of this question, assume that the market price for strawberries in Catron County was \$60 on June 15.

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4. Again suppose the contract is governed by article 2 of the UCC. If Escondido only managed to tender the 98 bushels on June 15 and Socorro allowed the berries to be off-loaded into its warehouse, only discovering the next day that the delivery was two bushels short, can it now rightly refuse to pay the price? What steps, if any, can it take to assure that it won't have to pay for 100 bushels when it received only 98?

Multiple choice questions

(Answer on attached answer sheet, p 19, which you may tear out)

Facts for George-Ray questions. George telephoned Ray's Supplies and ordered four widgets. The price was to be \$350 per widget. Ray took down the order and said "Okay." Later, the same day, Ray sent a note to George saying simply, "Confirming your order to buy 2 widgets. They'll be delivered next week. Yours, Ray."

1. If George was not a merchant:
 - a. There is a contract enforceable against Ray's Supplies, but not George.
 - b. There is a contract enforceable against Ray's Supplies, but only up to 2 widgets.
 - c. Both of the above.

- d. There is no enforceable contract.
2. Suppose that both George and Ray's Supplies were merchants.
 - a. George would have 10 days after receipt of Ray's note to give written notice of objection to its contents, or else he'll lose the defense of the statute of frauds.
 - b. There is a contract enforceable against both George and Ray's Supplies, but only up to 2 widgets.
 - c. George would have 10 days after receipt of Ray's note to give notice of objection to its contents, or else he'll lose the defense of the statute of frauds.
 - d. The fact that both George and Ray's Supplies are merchants would have no particular relevance as far as the statute of frauds is concerned..
3. Suppose that Ray did not send a note but, instead, sent the four widgets. The widgets were manifestly unmerchantable, but George said nothing about this fact. Instead, he just took the widgets and still holds them. Now Ray sues for the price and George claims, among other defenses, that there was no binding contract to buy the widgets.
 - a. The contract is not enforceable by either party.
 - b. The contract is enforceable by Ray's Supplies to recover the price up to a maximum of \$500.
 - c. The contract is enforceable by Ray's Supplies to recover the price for the four widgets, but the statute of frauds would prevent enforcement by George.
 - d. The contract is enforceable by Ray's Supplies to recover the price for the four widgets.
4. In the preceding question, if George can somehow get past the statute of frauds issue:
 - a. He would appear to have a remedy available for breach of implied warranty.
 - b. He would nevertheless appear to be barred from any remedy for breach of implied warranty.
 - c. He would have no action for breach of implied warranty since he failed to reject the manifestly unmerchantable widgets.
 - d. There could be no action for breach of any warranties since the parties' agreement said nothing about warranties.

5. Tobbit Feed Lots ordered 3 tons of grain from Irwin Livestock Supply Co. The grain was to be sent by train from Irwin's grain elevators in Carlton to the freight terminal in Forbes, a few miles from the Tobbit operation. While en route, on the train cars, the grain was rendered unusable by a fungus. The risk of this loss was on the seller if the contract provided that:

- a. The sale was to be F.O.B. Carlton.
- b. The sale was to be F.O.B. Forbes.
- c. The sale was to be C.I.S Forbes.
- d. All of the above.

6. Suppose in the preceding question that the grain was rendered unusable by a fungus while sitting in railroad storage bins waiting to be loaded on the train cars. The risk of this loss would have been on the seller if the contract provided that:

- a. The sale was to be F.O.B. train cars.
- b. The sale was to be F.O.B. Carlton.
- c. Both of the above.
- d. The sale was to be C.I.S. Forbes.

7. General Construction, in Freemont, placed an order to buy 500 tons of cement from Kendall Quarries, in Lincoln. The resulting contract contemplated that the material would be sent in a single delivery from Kendall to General by river barge. While in transit, the cement was severely damaged by rainwater that somehow leaked into the barges. The risk of this loss would have been on the seller if the contract provided that:

- a. The sale was to be F.A.S. barges.
- b. The sale was to be F.O.B. Lincoln.
- c. Both of the above.
- d. The sale was to be ex ship.

8. Suppose in the preceding question the contract provided that the sale was to be F.O.B. Lincoln and that 10 tons (of the 500) were damaged while still on Kendall's trucks being transported to the barges. Another 90 tons were damaged while actually on the barges, in transit. The remaining 400 tons are still perfectly all right. Meanwhile, however, the price

of cement has fallen and General can satisfy its needs at about 2/3 the price from local suppliers.

- a. General can reject only the 10 tons that were damaged while still on Kendall's trucks.
 - b. General can reject only the 100 tons that were damaged while in transit.
 - c. General can reject the whole 500 tons, including cement that was not damaged.
 - d. General must accept the whole 500 tons, but has an action for damages.
9. Suppose in the preceding question Kendall had no reasonable way to know of the water damage to any of the cement until after it had arrived and been inspected by General.
- a. Kendall may, by a seasonable notification, secure for itself a further reasonable time to replace the damaged cement with undamaged cement.
 - b. Kendall would have no right to cure in this circumstance, unless (as is unlikely from the facts) the time for performance had not yet passed.
 - c. General would be required to accept all the cement since the risk of loss was on General at the time the water damage occurred
 - d. General would be required to accept the cement since the seller could not reasonably have avoided the non-conformity.

10. Norton bought a suit at Hampton's Department Store. When he came back for the final fitting, the sleeves were still too long. He left the suit at the store and a Hampton's employee promised to call him when it was ready. The suit was ready the very next day, but nobody called or otherwise tried to notify Norton. After a week, Norton called the store and asked what was up. It was then discovered that, sometime during the week, the suit mysteriously disappeared from the Hampton's alterations shop.

- a. Hampton's can recover the price of the suit from Norton.
- b. Risk of loss had passed to Norton because the seller had made a tender of the suit.
- c. Both of the above
- d. Risk of loss remained on Hampton's since Norton had not yet received the suit.

{end of examination}

**Commercial Law-Sales
Fall, 2006
Professor Humbach**

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