

Sales & Secured Transactions Mid-Term Exam

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3/31/98

Although Kernnen has offered to repair the damaged guitars, the dispute may cause him to be less generous. He may seek to recover the price, claiming the risk of loss was on Montes. Montes may claim the risk was on Kernnen, and if so, Kernnen should be given time to cure the defects. The outcome of this dispute and the one over the defectively manufactured guitar will also determine who must pay for shipping. Regardless of that outcome, Montes must still pay for the eight guitars she has accepted. Montes may recover the stolen guitars from Upscale, and Upscale may recover from the reputable dealer.

Damaged Guitars(6)

A. Argument for the Risk of Loss Passing to the Buyer

Kernnen can seek damages in an action for the price by arguing that the risk of loss was on the Montes. When a contract is silent as to the risk of loss, courts presume that a shipment contract was intended. Under a shipment contract, the buyer assumes the risk of loss when the goods are delivered to the carrier. Since Kernnen claims the guitars were undamaged when delivered, he would not be liable. Buyer could argue that the guitars were already damaged.

Montes may still recover based on a claim for breach of the warranty of merchantability, which is implied if the seller is a merchant with respect to the goods. Since the magazine article states that he sells guitars, Kernnen is probably a merchant and the court will imply the warranty. The warranty of merchantability requires that the goods be adequately contained and packaged. Both sides would argue about the sufficiency of using cardboard boxes to contain fragile \$10,000 instruments. The court may look to the

usage of trade. Buyer must show that the packaging breached the warranty, and that breach was the proximate cause of her loss. Seller may offer as a defense that the guitars were damaged after Buyer unpacked them. This would be supported by the fact that buyer did not detect the damage in the original inspection.

However, Kernnen should argue that he effectively disclaimed the warranty of merchantability. Kernnen did use the word “merchantability,” but the writing must also be conspicuous. Here, the word was not in bold type, not in larger type, not in capital letters, and not in a different color of ink, but was in lower case letters and identical to all the other words in the writing. Seller may counter that the writing was so short that the buyer could not miss the word “merchantability.”

B. Arguments for the Risk of Loss Remaining on the Seller

Montes could argue that seller’s failure to promptly notify her of the shipment prevented the risk of loss from passing to her. Failure to promptly notify is a ground for rejection. If the buyer is to assume the risk of loss, she must have the opportunity to protect herself from the risks. Since Kernnen did not notify Montes until after the goods were shipped, she did not have the opportunity to make arrangements to ensure the safety of the guitars. Therefore, she was able to reject the goods.

Kernnen would argue that Montes’ objections are waived, because of her failure to particularize(2-605). Buyer did not specifically state the nature of the defect, so seller may argue that she was acting in bad faith to get out of the deal. Buyer may argue that her description of the guitars as “worthless piles of wood,” and seller’s response that they were fine when shipped, and that he would fix them, show that seller knew exactly what had happened.

Montes may also argue that the risk of loss did not pass, because it does not pass until the goods are “duly delivered” so as to satisfy 2-504. The mode of transport must be reasonable with respect to the nature of the goods, or the risk of loss does not pass to the buyer. Here, sending fragile \$10,000 instruments in cardboard cartons may not be reasonable, so Montes has a good argument that the risk of loss remains with the seller. Montes might also argue that seller should have heavily insured them because of their fragility and value.

If the risk of loss was on the seller, he still has a right to cure because he is still within the contracted time for performance. Montes claimed that it is “way too late,” but the guitars were not even due to arrive yet. Additionally, when the seller had reason to believe that the goods would be acceptable, he may be given further reasonable time to cure. Kernnen may argue that this was a surprise rejection, and that he will need more time to repair them. Regardless, Kernnen should be given the opportunity to cure.

Buyer could argue for still another type of analysis. Buyer could argue that this was a destination contract, because the seller was to ship the guitars to a particular destination, buyer’s store. In a destination contract, the risk of loss remains on seller until the goods are delivered. Since the guitars were to be shipped to buyer’s store, and arrived damaged, the loss would be on the seller.

Defectively Manufactured Guitar(1)

Montes may reject the defective guitar under the perfect tender rule, which applies to a single delivery sale. The rule allows Montes to reject the guitar if it fails in any respect.

Montes may opt to claim damages under a warranty action. The warranty of merchantability requires that the goods pass without objection, are fit for their ordinary purposes, and that they conform to the promises on the label. Buyer can argue that a guitar with a 'dull, flat tone' and a visible defect will not pass without objection in the trade, and that the price of the guitar is an indication of the level of quality expected. Likewise, such a guitar is not fit for its ordinary purpose as a high quality guitar. Furthermore, the label read, "TWO SPLENDID GUITARS." The defective guitar did not conform to the label. Seller can argue, however, that the term "splendid" is subjective, unquantifiable, and "merely puffing." He may also argue that the variation in his guitars is what gives them their uniqueness and value. However, Montes may argue that for \$8,000, she should receive a decent sounding guitar.

The effectiveness of the disclaimer, as discussed with regards to the damaged guitars, will probably determine buyer's recovery for the defective guitar. However, seller has a strong argument for disclaimer of merchantability with regards to the defective guitar, because he specifically disclaimed any warranty as to the quality of sound.

However, buyer might argue that such a disclaimer is inoperative under 2-316, because its attempt to disclaim an express warranty is unreasonable. Buyer made representations regarding the sound quality as "a joy to the ears," and attempted to disclaim them in the next sentence. Buyer will have a difficult time proving the existence of an express warranty, because the statements were not the "basis of the bargain." Montes ordered the guitars before the statements were made. In addition, those statements are probably "mere puffing." "A joy to the ears," is completely subjective, and the claim that this would be a "memorable experience" is true, but not in the way buyer had hoped.

If Buyer succeeds in proving a breach of warranty, she may claim treble damages under the Texas Deceptive Trade Practices Act. If she can prove that Kernnen intentionally or knowingly sold her the defective guitar, she could claim \$24,000 in economic damages. Either mental state could be inferred from the facts. It is highly unlikely that Kernnen did not see, feel, or hear the defect in his handmade instrument, so Montes will likely recover treble damages if she can prove that the warranty was not disclaimed.

Stopped Payment for \$120,000

Regardless of the outcome regarding the defective and damaged guitars, Montes would still owe Kernnen for the other 8 guitars for which she has not paid.

Return Shipping Cost

If the court determines that the risk of loss was on the buyer, then Montes should gladly pay the shipping if Kernnen would still volunteer to repair them.

If the court finds that the risk of loss was on the seller, and the buyer has rejected the damaged guitars, then she has only the duty to hold the goods with reasonable care. If the defective guitar is also rejected, the same duty applies and the buyer need not ship it.

Stolen Guitars (2)

Upscale will not be allowed to keep the stolen guitars. A thief has no title to convey, so Upscale simply does not own the guitars. Upscale, however, may sue the “reputable dealer” to recover its loss, providing Upscale gives “reputable dealer” proper notice that injury has occurred 2-607(5)(a).

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One of the first issues that is important in this case is whether there is an express warranty created by way of the article in MusiCrafts magazine. Buyer(Montes) will argue that there is an express warranty under UCC sect. 2-313 because the article states that Seller(Kernnen) excels at guitar-making and that they are used by two famous guitar players. Buyer would claim that this an affirmation of fact. Furthermore, Buyer will claim that this was a basis of the bargain. Buyer emphasized that she relied on Seller's expertise after reading the article. Seller will argue that the article is simple puffery and that there is no express warranty. Furthermore, the best defense for Seller is the Parol Evidence Rule, which would not allow introduction of the article as part of the agreement.

When Buyer sent the letter dated October 10, 1997, she made an offer to the Seller to buy 20 guitars for \$160,000. Buyer specified shipment to her town, thus creating a destination contract. Furthermore, she specifically told Seller to notify her once the guitars arrive. This may become an issue if it is decided that Buyer made this an exclusive mode of acceptance.

✓ The next important issue is whether a warranty of merchantability or warranty of fitness for particular purpose exists. The letter sent by Seller on November 1, 1997 accepts Buyer's offer by promise to ship, and states that the guitars will arrive at Buyer's store by February 8, 1998. This may be the date that performance of the contract is due. The letter goes on to state that Seller disclaims merchantability. Seller will argue that the disclaimer is conspicuous and mentions the word merchantability, therefore, it is an effective disclaimer of the Warranty of Merchantability. Buyer can counter argue that the disclaimer is not labeled as a disclaimer. Buyer can also argue that it would be unconscionable to disclaim the warranty of merchantability. In addition, ✓ Buyer can claim that the disclaimer is a material alteration of the agreement and that therefore, it is not part of the agreement. Seller will counter that the disclaimer is an additional proposal, and that the two parties are merchants, so the proposal automatically becomes part of the agreement under UCC sect. 2-207(2). Again, Buyer can argue that it would be unconscionable to disclaim this warranty. An alternative or additional warranty that may available to Buyer is the Implied Warranty of Fitness for a Particular Purpose. Under UCC sect. 2-315, the Seller must have reason to know the particular purpose for which goods are required and that Buyer is relying on Seller's skill or judgment to select or furnish suitable goods. Buyer would argue that Seller knew the purpose was for resale and certainly the Seller knew that Buyer was relying on Seller's expertise because she stated as much in one of letters. Seller of course

would argue he did not know particular purpose or that buyer was relying on his expertise. Buyer must give notice to Seller if she is going to allege breach of warranty as a basis of her rejection under UCC sect. 2-206.

The Buyer could argue that Seller is in breach of the warranty of merchantability because seven of the guitars were unfit for their ordinary purpose. Six of the goods were completely unusable. This is also important to the Buyer in regard to the guitar that was made unevenly. Because this caused a dull, flat tone, Buyer can argue that this guitar is not suitable for its ordinary purpose, either, and it therefore breaches the merchantability warranty. Seller should point out that he disclaimed that warranty, as well as explicitly stated that he did not warrant the quality of sound that each guitar will make because each one is unique. Buyer will always argue unconscionability or material alteration.

As mentioned above, Buyer asked Seller to notify her when shipment arrived. Seller did not do so, and thus if Buyer chooses not to buy the guitars, she can argue that the notification was part of an exclusive mode of acceptance. This is a weak argument because courts usually find that acceptance can be made by any reasonable means.

Another major issue that must be resolved is whether Seller must be given right to cure non-conforming goods. The Buyer picked up the guitars on January 26. After opening six of them, she took delivery of all 20 guitars. Later, she discovered that six more were damaged and that one was incorrectly made. Buyer can argue that she has the right reject the whole or any part of the shipment because of the Perfect Tender Rule under UCC sect. 2-601. Therefore, she can argue that she accepted only thirteen of the guitars since each one is a commercial unit. Seller will counter by stating that he has the right to cure because the time for performance had not yet expired (February 8) under UCC sect. 2-508. Seller probably has the stronger argument. In the same provision of the UCC, it is stated that when Buyer rejects goods that Seller reasonably believed would be accepted, then as long as he gives Buyer seasonable notice, he may have more time (reasonable) to cure. In this case, Seller stated in his letter that the guitars were in perfect shape when they were shipped, so Seller reasonably believed the guitars would be accepted.

In addition to recovery of damages for breach, the Buyer may revoke his acceptance of a commercial unit whose non-conformity substantially impairs its value to her if she has accepted it without discovery of such non-conformity if her acceptance was reasonably induced by difficulty of discovery before acceptance under UCC sect. 2-608(1). Because the guitars are smashed, it should be easy for the Buyer to argue that their value is substantially impaired. Seller can argue that this is only available before acceptance and in this case, Buyer had already accepted. Seller can argue that the damage occurred after the reasonable time period. Since the Buyer received the

guitars on January 26 and then notified the Seller of the defect on February 3. She can also argue that she notified the Seller of the non-conformity within a reasonable amount of time. In support of this, Buyer can use UCC sect.2-513, which states that Buyer has the right to inspect the goods after delivery. Seller will argue that Buyer had more than ample reasonable time to inspect, and that she accepted the goods. Buyer will probably win this argument. Because Buyer is asking for her money to be returned and not for repaired goods, her best argument is revocation of acceptance. Buyer will also be able to recover consequential damages .

Risk of loss is also an issue. Seller will argue that there is no breach and that this is a destination contract. Therefore the risk of loss passes to the Buyer when the goods are there duly so tendered so as to enable Buyer to take delivery under UCC sect. 2-509(1)(b). Seller will argue that risk of loss passed to Buyer when the guitars arrived at in San Antonio. This is important because Seller will argue that the damage to the six guitars must have occurred when the risk of loss passed to Buyer (since they were in perfect shape when the Seller delivered the goods to the carrier.) Buyer will argue that Seller did not notify her of the shipment, and that she could therefore not take delivery. Buyer can argue that risk of loss is on Seller until Buyer actually receives the guitars. In this case, Buyer will maintain that damage occurred during shipping, and at that point, Buyer had not actually received the goods so risk is still on Seller.

Buyer can also argue that there is a breach on the part of the Seller. Under UCC sect.2-510, where tender or delivery of goods fails to conform to the contract as to give right of rejection, the risk of loss remains on the Seller until cure or acceptance. Alternatively, if the Buyer argues that she revoked her acceptance of the guitars, the value of the two guitars that were stolen may also be recovered under UCC sect.2-510(2). Seller will argue that there is no breach because he has the right to cure within the time of performance of the contract.

If the Seller is claiming that Buyer accepted all the goods, he may seek action for the price under UCC sect. 2-709, in which case Seller would recover price and incidental damages, such as the shipping costs amounting to \$900. Buyer of course would argue that she did not accept because she discovered the defects within reasonable time. Seller would argue that payment had already been made. The Buyer has a stronger argument because one week is a reasonable time period. //

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Revocation of Acceptance

Montes will argue, in the alternative, that she is entitled to revocation of acceptance under 2-608 because the goods were substantially impaired in value, and that acceptance was induced by the seller's assurances ("two splendid guitars" inscribed on each box) or by difficulty of discovery *Wash.* (too many boxes to search through at the airport).

Kernnen will respond that (a) the goods were not substantially impaired, because he offered to cure the defects, and that (b) mere language on a shipping box is far from inducing the buyer that the goods are conforming, and that there was no difficulty of discovery (opening boxes is not very difficult). Furthermore, he will argue that the reasonable time to revoke, under (2) has lapsed because she should have discovered it upon receiving the goods, or shortly thereafter.

Montes will respond by arguing that Kernnen has no right to cure the defect under revocation of acceptance in Texas, but Kernnen may still argue around the Texas case on point because it relied on the "shaken faith" doctrine. Kernnen will probably prevail in this argument, especially because the reasonable time to revoke has lapsed. *Not required to deliver the goods not signed*

Right to Cure

In any event, Kernnen will argue that rejection or revocation or any other remedies are improper because he has not been afforded opportunity to cure the defects. Under 2-508(2), he is entitled to do so because he thought the goods were going to be acceptable (assuming this is true) and because he notified Montes of his intent to do so. Therefore, he will argue that she is required to give him further reasonable time to substitute good guitars. Montes will probably be required to let him do so.

Montes could make the "shaken faith" argument, that her experience with Kernnen's guitars has been so tumultuous that she wishes to have nothing to do with them. This might work, but the problems really appear to come from damage, and not poor workmanship. *Good point*

Damages

Assuming that the goods were damaged after the risk transferred to Montes, Kernnen will argue (and will probably succeed) that he is entitled to recover the purchase price under 2-709. ✓

If the goods were damaged while the risk of loss was still with Kernnen, Montes will argue the above mentioned points of rejection and revocation of acceptance. As stated earlier, Kernnen probably has the right to cure. ✓

Assuming that Montes can prevail in her arguments that she is entitled to rejection or revocation of acceptance, neither of which is likely to succeed, she will argue that she is entitled to recover the money she put down under 2-711 and any expenses in receipt of the goods. ✓

Stolen Guitars

As against Upscale, Montes can argue that she is entitled to recover the guitars, because Upscale has no title in them. Upscale has no title because the goods were stolen, and a thief has no title to

goods. Therefore, the person who purchases from a thief acquires no title, and can transfer no greater title than what they themselves have, under 2-403(1). The exceptions in 2-403 do not apply, because they apply only to *voidable* title. Of course, all of this assumes that Montes can prove these are in fact the stolen guitars.

Shipping Costs

Montes will argue that she is accountable for the shipping costs because under 2-201(1) a written K is not enforceable beyond the writing. 2-201(2) will not apply, because Montes gave written objection the contents of Kernnen's letter demanding payment for shipment.

Bt under 5d part 1,
Kernnen's letter
Bt 2 -

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Sales & Secured Transactions: Mid-Term Examination

Offer & Acceptance

K is merchant under UCC because he holds himself out as having knowledge or skill peculiar to guitar-making.

The Oct 10th letter from M to K would operate as an offer and the reply letter from K would be the acceptance that did not change any of the terms of the offer except for disclaimer of warranties. M would argue that the disclaimer materially altered the contract and therefore is not an addition to the contract. K could argue that M did not give notification of objection to the disclaimer within a reasonable time and therefore became part of the contract.

Statute of Frauds

Wlet
18/10/17
No violation of the Statute of Frauds even though the contract amount is more than \$500 because the Oct 10th letter is signed by M against whom enforcement is sought. Also, the transaction is between merchants therefore the reply letter dated Nov 1st from K confirmed the contract and M had reason to know of its contents and did not object within 10 days after receipt.

Shipment terms

A destination contract may have been formed by the contract term requiring shipment by air to San Antonio. However, because the contract was silent on risk of loss, the Court may presume a shipment contract in which risk of loss passed to M when the guitars were delivered to the air carrier.

Since the contract did not specify delivery terms other than air freight to San Antonio, there is a dispute as to whether the \$8,000 price included freight or it did not. M will argue that the price included freight and K is arguing that it did not. The court can use its gap-filling power and supply the missing delivery terms according to trade usage but not course of dealing since the assumption is that M & K have had no previous dealings.

Risk of Loss - No Breach

K will argue that there was no breach and therefore if the Court construes as a destination contract, the risk of loss passed to M when the guitars were tendered for delivery to M by

Liberty. If the Court construes as a shipment contract, the risk of loss passed to M when K delivered guitars to the carrier. However, M will argue that K did not give notification of the shipment and impending delivery. But K will argue that the carrier notified M and M subsequently accepted from Liberty. If risk of loss had passed to M, the two stolen guitars will have to be paid for by M.

Risk of Loss - Breach

M will argue that there was a breach by K and risk of loss stayed with K. M will argue that the 7 guitars were nonconforming and rightfully rejected because acceptance of the 7 did not occur until M had a reasonable time to inspect. K will argue that acceptance was effective when M had the opportunity to inspect when tendered by Liberty. M will counter that if acceptance was found to have occurred for all 20 of the guitars, the 7 were rightfully revoked within a reasonable time. M has to pay for the guitars accepted but not for the 7 refused. Since risk of loss stayed with K, M may not have to pay for the two stolen guitars and simply return the 7 refused, therefore paying only for the 11 guitars remaining.

Seller's Right to Cure

✓ K will argue that IF all 7 of the guitars were defective prior to shipment, he has a right to cure and the time for performance did not expire until Feb 8th. This will probably be allowed if the Court finds that the goods were not accepted but rejected. However, there is an unresolved question in the courts of a seller's right to cure following revocation. K will argue stridently that the right to cure follows not only rejection but revocation of acceptance.

Warranties & Disclaimers

M will argue that the one guitar was made with uneven wood and could rightfully reject or revoke acceptance of it. K could argue that he had disclaimed merchantability. M would say that the disclaimer was not effective because the disclaimer was not conspicuous enough. K would counter that merchantability was mentioned in the reply letter and was conspicuous because there is minimal language in disclaimer.

M will argue that express warranties of being a "joy to the ears" and the magazine article exist and could not be disclaimed because had formed the basis of the bargain. K would argue that he had expressly not warranted the quality and therefore had effectively disclaimed.

M will argue that a warranty for fitness of a particular purpose was implied because K had reason to know of the purpose for the guitars and M had relied on K's expertise in furnishing suitable guitars. Further, this warranty was not effectively disclaimed because it was not in writing and conspicuous. K would counter that no warranty for a particular purpose existed because the guitars were to be used for their ordinary purpose and not a specific or peculiar use.

K would argue that even if the warranties had not been effectively disclaimed, he still had a right to cure and time of performance had not expired.

Seller's Remedies

There are no liquidated damages provided for in the contract. K will be arguing that freight was not included in the \$8,000 price.

K will argue that the guitars were damaged and 2 guitars subsequently stolen while in M's custody and after risk of loss had passed to M. K will argue that M had not paid for the conforming guitars by Feb 9th as agreed and therefore should recover the remaining contract price of \$120,000 plus any incidentals (which may include the \$900 freight charge).

If resale of the goods are possible, then K will be able to recover the difference of the contract price of \$120,000 less the market price of \$10,000 each or \$70,000 (according to magazine article) or \$15,000 each or \$105,000 (competitor price) together with any incidentals.

K can argue lost volume sale and recover the profit including overhead together with incidentals, incurred costs less credit for proceeds of resale.

If the Court finds that one or all 7 of the guitars were non-conforming when shipped then the recovery will be adjusted accordingly and M will simply return the non-conforming guitar(s).

Buyer's Remedies

M will argue that had rightfully rejected or revoked 7 guitars. Since M accepted 13 of the 20 guitars tendered, \$104,000 would be the adjusted contract price less the \$40,000 payment; therefore, M owes K \$64,000. However, if the Court finds that risk of loss did not pass to M but stayed with K (2-510), then the two stolen guitars may not have to be paid for bringing the payment owing to \$56,000. M will argue that the price of freight was included in the \$8,000 price.

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SALES EXAM

EXAM # 6620

K = contract

betwn = between

w/ = with

First I think we need to look at whether there was a contract, an offer, an acceptance and was there good faith on the part of both parties.

The parties met the Statute of Frauds requirement (§2-201) by having a writing sufficient to indicate that a contract for sale has been made betwn the parties & signed by the parties. So we can clearly tell from the writings made there was a contract for the sale of goods. (§2-204) Further, there seems to be good faith on the part of both parties, in the beginning. (1-203)

Montes (the buyer) will say that Parol Evidence Rule doesn't apply to anything I say because this was not a complete and final statement of our agreement & if the seller wanted this to be so, then he should have specifically stated this in writing.

Seller: PER does apply, but we can always argue terms w/regards to trade usage.

Next we look at whether there was an offer and an acceptance under the UCC §2-206.

Buyer: There was an offer & acceptance because she met the requirements under 2-206(1)(a) and the seller (Robbie) accepted when he promised to ship the goods. The buyer can also argue that the seller added additional terms and she didn't say she agreed to the additional terms. (2-207)

Seller will probably agree to the offer and may agree that there was acceptance, however, he will say that under 2-207(2) that those terms became part of the K because they didn't say "No ^{contract} acceptance unless you agree to these terms", nor did these terms materially alter (where the test is whether it will surprise the other party or create a hardship), nor did the buyer w/in a reasonable time object to these terms.

Buyer: yes, there were completely different terms because you said they would be ready for shipment on February 8, 1997, not 1998 as requested.

Seller: Wait this is an honest mistake and doesn't materially alter because you knew what I meant and this mistaken term doesn't fall under any category in 2-207.

Next let's move on to the warranty the seller tries to disclaim in his acceptance letter.

Buyer: Under 2-313 the seller created an express warranty when he stated that his guitars were a joy to the ears. The seller knew the buyer had heard of him through another source and was relying on his expertise. So when the seller affirmed this fact or promise which related to the goods, it became part of the basis of the bargain and created an express warranty. The buyer didn't even need to rely on the statement by the seller according to 2-213 Comment 3.

Seller: Oh no, I specifically stated that I could not guarantee the quality of sound which relates to my statement about being a joy to the ears. I expressly did not make any warranty to the sound of the guitars.

Buyer: Well maybe you did do that, but there is still an implied warranty of merchantability because 2-314 applies to seller who are merchants w/respect of goods to that kind. And you are surely a guitar making merchant, so this applies to you. Under 2-314 these goods must be fit for the ordinary purpose and they are not because they are broken, and I want my money back! [2-214(2)(c)]

Seller: I don't think so because, if you would read the statute it says that I may exclude or modify the warranty of merchantability under 2-316 and that is just what I did. [2-314(1)] If you had a problem with that you should have notified me. I did everything I am suppose to do under the statute. I mentioned the specific word of merchantability and it was conspicuous.

Buyer: Just the fact that you stated it is not conspicuous, you must make it stand out, set is aside, mark it in red, make it big, etc..(handout, hypothetical, 3 Yr. Warranty dated 2/3/98). Further, you didn't even mention the implied warranty of fitness for a particular purpose, thus, not disclaiming it. You knew @ the time of the K, that I was relying on your skills & that the goods were for a particular purpose, so you are still bound by this warranty. (2-315)

Seller: Can argue trade usage as to there is never an implied warranty of anything in this business. (If this is the case) *Sum*

** note: Magnuson-Moss doesn't apply here because we are not dealing with consumer goods where a manufacturer has issued a warranty. This is a K betwn 2 merchants. **

Buyer: This is a shipment K under the terms of 2-503. With regards to the shipment, first you did not meet the guidelines of 2-504(c) in that you did not promptly notify me of the shipment. I say that 2-504 applies because we didn't otherwise agree where you were to ship the goods, I just said by air freight. Thus, I can reject the goods alone on this failure on your part. *✓*

Seller: if you would read further into the statute it says that 2-504(c) is a ground for rejection of the goods only if failure to notify ensues a material delay or loss. Which in your case, buyer, it doesn't do either. So I didn't have to notify you and you can't reject under this provision. ✓

Buyer: the goods were damaged and you damaged them. How can you tell me I can't reject damaged goods. Further, one of them was even defective. Under 2-513 I have a right to inspect the goods even after their arrival [2-513(1)]. And I can inspect them before payment and before acceptance. I may select the time or place or manner, as long as it is reasonable, & I surely think in my basement of the store a few days after receiving the items is reasonable. I don't have to abide by the normal customs of my trade. (2-315 comment 3). ✓

Seller: You had a chance to inspect the goods on the dock. If you could inspect 3 boxes there why couldn't you inspect the rest. Further, you should've noticed the dents in the boxes when you loaded them on to the truck, or when you loaded them off your truck.

Buyer: In the letter dated 2/3, I rejected your goods in accordance with UCC 2-602 because I notified you. Further, I did not accept the goods w/regards to 2-606 because I didn't say I would accept the goods, I didn't fail to make an effective rejection be/c I rejected on 2/3, and I didn't do any act inconsistent with your ownership, seller. Also, under 2-601, I can reject part of the shipment, just as I have. ✓

Seller: NO, you accepted because you sent full payment before you decided to breach the K. You should've inspected the guitars when they were sitting in you basement and you definitely should've inspected the guitars before you sent me the full amount of payment. You should've discovered the breach. [2-607(3)(a)] Also under 2-608(1)(b) there was nothing to induce your acceptance nor was there a difficulty in your discovery of the defect, so I have the right to cure the defect as I said I would do for you under 2-508 because it is still before the agreed date of delivery. ✓

Buyer: I am not being difficult, I have the Shaken Faith Syndrome. But even then, if I did accept, I have the right to revoke my acceptance under 2-608(2) and I clearly notified you. And under *Galpenburg* (666 SW 2nd 88), 2-508 only applies where I rejected not revoked my acceptance, so you don't have the right to cure. ✓

Seller: I agree with Karl Llewellyn not wanting the rule of perfect tender (2-601). People are genuinely flexible and I don't know why you are being such a difficult buyer. I said I would fix it for you. I don't know why we're even discussing this because it only effects 1 guitar. The other 6 you obviously damaged yourself because they were fine when I shipped them. The risk of loss shifted to you in this shipment K at the time I took the goods to the shipper. (2-509) ✓

Buyer: However, if some goods were damaged prior to giving to carrier, then the risk remained on you & if the delivery wasn't conforming, which it wasn't then I have the right to reject.

But it was 17 days to go

Seller: Because this is a cash sale, I have the right to take back the goods. 2-507, 2-702, 2-705 And I can repair & sell the guitar and recover the difference between the K price and the resell price if I want to. I can also opt to take the market price @ time & place of buyer & unpaid K price w/any incidental damages (such as me having to repair the damage that you caused) less any saved expenses in consequence of your, the buyer's, breach.

Buyer: Well, since you breached because your goods were defective I can recover from you any amount in which I had to pay to "cover" plus incidental damages. (2-711)

Seller: well under 2-501 you obtained a special property & insurable interest in goods by identification of existing goods as goods to which the K refers even if you had the option to return or reject.

Buyer: under 2-510, when I rightfully revoked acceptance, any deficiency in my effective insurance coverage treat the risk of loss as having rested on you, the seller, from the beginning.

Seller: well, your insurance coverage was not in effect @ the time, be/c it had lapsed. And you didn't reject the goods that got stolen, so you're pretty much out of luck and you owe me for the K price plus shipping, because it was your burden to pay for shipping. (2-504) I guess I'll just see you in court, where the judge will decide in my favor.

Buyer: Dream on Mr. Carrot Top Head Guitar Man. You don't have a case. I'll see you in court, & you can take your guitars and shove them.

What about upside?

23

Exam Number 2739

It is clear that Montes, owner and operator of a retail music store, is a merchant under UCC § 2-104, because she deals in goods of the kind which will be at issue. What is less clear is whether Kernnen is a merchant because he only crafts guitars in his spare time. However, it may be resolved that he too is a merchant because he holds himself out as knowledge or skill particular to the practices or goods involved in the transaction. ✓

The offer written by Montes to Kernnen satisfies the requirements of a firm offer, under § 2-205, because it is a signed writing by a merchant and holds the offer open to Kernnen. Because no duration is stated, the offer will be good for three months. This letter is an offer for a destination contract, for Montes wrote that the goods should be delivered to her place a business, a specific delivery point. This offer can become a valid contract under the statute of frauds, even though the price is over \$500, because it is a writing, signed by a party who it can be held against, and it mentions quantity which can be enforced (twenty guitars). § 2-201. not a

Montes has not waived any of the implied warranties on the goods by contracting for the goods before examining any sample or model. § 2-316 (3)(b) would require that there be a demand by Kernnen that Montes examine a sample of the goods before there would be any waiver (see comment 8). In addition, the down payment by Montes does not act as an acceptance of the goods or impair her rights to inspect the goods or impair any of her remedies. Under § 2-512 (2), even if the contract *required* payment in advance, the buyer would not lose any of the above rights.

The 11/1/97 acceptance letter by Kernnen satisfies the requirements of acceptance of an offer under § 2-206. An offer to buy goods for prompt shipment invites

acceptance either by prompt shipment, or by a prompt promise to ship, as Kernnen has done here. However, Kernnen has added additional terms to his acceptance, disclaiming merchantability. Under § 2-207 (2)(b), between merchants, if an additional term materially alters the contract that was offered, the term will not become a part of the contract. Comment 4 to this section states that a "typical" clause which materially alters is one which tries to disclaim merchantability or other implied warranties. Furthermore, the attempted disclaimer will fail because § 2-316 requires a proper disclaimer to not only mention merchantability, but also be in conspicuous writing that stands out from the rest of the text, which is not the case here. ✓

The statements by Kernnen that "each guitar will be a unique creation, a joy to the ears" will probably not create express warranties, for this is opinion, and more likely to be seen as puffing than as an affirmation or promise. ✓

Kernnen failed to meet the requirements of tender of delivery, under § 2-503 (1), when he failed to give Montes notice that the goods had arrived, failed to deliver them to the right location (Montes' shop), and apparently neither tendered documents of title nor procured acknowledgement from the bailee (Liberty Airlines) of the buyer's right to possession. Tender of delivery must occur before the buyer has a duty to accept or pay for the goods. § 2-507 (1). Therefore, Montes had the right to reject the whole shipment, reject part of it, or accept it all. § 2-601.

The risk of loss, which was supposed to pass to Montes when the goods were properly tendered, has shifted because of the improper delivery. Taking possession of the goods in a breach situation will not be enough to pass the risk of loss to Montes unless she had an adequate opportunity to inspect. § 2-606 (1)(b). It appears Montes did not

have an opportunity to inspect all of the goods until they had been unloaded in the store's basement storage area, although it is arguable that she could have inspected all ten cartons since she gave a cursory inspection of three of the cartons at the airport.

When Montes sold the first guitar on 1/26/98 she showed acceptance of the goods, for the sale was an act inconsistent with the seller's ownership. § 2-606 (c). Delegating the duty of paying for the goods to her accountant was permissible under § 2-210. *not an issue*

Eight days later, when Montes discovered the damage to the three cartons in her basement, the issue arises as to whether she has had adequate time to inspect her goods.

If she has not, then she has not yet accepted the goods and may rightfully reject the whole or any unit. § 2-601. If she has, then Montes will have accepted the goods in spite of their non-conformity. § 2-606 (1)(a). There is no standard for how long it takes to reasonably inspect goods; rather, it is determined by the circumstances and reasonableness (see comment 1 to § 2-606). If Montes has accepted the goods, she might have a claim under § 2-314 (2)(e) that there was a breach of the implied warranty of merchantability, for the goods were inadequately packaged. She might also have a breach of implied warranty of merchantability claim for the guitar with the flat tone, for under § 2-314 (2)(d), it does not run within even quality. Neither does it conform to the label of a "splendid guitar." *good*
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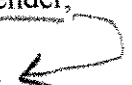
The 2/3/98 telegram by Montes assumes that she can *reject* the damaged goods, rather than *revoke* her acceptance. Again, she may only do this if she did not have a reasonable time to inspect the goods before discovering the damage. If this is the case, then this letter is effective timely notice that she is rejecting seven of the guitars, and she need not give Kernnen a chance to cure. § 2-601.

If it is determined that Montes has had reasonable time to inspect, then this letter is a revocation of an accepted tender. Under § 2-607 (3)(a), the buyer must notify the seller of the breach within a reasonable time after discovery or be barred from any remedy. Here, Montes has notified Kernnen that there has been a breach, but she has not told him what the breach was, nor has she given him a chance to cure. She will not be able to rely on the unstated defects to justify rejection or establish breach (failure to particularize). § 2-605 (1)(a). The burden of establishing the breach is on the buyer (§ 2-607 (4)), and Montes will be precluded from remedy because she has not told Kernnen *what* has been breached. ←
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Kernnen's response on February 4th is a seasonable notification by the seller of his intent to cure, as is allowed under § 2-508 (1). Indeed, because Kernnen had a reasonable belief that the guitars were in perfect shape when he sent them, he may be given a further reasonable time to substitute a conforming tender. § 2-508 (2). Kernnen's prerequisite that Montes ship the damaged guitars back to him before he cures, however, may be unjustified, as there is no code provision to support this stance. ✓


As to shipment costs, if Montes has made a rightful *rejection*, then she has no further obligation with regards to the goods and will not have to pay these costs. § 2-602 (2)(c). Likewise, if Montes has made a *revocation of acceptance*, she has no obligation for shipping costs either, for under 2-608 (3), a buyer who revokes acceptance has the same rights and duties with regard to the goods as if he had rejected them.

Montes' responding telegram on February 5th is of no effect if she has "accepted the goods" (see reasonable time for inspection, above), since she has ignored Kernnen's N,
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✓ 2-608 (3)
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4

right to cure under the UCC. If she has made a rightful rejection of the imperfect tender, then she is entitled to the \$56,000 refund, without giving Kernnen a chance to cure.  No

The stopped payment on the \$120,000 check was not wrongful by Montes, on February 5th, for in her original contract she stated that she would pay the remainder within 14 days of shipment, and only ten days have passed since shipment. However, when she did not pay the amount she owed to Kernnen by February 9th, she breached, for she had not paid him the price when it became due.

Even if she has not accepted the *damaged* goods, she has still shown acceptance of the *conforming* goods by beginning to sell them. Her letters indicate that she is only rejecting the *damaged* goods, seven guitars at \$8000 each (\$56,000). Therefore, it was clearly wrong to cancel the check and not issue a new one for the \$64,000 still owed.

Kernnen can bring an action for price for \$64,000 against Montes, for § 2-709 (1)(a) allows the seller to recover the price of goods accepted when the buyer fails to pay the price as it becomes due. If the action for price fails, Kernnen can nonetheless prove a case entitling him to damages for non-acceptance (comment 7 to § 2-709). In that case, he would calculate damages by subtracting the unpaid contract price (+ incidentals) from the market price at the time of the tender. § 2-708 (1). 

Montes must carry the responsibility for the theft of the two *conforming* guitars. Again, she has apparently accepted the *conforming* guitars. When Kernnen completed performance of the *conforming* guitars (by delivery), Kernnen's title passed to Montes, and Kernnen no longer retained an insurable interest. Thus, Montes is out of luck with regard to not having insured the guitars. The risk of loss has passed to her.

Montes will not be able to get her guitars back from UpScale, for it appears UpScale is a good faith purchaser of the guitars. If UpScale bought the guitars from a reputable dealer who had voidable title, then UpScale will have been transferred good title, and no claim by Montes will defeat that title. § 2-403 (1). The UCC has limited coverage of good faith purchasers, but, as is stated in § 1-103, the principles of law and equity will supplement these provisions.

Montes' Argument: Montes will want to argue that she never had a reasonable opportunity to inspect the goods. She couldn't inspect them at the airport because of inconvenience and noise, and it takes a while to inspect 20 guitars, which require special attention to tone, quality, and craftsmanship. On the eighth day, when she discovered the defect, she had not yet accepted them, and immediately wrote a rejection of the damaged guitars. Because Kernnen failed to accept her rejection, she is now holding the guitars as a security interest. She can recover loss resulting from Kernnen's breach, breach of warranty damages and incidentals (§ 2-714-15). Upon notifying Kernnen, Montes may deduct these damages from the amount still owed under the contract (§ 2-717).

Kernnen's Argument: Kernnen will argue that she had reasonable time to inspect them, she accepted the goods, with their non-conformity, would not allow him to cure, and would not apprise him of the specific breach, therefore waiving any justification for the breach. Because she has accepted all the goods, she owes him the contract price for all the guitars.

I think Kernnen will have a good argument that she waived the defects by not specifying and not allowing him to cure. Montes probably will be considered to have accepted the goods, for eight days is more than enough time to check 20 guitars.

A 21

SALES MIDTERM--PROF. KASTELY

MARCH 31, 1998

Perfect Tender

Montes will argue that the delivery of the guitars was not a perfect tender, as required under 2-601.

Risk of Loss if No Breach

Assuming that the goods were damaged during or after shipping, Kernnen will argue that the tender was indeed perfect, as he delivered the goods to the carrier in perfect shape, and that the risk of loss shifted to Montes after delivery to the carrier. Kernnen will argue that this was to be a shipment K under 2-504, because the K required him only to deliver them to a particular destination--the air carrier. Under 2-509, the risk of loss shifts to the buyer under a shipment K when the goods are delivered to a carrier. ✓ *Very good*

Montes will try to argue that this was not a shipment K, but a destination K instead, because the K required Kernnen to ship the guitars to San Antonio. She will argue that under 2-509(b), in a K that requires the seller to ship to a particular destination, the risk shifts to the buyer when they are tendered in a way that the buyer can take delivery. Montes will probably prevail on this point. ✓

Kernnen will respond by saying that the guitars were likely damaged while in Montes' possession because a reasonable person would have noticed damaged boxes upon accepting them at the airport. ✓

Montes will also try to argue that there was grounds for rejection because Kernnen failed to notify her of shipment, as required under 2-504(c). Kernnen will counter that this failure to notify is not grounds for rejection unless it results in material delay or loss, which obviously has not happened. ✓

Implied Warranty of Merchantability

Assuming that the goods were damaged while Kernnen bore the risk of loss, Montes will argue that an implied warranty of merchantability exists and that Kernnen failed to ship merchantable goods as defined under 2-314 (c) and (e). ✓ *Very good*

Kernnen will respond by saying that he properly disclaimed the warranty, under 2-316(2), in his Nov. 1 response. ✓

Inconsistent Disclaimer

Montes can argue that the disclaimer was invalid because it was inconsistent with other language in the acceptance that each guitar would be a "joy to the ears." By relying on 2-316(1) she could argue that such inconsistent language is to be construed wherever reasonable, and in no way to negate or limit a warranty when the construction would be unreasonable. ✓

Kernnen will respond by arguing that the language was mere puffery, and is not sufficient to trump the disclaimer contained in the writing. ✓

Battle of the Forms: 2-207

Montes can also argue that the disclaimer of the implied warranty of merchantability was insufficient because under 2-207(2)(b) additional terms in an acceptance do not become terms of the K between merchants if the materially alter the K. Montes will argue that this term constitutes surprise or hardship under the comment 4 test. ✓

Kernnen could attempt to argue that the additional terms do not materially alter the K because it was reasonable for Montes to expect such a disclaimer, thus it does not constitute surprise or hardship. Under either argument, Kernnen is not likely to prevail on this issue.

Implied Warranty of Fitness for a Particular Purpose

Alternatively, Montes could argue that an implied warranty was created that the goods were to be fit for a particular purpose under 2-315. She would argue Kernnen knew, at the time of Contracting, that Montes was seeking high quality guitars to be resold in Montes' store. Furthermore, Montes would argue that she was relying on his skill in furnishing such guitars, as evidenced by her offer. Consequently, she would argue, the guitars are not fit for their particular purpose, which is to produce high quality sounds and to resale at high prices. ✓

First, Kernnen will argue that any such warranty was disclaimed by his Nov. 1 letter, in which he stated that he could not guarantee the quality of sound any of the guitars would make. Kernnen could argue (probably successfully) that this language is sufficient under 2-316(2) and Comment 4, which state that general language can be used to disclaim the IWFPP. ✓

Express Warranty

As a third alternative, Montes could argue that the magazine article created an express warranty that the guitars would be so high in quality that professionals use them, and that Kernnen excels in the art of guitar making. ✓

Kernnen will counter that he did not make the warranty and that 2-313(a) specifically states the warranty must have been made by the seller. Furthermore, he could always argue that the article was mere "puffing." He will probably prevail on the point that he, as the seller, did not write the article.

Rejection/Acceptance

Montes will then argue that because the delivery was not a perfect tender, she is entitled to reject the entire shipment under 2-601(a). ✓

Rejection

✓ Kernnen will argue that Montes is not entitled to reject the goods for non conformance because she did not seasonably notify Kernnen, as required under 2-602(1). He will argue that she had ample opportunity to inspect all of the goods when they arrived at the airport, but failed to do so. ✓
Consequently, Kernnen will argue that Montes' actions constituted acceptance under 2-606(1)(b). Furthermore, Kernnen will argue that acceptance is further evidenced by the fact that Montes sold a guitar, placed several of them in her inventory and paid for them, all of which constitute acts inconsistent with the seller's ownership under 2-606(1)(c). Kernnen will probably prevail. ✓