

- 1 **CHAPTER 20**  
2 common law versus civil law: precedence and the separation of powers  
3 Uniform Commercial Code:  
4 Art. 1 definitions; Art. 2 sale of goods (2A leases); Art. 3 negotiable instruments; Art. 4  
5 banking system; Art. 5 letters of credit; Art. 6 bulk transfers;  
6 Art. 7; documents of title (e.g., warehouse receipts); Art. 8 investment securities;  
7 Art. 9 secured transactions  
8 amendments updating UCC effective in Nebraska January 1, 2006  
9 (e.g., electronic commerce per UETA *record* replaces *writing*)  
10 **goods** = tangible and movable  
11 predominant nature of the transaction  
12 sale = pass title from seller to buyer for a price; lease = sells right to possess  
13 consumer = natural person purchasing goods primarily for personal or household use  
14 **merchant** =  
15 deal in goods of that kind (i.e. reason to know; or  
16 hire an agent who is a merchant; (i.e., vicarious knowledge) or  
17 hold self out as a merchant (i.e., estopped to deny knowledge)  
18 UCC is your default contract.  
19 you may disclaim all but 1-202 (19) and part of 2-318  
20 **may not disclaim good faith.** may not disclaim personal injury for consumer goods.  
21 good faith: C.L. consumer; UCC consumer; merchant; fiduciary  
22 **open terms:** UCC focuses upon objective intent and reasonably certain terms of contract;  
23 supply all missing terms with *good faith measured commercially reasonable terms*  
24 but, **must have quantity specified**  
25 merchant's firm offer: signed writing creates option contract  
26 acceptance via shipment of *conforming goods* or via shipment of nonconforming goods,  
27 but, counter offer via shipment of nonconforming goods with **seasonable notice** that  
28 shipped as an **accommodation** (see, cure, p. 427)  
29 *UCC rejects the Mirror Image Rule*  
30 non-merchants do not make a counter offer if make an definite acceptance;  
31 merchants add **additional terms**  
32 that do not material alter (e.g., expressly limited; timely objection) the offer  
33 are included in the contract  
34 contract **modifications** made in good faith do not require new consideration;  
35 but: may expressly require a writing,  
36 but: writing required if consumer's contract with a merchant is being modified  
37 Statute of Frauds  
38 \$5,000 sale of good; \$1,000 lease of goods;  
39 *merchant's 10 days silence* following receipt of signed written contract *equals a signature*  
40 no writing needed for  
41 specially manufactured goods; admits in pleadings; or partial performance  
42 express terms, course of performance, course of dealings, usage of trade  
43 unconscionable contracts: reform versus sever versus void  
44 **CISG:** no Statute of Frauds; keeps (heart of ) Mirror Image Rule; must have price;  
45 silent on choice of law, forum, venue, and language; use a *Force Majeure Clause*

1 **CHAPTER 21**2 **insurable interest**, see p.420 and p. 990

3 title is easy to define and very difficult to locate: seller's physical delivery to buyer

4 **identification** is both easy to define and difficult to locate: **existence and designated**

5 fungible (i.e., homogenous) goods: tenants in common to the undivided entire mass

6 shipment contracts (i.e., hands of carrier); destination contract (i.e., location)

7 delivery without movement of goods: documents of title

8 sales by non-owners

9 void title creates void title: e.g., fraud in the execution (or inception)

10 voidable title creates a voidable title: e.g., fraud in the inducement

11 good faith purchaser for value w/o knowledge

12 **entrustment rule** true owner entrusts to a merchant who deals in goods of that kind and

13 buyer in the ordinary course of business buys in good faith, w/o knowledge, &amp; for value

14 **risk of loss** passes not upon title; rather risk of loss passes upon identification plus delivery

15 consumer buyer: seller's front door, unless ...

16 merchant buyer: merchant seller's back door, unless ...

17 **bailment**: transfer of possess (and possibly use) see, p. 951

18 conditional sales: sale or return (e.g., consignment); sale (really an offer) on approval

19 bulk transfer: not made in the ordinary course of business

20

21

22 **CHAPTER 22**23 **good faith**: C.L. consumer < UCC consumer < merchant < fiduciary

24 both performance and enforcement of UCC contracts implemented in good faith

25 lack power to disclaim UCC good faith

26 tender and conforming goods

27 UCC, as does C.L., requires perfect tender but

28 **cure** = right of seller prior to performance due date to remedy non-conforming goods

29 substitution of carriers

30 installment contract: value of whole is substantially impaired

31 foreseeable versus unforeseen contingencies

32 *Force Majeure* Clause; impractical (x3); impossible (x10)

33 partial performance

34 destruction of identified goods

35 good faith:

36 **Right of Assurance**: if reasonable grounds, then may make written demand37 **Duty of Cooperation**38 **right of inspection**: absolute right; opportunity is a condition precedent to duty to pay

39 partial acceptance: nonconforming goods or failure to cure

40 anticipatory repudiation may be retracted prior to detrimental reliance

41 compensatory **damages** (see also, p. 343 and 443)42 include incidental damages which *include* consequential damages of lost profits

43 difference between benefit of the contract and market price, plus overhead

44 **right to cover** is a means of discharging duty to mitigate damages

45 enter market for substitute performance

46 parties can agree to exclusive remedies, otherwise no election of remedies

**CHAPTER 23**

1 employment, bailment, warranty, license  
2 generic implied warranties: good title; no liens; *no infringements*: expressly disclaim  
3 **express warranties**: affirmation of fact (e.g., sample or model) that is the basis of the bargain  
4 but, opinion: puffery; value; and expert's opinion  
5 UCC2 implied warranties  
6 **merchantability**: reasonably fit for ordinary purposes  
7 if food, then predominate nature of the transaction is goods  
8 **fitness for a particular purpose**: seller **knows** of buyer's reliance  
9 federal Magnuson-Moss Warranty Act: commerce, consumer, if written, then full or limited  
10 warranties may overlap, if conflict, then express > implied; technical > sample > description  
11 disclaimer of warranties:  
12 if express warranty, then express disclaimer  
13 if merchantability, then conspicuous (e.g., say not merchantable or say as is)  
14 disclaimer can be unconscionable  
15 **product liability** (see also, p. 150 and p. 957)  
16 tort liability based on negligence, but **privity** not required under UCC  
17 tort liability based on fraud or innocent material misrepresentation  
18 tort strict liability, Restatement section 402 A  
19 defective condition; business of selling; unreasonably dangerous;  
20 physical harm; proximate cause; not substantially changed  
21 UCC strict liability for products 2-318 option A, B, or C  
22 **defects**: manufacturing; design; labeling  
23 assumption of the risk versus foreseeable misuses  
24 market share liability  
25 statute of limitations versus statute of repose  
26  
27  
28

**CHAPTER 47**

29 real property: land (including subsurface), water, and air  
30 **fixture**: objective intent (e.g., trade fixtures)  
31 personal property: not land  
32 tangible (e.g., factory) and intangible (e.g., intellectual property)  
33 **ownership**:  
34 fee simple absolute; tenancy in common; joint tenancy  
35 tenancy by the entirety and community property  
36 acquisition  
37 possession; production;  
38 **gift** ([constructive] delivery & intent & acceptance): *inter vivos* versus *causa mortis*  
39 will; accession; **confusion**: commingling of fungible goods  
40 **mislaid, lost & estray, abandoned** (but, not CERCLA) (treasure trove versus trespassers)  
41 **bailment**: personal property; delivery; agreement  
42 bailee: rights (possession, use, compensation) and duties (care, return)  
43 bailor: rights (reasonable care, agreement) and duties (warn, warranty)  
44 documents of title  
45 common carriers (see also, p. 150 & p. 457); warehouse; innkeepers  
46

**CHAPTER 48**

real property: land (including subsurface), water, air

**ownership:**

fee simple;

life estate;

leasehold estates: tenancy for years; periodic tenancy; at will; at sufferance

nonpossessory interests:

**easements** (i.e., use) and **profits** (i.e., extraction): either appurtenant or in gross

**waste**

**license:** revocable right to use

transfer

**deed**

grantor & grantee; express intent; legally sufficient description; signature; & delivery

general warranty deed; limited warranty deed; quit claim deed; sheriff's deed

recording statute: race (i.e., first to file)

mortgage, escrow

implied warranty of **habitability**: sale (see, p. 970) versus rent (see, p. 977)

adverse possession: actual & exclusive; open, visible, & notorious; continuous & peaceable;

hostile & adverse; duration (10 years in Neb.); (and, in Neb. colorable title)

**nuisance:** unreasonably interfere with the reasonable use and enjoyment

private solution: covenants running with the land

judicial solution: nuisance suit

private nuisance versus public nuisance: standing to sue

legislative solution: zoning

eminent domain: **taking** via due process, public use, and just compensation

but, not mere regulation

landlord - tenant: residence versus commercial: notice of termination; duty to warn & protect

**CHAPTER 49**

insurance policy pools existing risk and transfers risk in exchange for average price premium

adverse selection

insurance agent has insurER as principal; insurance broker has insurED as principal

binder

liability for non-procurement of policy

**insurable interest** (see, p. 410 and p. 990) differentiates gambling from insurance contract

property insurance needs insurable interest at **time of loss**

life insurance needs insurable interest at **time of contract**

risk is the subject matter, thus all risk is material

but, incontestability clause

coinsurance clause prompted by **moral hazard**

multiple policy coverage limited to recovery of 100% of loss

punitive damages for insurer's bad faith

insurER requires **adhesion contract** to pool risk and do average pricing

ambiguities interpreted against the insurER

**1 CHAPTER 50****2 capacity:** crime > contract > tort > wills

3 ability to grasp the natural consequences on one's actions

4 e.g., natural objects of one's bounty

**5 wills:** capacity; intent; writing, (holographic; nuncupative); signature; witnesses; publish  
6 revocation

7 probate

**8 intestacy**9 objectively, who do you love?: parents, surviving spouse, children, grandchildren  
10 *per stripes* (i.e., Neb.) versus *per capita* (see, p. 1018)**11 trusts:** grantor, trustee (i.e., legal title), delivery, beneficiary (i.e., beneficial title)

12 express: living; testamentary; charitable; spendthrift; Totten (grantor is trustee)

13 implied: constructive; resulting

**14 trustee** is a fiduciary: utmost good faith

15 durable power of attorney versus living will

16

**17 CHAPTER 51**

18 common law liability for State licensed professionals

19 breach of contract

20 much broader intended creditors and intended donees

21 **Ultramares Rule** (i.e., Neb): near privity and primary benefit

22 Restatement Rule (i.e., majority rule): foreseen

23 Minority Rule: reasonably foreseeable (UK switched to, then abandoned)

24 tort

25 duty of care

26 standard of care

27 e.g., GAAP and GAAS; code of ethics: attorney versus others

28 expert's opinion is a fact

29 Securities Act of 1933:

30 issue = first sale

31 security:

32 an investment of money in a common enterprise with

33 a reasonable expectation of profit

34 derived from the undeniably significant efforts of others

**35 security law fraud:**

36 misrepresentation or omission of a material fact proximately causing injury

37 **material:** mutual mistake > unilateral mistake > C.L. fraud > security law fraud

38 disclosure (e.g., prospectus)

**39 due diligence defense**

40 Securities Exchange Act of 1934

41 trading = second and subsequent sales

42 continuing disclosure: e.g., 10-Q and 10-K

43 Good Faith Defense: scienter

44 insider trading: 10b (i.e., tippee) versus 16b (i.e., statutory insider)

45 SOxA: auditor independence; maintain working papers; hot line; ethics training; reporting up

**46 confidentiality versus privilege**