

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

- 1 unconscionable contracts: **reform** versus **sever** versus **void**  
2 **CISG**: no Statute of Frauds; keeps (heart of ) Mirror Image Rule; must have price;  
3 silent on choice of law, forum, venue, and language; use a *Force Majeure* Clause  
4  
5  
6  
7 **CHAPTER 21**  
8 **insurable interest**, see p.420 and p. 990  
9 title is easy to define and very difficult to locate:  
10 seller's physical delivery to buyer  
11 **identification** is both easy to define and difficult to locate:  
12 goods are in **existence and** are **designated** by the seller  
13 fungible (i.e., homogenous) goods: tenants in common to the undivided entire mass  
14 shipment contracts (i.e., hands of  
15 carrier); destination contract (i.e., location)  
16 delivery without movement of goods:  
17 documents of title  
18 sales by non-owners  
19 void title creates void title:  
20 e.g., fraud in the execution (or inception)  
21 voidable title creates a voidable title:  
22 e.g., fraud in the inducement plus good faith purchaser for value w/o knowledge  
23 **entrustment rule** true owner entrusts goods  
24 to a merchant who deals in goods of that kind  
25 and buyer in the ordinary course of business  
26 buys in good faith, w/o knowledge, & for value **obtains good title**  
27 **risk of loss** passes not upon title;  
28 rather risk of loss passes upon identification plus delivery  
29 consumer buyer: seller's front door, unless ...  
30 merchant buyer: merchant seller's back door, unless ...  
31 note the difference between **\_a\_** risk of loss and **\_the\_** risk of loss  
32 **bailment**:  
33 transfer of possess (and possibly use) see, p. 951  
34 conditional sales:  
35 sale or return (e.g., consignment);  
36 sale (really an offer) on approval  
37 bulk transfer: not made in the ordinary course of business  
38

- 1 **CHAPTER 22**  
2 **good faith:** *recall:* C.L. consumer < UCC consumer < merchant < fiduciary  
3 both performance and enforcement of UCC contracts implemented in good faith  
4     lack power to disclaim UCC good faith  
5 perfect tender and conforming goods  
6 UCC, as does the common law (C.L.), requires **perfect tender** but  
7     **cure** = right of seller prior to performance due date to remedy non-conforming goods  
8     for example,  
9     substitution of carriers  
10 installment contract: value of whole is substantially impaired  
11 foreseeable versus unforeseen contingencies  
12     *Force Majeure* Clause v. impractical (x3) v. impossible (x10)  
13 partial performance  
14 destruction of identified goods  
15 good faith:  
16     **Right of Assurance:** if reasonable grounds, then may make written demand  
17     **Duty of Cooperation**  
18 **right of inspection:**  
19     buyer has an absolute right;  
20     *opportunity* is a condition precedent to duty to pay  
21 partial acceptance: non-conforming goods or failure to cure  
22 anticipatory repudiation may be retracted prior to detrimental reliance: *recall* **cure**  
23 compensatory **damages** (see also, p. 343 and 443)  
24     difference between benefit of the contract and market price, plus overhead  
25     include UCC incidental damages  
26     which *include as a matter of law reasonably foreseen* lost profits  
27 **right to cover** is a means of discharging duty to mitigate damages  
28     enter market for substitute performance  
29 parties can agree to exclusive remedies,  
30 otherwise no **election of remedies**

- 1 **CHAPTER 23**  
2 employment, bailment, warranty, license: each can be, but need not be, a contract  
3 generic implied warranties:  
4     good title; no liens; *no infringements*:  
5     may expressly disclaim (e.g., quit claim deed)  
6 **UCC2 express warranties:**  
7     affirmation of fact (e.g., sample or model) that is the basis of the bargain  
8     but, opinion: puffery; value; and expert's opinion  
9 **UCC2 implied warranties**  
10     **merchantability:**  
11         reasonably fit for ordinary purposes (i.e., pass without objection in the market)  
12         if food, then predominate nature of the transaction is goods  
13     **fitness for a particular purpose:**  
14         seller **knows** of buyer's reliance  
15 federal Magnuson-Moss Warranty Act:  
16     IF: [1] commerce, [2] consumer product, [3] written; THEN **full** or limited  
17 warranties may overlap,  
18     if conflict, then express > implied; technical > sample > description  
19 disclaimer of warranties:  
20     if express warranty, then express disclaimer  
21     if merchantability, then conspicuous (e.g., say "not merchantable" or say "as is")  
22     but, disclaimer can be unconscionable  
23         e.g., can not disclaim personal injury from consumer product  
24 **product liability** (see also, p. 150 and p. 957)  
25     tort liability based on negligence,  
26         but **privity** not required under UCC  
27     tort liability based on C.L. fraud or innocent material misrepresentation  
28     tort strict liability,  
29         Restatement section 402 A  
30             defective condition; business of selling; unreasonably dangerous;  
31             physical harm; proximate cause; not substantially changed  
32     UCC strict liability for products 2-318 *options A, B, or C*  
33         who and what is reasonably expected?  
34 **defects:**     manufacturing; design; labeling  
35 assumption of the risk   versus   foreseeable misuses  
36 market share liability  
37 statute of limitations   versus   statute of repose  
38

- 1 **CHAPTER 47**  
2 real property is land and anything attached thereto (including subsurface), water, and air  
3 **fixture**: objective intent (e.g., **trade fixtures**)  
4 personal property is not land  
5 tangible (e.g., photocopy machine)  
6 intangible (e.g., intellectual property)  
7 **ownership**:  
8 fee simple absolute;  
9 tenancy in common; joint tenancy  
10 tenancy by the entirety and community property  
11 acquisition  
12 possession; production;  
13 **gift** ([constructive] delivery & intent & acceptance):  
14 *inter vivos* versus *causa mortis*  
15 will;  
16 accession; **confusion**: commingling of fungible goods  
17 **mislaid, lost & estray, abandoned**  
18 (but, not CERCLA) (treasure trove versus trespassers)  
19 **bailment**: personal property; delivery; agreement  
20 bailee: rights (possession, use, compensation) and duties (care, return)  
21 bailor: rights (reasonable care, agreement) and duties (warn, warranty)  
22 documents of title  
23 common carriers (see also, p. 150 & p. 457); warehouse; innkeepers  
24  
25  
26  
27 **CHAPTER 48**  
28 real property: land (including subsurface), water, air  
29 **ownership**:  
30 fee simple;  
31 life estate;  
32 leasehold estates: tenancy for years; periodic tenancy; at will; at sufferance  
33 nonpossessory interests:  
34 **easements** (i.e., use) and **profits** (i.e., extraction)  
35 either appurtenant or in gross  
36 **waste**  
37 **license**: revocable right to use  
38 transfer  
39 **deed**  
40 grantor & grantee; express intent; legally sufficient description; signature; & delivery  
41 general warranty deed; limited warranty deed; quit claim deed; sheriff's deed  
42 recording statute: race (i.e., first to file)  
43 mortgage, escrow  
44 implied warranty of **habitability**: *sale* (see, p. 970) *versus rent* (see, p. 977)  
45

- 1 adverse possession:  
2       actual & exclusive; open, visible, & notorious;  
3       continuous & peaceable; hostile & adverse;  
4       duration (10 years in Neb.); (*and, in Neb. colorable title*)  
5 **nuisance**: unreasonably interfere with the reasonable use and enjoyment  
6       private solution: covenants running with the land  
7       judicial solution: nuisance suit  
8       private nuisance versus public nuisance: standing to sue  
9       legislative solution: zoning  
10 eminent domain:  
11       **taking** via due process, public use, and just compensation  
12       but, not mere regulation  
13 landlord - tenant:  
14       residence versus commercial:  
15       notice of termination; duty to warn & protect  
16  
17  
18 **CHAPTER 49**  
19 insurance policy pools existing risk and transfers risk in exchange for average price premium  
20       **adverse selection**  
21 insurance agent has insurER as principal  
22 insurance broker has insurED as principal  
23 binder  
24       liability for non-procurement of policy  
25 **insurable interest** (see, p. 410 and p. 990) differentiates gambling from insurance contract  
26       property insurance needs insurable interest at **time of loss**  
27       life insurance needs insurable interest at **time of contract**  
28 risk is the subject matter, thus all risk is material  
29       but, incontestability clause  
30 coinsurance clause prompted by **moral hazard**  
31       multiple policy coverage limited to recovery of 100% of loss  
32       *in NEB recovery limited to largest policy even in less than 100% of loss*  
33 insurER requires **adhesion contract** to pool risk and do average pricing  
34       ambiguities interpreted against the insurER  
35 punitive damages for insurer's bad faith  
36

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;

6 writing, (holographic; [but, nuncupative]); signature;

7 witnesses; publish

8 revocation

9 probate

10 **intestacy**

11 objectively, who do you love?

12 parents, surviving spouse, children, grandchildren

13 *per stripes* (i.e., Neb.) versus *per capita* (see, p. 1018)

14 **trusts**

15 grantor, trustee (i.e., legal title), delivery, beneficiary (i.e., beneficial title)

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

17 implied: constructive; resulting

18 **trustee** is a fiduciary to the beneficiary: utmost good faith

19 durable power of attorney versus living will

20

21

22 **CHAPTER FIVE**

23 **ethics**

24 (see also, Focus on Ethics

25 pages 115 - 117; 206 - 208; 376 - 378; 472 - 475; 984 - 986; and 1061 - 1063

26 which, typically, will be covered after the last chapter of each such Unit)

27

- 1 **CHAPTER 51**  
2 common law liability for State licensed professionals  
3 breach of contract  
4 much broader intended creditors and intended donees  
5 **Ultramares Rule** (i.e., Neb): near privity and primary benefit  
6 Restatement Rule (i.e., majority rule): foreseen  
7 Minority Rule: reasonably foreseeable (UK switched to, then abandoned)  
8 tort  
9 duty of care  
10 standard of care  
11 e.g., GAAP and GAAS; code of ethics: attorney versus others  
12 expert's opinion is a fact  
13 Securities Act of 1933:  
14 issue = first sale  
15 security:  
16 an investment of money in a common enterprise with  
17 a reasonable expectation of profit  
18 derived from the undeniably significant efforts of others  
19 **security law fraud:**  
20 misrepresentation or omission of a material fact proximately causing injury  
21 **material:** mutual mistake > unilateral mistake > C.L. fraud > security law fraud  
22 disclosure (e.g., prospectus)  
23 **due diligence defense**  
24 Securities Exchange Act of 1934  
25 trading = second and subsequent sales  
26 continuing disclosure: e.g., 10-Q and 10-K  
27 Good Faith Defense: **scienter**  
28 insider trading: 10b (i.e., tippee) versus 16b (i.e., statutory insider)  
29 SOxA: auditor independence; maintain working papers; hot line; ethics training; reporting up  
30 **confidentiality versus privilege**