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Sales and Sports Law

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INTRODUCTION

The purpose of this article is to provide insight into the basics of the Uniform Commercial Code (UCC) and explore its application to sports law. Particular focus will be on the sale of goods found in the UCC's Article 2.¹ The UCC deals with all of the stages of the commercial transaction from the purchasing of raw materials to the manufacture and ultimate delivery of the product to the buyer. The UCC also addresses breach of contract situations related to defective performance of the agreement. Whether a buyer and seller closes a deal for the sale of helmets, bats, balls, backboards, sports memorabilia, a new artificial surface for the outdoor field or to fulfill an order for a new set of game jerseys, the UCC applies to the sale if the parties to the sales contract failed to otherwise agree upon the specifics.²

The UCC is designed to promote commerce rather than stifle it, and it focuses on maintaining commercial relationships (as opposed to promoting litigation) by offering the parties various sorts of remedies in the event of a breach. Since all states have adopted the UCC either in whole or in part, the UCC is a primary reference for the application of the various types of product warranties when a good needs to be repaired or replaced due to a defect in design or manufacture.³ The UCC could also be relevant in tort claims involving personal injury as a result of product use (or misuse), the leasing of goods (as opposed to a sale of the goods), and to special sales relationships known as consignment sales which might include the sale of used fitness and

1. Uniform Commercial Code (UCC), §1-101, et seq. (2007).

2. See, e.g., Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031 (2003).

3. Compare, e.g., RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §1 (1998). See also RESTATEMENT (SECOND) OF TORTS §402A (1965) (imposing liability upon one who sells any product in a defective condition if the seller was engaged in the business of selling such a product and the product was expected to, and did, reach the user or consumer without substantial change).

training equipment.⁴ Claims alleging that the sale of goods violates particular state consumer protection laws might also come into play.⁵

In the end, understanding the role of the UCC actually serves as a useful resource for contract drafters and any party to an agreement involving the sale of goods. Good contract drafters should ponder the possibilities of the sales relationship and provide for it in their own agreement. Otherwise, the UCC will fill in the gaps. Appreciating the role of the UCC is important for anyone involved in manufacture, distribution, sale or purchase of goods in the United States including sports law practitioners, academicians and sport managers.⁶

HISTORY

The Uniform Commercial Code (UCC) was developed during the post-industrial era during a time when nationalistic regulatory schemes were supported federally during the Roosevelt era.⁷ Developing a federal scheme involving the uniform systems of contracts and contract interpretation involving the sale and distribution of goods addressed the potential legal minefields involving interstate commerce generally.⁸ The UCC has been modified several times since its original enactment in 1951, and has provided a statutory framework for trade that reflects the modern contracts environment

4. States began adopting the UCC's Article 2A after it was promulgated in 1990. Article 2A governs the lease of goods rather than a sale. In sports law, leasing goods could be relevant for scoreboards, backboards, fences, and all types of other temporary stands or structures for a sporting event. See, e.g., Michael I. Spak, *Pledge Allegiance to the Code: Dodging the Draft with Liberty and Leases for All*, 13 J.L. & COM. 79 (1993).

5. Anne I. Bandes, *Saddled with a Lame Horse? Why State Consumer Protection Laws Can be the Best Protection for Duped Horse Purchasers*, 44 B.C. L. REV. 789 (2003).

6. Compare United Nations Convention on Contracts for the International Sale of Goods, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last visited Dec. 20, 2007). This treaty is known as the CISG and often referred to as the international version of the UCC. See also Peter Schlechtriem, *Subsequent Performance and Delivery Deadlines-Avoidance of CISG Sales Contracts Due to Non-Conformity of the Goods*, 18 PACE INT'L. L. REV. 83 (2006). See also generally, Gregory C. Walker, *Trade Usages and the CISG: Defending the Appropriateness of Incorporating Custom Into International Commercial Contracts*, 24 J.L. & COM. 263 (2005).

7. Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 94-96 (1993). See also, Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-1954*, 49 BUFFALO L. REV. 359, 361-362 (2001) (discussion of the history of the drafting of the UCC and the struggle between the academic community to produce neutral commercial regulatory scheme and the pressure from political influences and special interest groups).

8. Patchel, *supra* note 7, at 94-95 (UCC reflected a push for enactment of a federal sales bill which would have replaced the Uniform Sales Act).

in the United States today. All of the states have adopted the UCC just as they have numerous other acts promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL).⁹ The UCC is the byproduct of the efforts of the American Law Institute (ALI) and the NCCUSL. While all states have adopted the UCC, Louisiana has enacted only parts of the Code and has not adopted Article 2.¹⁰

The UCC's Article 2 deals with the sale of goods. It does not apply to the sale of land (real estate), services or the unique personal services agreements often found in professional athletic and entertainment industry contracts. Therefore, it is important from the outset of this article that the reader understand that the UCC has limited application in the study of sports law since most sophisticated buyers and sellers will have already addressed contract issues and remedies for a breach of contract in the sales agreement. Article 2 will apply to the sale and leasing of tangible goods, commercial equipment and the various sales warranties, but only if the buyer and seller failed to address concerns in the sales contract in the first place.¹¹

Nine major Articles (11 total) make up the UCC and deal with every stage of the sale—from ordering the goods, delivering the goods, repairing or replacing the goods if necessary, and paying for the goods.¹² Before the enactment of Article 2, the seller and the buyer of goods had to comply with the "mirror image" rule in contract law.¹³ This principle holds that an acceptance of an offer has to exactly match the terms of the offer. If the acceptance differs in any way, this is recognized as a counter offer and no contract has yet been established. This even occurs with boilerplate

9. National Conference of Commissioners on Uniform State Laws (NCCUSL.ORG), available at <http://nccusl.org/Update/DesktopDefault.aspx?tabindex=2&tabid=60> (last visited Sept. 2, 2007). The same organization has promulgated the Uniform Athlete Agents Act (UAAA).

10. Louisiana has not adopted Article 2. Instead, it uses legal foundations developed from its statutory French Civil Code. Gregory E. Maggs, *Patterns of Drafting Errors in the Uniform Commercial Code*, 2002 U. ILL. L. REV. 81 (2002).

11. UCC §1-302 (Variation by Agreement) (importance of the phrase "unless otherwise agreed").

12. The Articles of the UCC include Article 1: General Provisions (Definitions such as "good faith", sale, "good," and "merchant"); Article 2: Sales; Article 2A: Leases (of goods); Article 3: Commercial Paper (Negotiable Instruments); Article 4: Bank Deposits and Collections; Article 4A: Funds Transfers; Article 5: Letters of Credit; Article 6: Bulk Transfers; Article 7: Warehouse Receipts, Bills of Lading and Other Documents of Title; Article 8: Investment Securities; Article 9: Secured Transactions; Sales of Accounts and Chattel Paper. UCC, §1-101, et seq.

13. Charles Sukurs, *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, 34 VAND. J. TRANSNAT'L L. 1481 (2001).

agreements, for example, when an offeree crosses out or adds terms to these pre-printed agreements involving the sale of goods.¹⁴

SALE OF GOODS

Applying the UCC to a sale of goods requires an understanding of various terms defined in UCC Article 1 such as goods, merchant and sale, to name a few.¹⁵ According to the UCC, goods fall into one of three categories.¹⁶ Goods either "exist," are "future goods" or are part of a larger "lot."¹⁷ Existing goods are tangible and moveable at the time of a sale. This is not normally an issue since goods can be identified in various ways including product serial numbers. Future goods are unique because these are goods that do not yet exist, such as unborn race horses, cattle and the like.¹⁸ Goods that are part of a larger lot relate to a barrel, box or batch of an entire shipment.

The UCC is much more flexible than common law contract principles when it comes to the offer and acceptance elements of a contract. In fact, the UCC states that as long as the parties intended to make a contract and there is a reasonably certain basis for a court to grant an appropriate remedy, then there is a contract.¹⁹ This includes agreements where important contract terms such as price, payment options, and delivery of the goods might not have been addressed in the contract or, at best, have been ambiguous in the agreement. More specifically, in sales contracts involving purchase "requirements" of the buyer or production "output" from the seller, the quantity element is missing though the UCC still imposes a good faith limitation in these instances.²⁰ For example, a buyer might ask the manufacturer of baseballs to provide them with "all the baseballs necessary for the summer season." The quantity element is certainly vague, but the UCC still allows for such a clause as long

14. Boilerplate contracts are sometimes referred to as standard form contracts. Stephen J. Choi and G. Mitu Gulati, *Panel Four: Boilerplate Versus Contract: Contract as Statute*, 104 MICH. L. REV. 1129, 1130 (2006).

15. UCC §§2-102, 2-104, 2-106.

16. UCC §2-105 defines goods as "all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale. . ."

17. *Id.*

18. *Id.* See also, *Fancher v. Benson*, 580 A.2d 51 (Vt. 1990) (horses specifically included within the definition of goods under the Vermont Consumer Fraud Act).

19. UCC §2-204 (1), "A contract for the sale of goods may be made in any manner sufficient to show agreement. . ."

20. UCC §2-305 ("Open Price Term") & UCC §2-306 ("Output, Requirements and Exclusive Dealings"). See also Randal Owings, *UCC: Output Contracts and the Unreasonably Disproportionate Clause of section 2-306*, 59 MO. L. REV. 1051 (1994).

as the buyer was reasonable in its demands throughout the summer and acted in good faith.²¹ Good contract drafters could certainly provide a minimum amount of baseballs (i.e., a floor) or a maximum amount (a ceiling) in the contract itself so as to provide some measure of certainty for the parties.

According to the UCC, acceptance of an offer can be made by any reasonable means under the circumstances, and in some cases an acceptance that adds or alters terms could still create a contract between merchants even if there were conflicting terms.²² This reflects the UCC's desire to maintain sales contracts, to promote commercial transactions, and to avoid undoing contracts when at all possible. Therefore, buyers and sellers should take great care to make sure that during the negotiation phase of a contract for the sale of goods their correspondence conspicuously states (or disclaims) words such as "offer" or "counteroffer" to provide evidence if necessary that their pre-contract discussions did not actually intend to enter into an agreement at that point.²³

DELIVERY OF GOODS

The UCC also addresses which party to the contract is responsible for the delivery of the goods. The seller (sometimes referred to as the shipper) delivers goods by a carrier to the buyer (recipient). When goods are shipped, the parties usually agree in advance on who will be responsible for the delivery. When it comes to who "owns" the goods during the delivery process, however, the UCC takes a somewhat different approach and focuses more on who is responsible for the goods along the way. Since the delivery of goods via a carrier can cause all sorts of problems including damage to the goods, or delays in delivery due to weather issues such as snowstorms or hurricanes, the UCC essentially focuses on snapshots in time which allocate responsibility for the goods during delivery and the respective rights between the parties themselves. One reason for this is so the seller or buyer can obtain insurance on the goods to protect against a possible loss along the way.

21. UCC §1-201 (b)(20) (Definitions). ("Good faith" . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing."). *See also*, UCC §1-304 (Obligation of Good Faith). "Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement."

22. UCC §2-207. Many states use what is known as the "knock-out" rule: conflicting terms cancel each other out, and UCC §2-509 would fill in the gaps.

23. *Id.* This process is often referred to as the "battle of the forms" in which the seller accepts the buyer's offer, but there are additional or different terms as part of the acceptance. UCC §2-207.

All UCC contracts are presumed to be *shipment* contracts unless otherwise agreed in the sales contract.²⁴ This means that title to the goods and the risk of loss passes to the buyer when the goods are given to the carrier such as a trucking company. This is often referred to as the F.O.B. shipping point.²⁵ Under a *destination* contract, the title passes when the goods are actually delivered (i.e., "tendered") to the buyer wherever that may be.²⁶ This is often referred to as F.O.B. destination point. The buyer can then pick up and take delivery of the goods.²⁷ A bill of lading (airbill or warehouse receipt) is a document of title that identifies the goods being delivered by the carrier or stored by a warehouse, and it displays who owns the goods and may describe when title to the goods transfers.²⁸

All sales contracts require good faith between the seller and buyer. Good faith is one of the most important themes found throughout the UCC.²⁹ Good faith means "honesty in fact" and for a merchant it means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."³⁰ According to the UCC, the buyer owes a duty to the seller to accept and pay for conforming goods. However, the buyer has the right to inspect the goods before accepting.³¹

SPECIAL SALES

The resale of goods is addressed by the UCC in a special relationship known as a consignment sale. In a consignment sale, the owner of the goods (consignor) delivers the goods to another (consignee) to sell as their agent for a commission or a flat fee.³² While the goods are in possession of the

24. UCC §2-401(2)(a).

25. UCC §2-319. (F.O.B. means "free on board").

26. UCC §2-401(2)(b).

27. UCC §2-503(1). Also, note that when goods are held by the seller for the buyer to pick up, a document of title is not normally used.

28. UCC §1-201(6), (45) (General Definitions).

29. Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559 (2006).

30. UCC §2-103(1)(b).

31. UCC §2-513.

32. Compare the law of bailments in which, similar to consignment sales, possession of a good is delivered to another but there is an expectation that the item (such as with valet parking, dry cleaning of clothes, coat-check at a restaurant) will be returned as opposed to being sold and thus title to the good is not transferred. See, e.g., Katie J.L. Scott, *Bailment and Veterinary Malpractice: Doctrinal Exclusivity, or Not?*, 55 HASTINGS L.J. 1009 (2004). See also, William V. Vetter, *The Parking Lot Cases Revisited: Confusion at or about the Gate*, 40 SANTA CLARA L. REV. 27 (1999).

consignee, the consignee actually holds title to them.³³ For example, many fitness and health clubs that display artwork in their halls enter into a consignment sales contract with the artist. Another example of a consignment sales relationship could be when a sporting goods store agrees to resell used fitness and training equipment to the general public for a commission or, in some cases, for an outright fee.³⁴ Of course, any store or business that sells used equipment such as golf clubs, shoes, racquets and the like could be involved in a consignment sales relationship even if they are not primarily in the business of selling used items. To avoid the applicability of the UCC as a default resource in the event of a dispute, the parties to the consignment sale may always establish the specific terms and conditions of the consignment relationship on their own in clear and unambiguous terms.

A *sale or return* is a special type of sale for the buyer, such as a retailer, who intends to resell the goods to a third party such as the general public.³⁵ In fact, the buyer actually has the right to return the goods to the seller within a specified time to undo the "sale" and receive a full refund or credit. If the buyer does not return the goods within that time frame, then the sale is complete. For example, a health food store that sells bodybuilding and fitness related magazines can return the unsold issues to the distributor who will credit the store. This is essentially the same as a consignment and therefore the UCC treats them in the same manner.³⁶ The sale or return relationship is quite common for the sale of magazines, but it could present interesting challenges for manufacturers of championship merchandise. For instance, suppose a manufacturer of championship t-shirts prints victorious shirts for both teams so that they can be the first to bring such goods to the marketplace. Could the distributor or buyer return the losing team's merchandise back to the seller for credit? If this issue was not otherwise addressed by the parties and the t-shirts were primarily for resale to the public, then the buyer would most likely be able to return the goods to the seller.³⁷ Ultimately it would depend on the

33. UCC §2-326. Note, however, that the amended UCC of 2003 (AUCC) moves consignments to Article 9, SECURED TRANSACTIONS. Jean Wegman Burns, *New Article 9 of the UCC: The Good, the Bad, and the Ugly*, 2002 U. ILL. L. REV. 29 (2002).

34. See, e.g., PLAYITAGAINSPORTS.COM, available at <http://www.playitagainsports.com/usedgear.aspx> (last visited Dec. 21, 2007).

35. UCC §§2-326, 327.

36. *Id.*

37. UCC §2-326 (1). "Unless otherwise agreed, if delivered goods may be returned by the buyer even if they conform to the contract, the transaction is: (a) a "sale on approval" if the goods are delivered primarily for use; and (b) a "sale or return" if the goods are delivered primarily for resale.

terms of the contract between the parties and whether or not they agreed to such arrangement.

A *sale on approval* is not really a sale at first. It is a sale on a trial basis only and is more akin to a conditional offer and similar to a money-back guarantee.³⁸ Title and risk of loss remain with the seller until the buyer accepts (approves) the deal. Sometimes it is unclear whether the deal is a sale or return, or sale on approval, though the UCC states that "if the goods are primarily for resale" then that is considered a sale or return.³⁹ Sales on approval are often very effective since the seller gets the product out into the marketplace on a trial basis at no cost to the customer. This occurs frequently with fitness equipment, nutritional supplements and dietary aids.

REMEDIES

When a breach of contract occurs between a buyer and seller, the aggrieved party often looks for remedies for such a breach and the UCC spells out the possibilities if the parties had not otherwise agreed. The general purpose of contract remedies is to put the aggrieved party in as good a position as if the other party had fully performed although buyers and sellers may agree to waive or excuse non-performance of or non-compliance with the agreement, or even provide their own remedial scheme for remedies or other damages.⁴⁰ Sellers and buyers may also agree to the exclusive remedies of the right to repair or replace the defective goods or parts when sales warranties are involved.⁴¹ Lost profits (consequential damages) may be pursued as a result from a breach of contract if they were reasonably foreseeable at the time the breach occurred. Thus, the UCC's remedial scheme is pro-commerce for both sellers and buyers.⁴²

When the goods that will be delivered are still in the possession of the seller, and the buyer breaches the contract, the seller may cancel the contract and notify the buyer; withhold delivery of the goods if the buyer wrongfully rejects or revokes acceptance, fails to pay, or repudiates part of the contract; or

38. UCC §2-326(2).

39. UCC §§2-326, 327.

40. UCC §1-106(1)(Remedies to Be Liberally Administered); §1-302 (Variation by Agreement) (the importance of the phrase "unless otherwise agreed"). See also, Sarah Howard Jenkins, *Contracting Out of the Uniform Commercial Code: Contracting Out of Article 2: Minimizing the Obligation of Performance & Liability for Breach*, 40 LOY. L.A. L. REV. 401 (2006).

41. UCC §2-312-318.

42. UCC §2-701-710 (Sellers); UCC §2-711-717 (Buyers).

resell or dispose of the goods (holding buyer liable for any loss).⁴³ For unfinished (partly done) goods, the seller can stop making the goods and scrap them or complete manufacture and resell or dispose of the goods, holding the buyer responsible for any deficiency (contract price minus resale price) and incidental damages.⁴⁴

The buyer, of course, has a host of remedies as well when there is a breach of contract on the part of the seller.⁴⁵ For example, the buyer may cancel the contract if the seller does not deliver the goods; reject the goods; obtain specific performance (i.e., an injunction) when a remedy at law is inadequate; or cover with substitute goods.⁴⁶ The buyer may also keep the conforming goods, reject the rest of the goods, and recover other damages. If the buyer rejects the goods, the seller must be notified "seasonably."⁴⁷

If a delivery of the goods becomes commercially impracticable, or if a supervening event occurs frustrating the purpose of the contract, then performance of the contract may be excused.⁴⁸ The seller must notify the buyer as soon as possible that there will be a delay or non-delivery (strike, war, terrorism, or acts of God such as inclement weather, etc.).⁴⁹ The parties may also be excused from performance of the contract of the sale and delivery of goods that were identified at the time the contract was formed if they are destroyed by fire or other natural or man-made catastrophe. Since sellers and buyers often agree to deliver goods in installments involving a series of performances (lots), a buyer can reject the entire contract if either of the parties agree or one or more non-conforming installments substantially impairs the whole contract.⁵⁰

Regardless of which party breached the sales contract, a claim for breach of contract under the UCC must be commenced within four years of the date of the breach. This can present challenges for litigants and courts to determine whether the four year statute of limitations under the UCC applies or if the appropriate state tort law statute of limitations or repose is more relevant, both of which can be shorter or longer depending upon the circumstances of the

43. UCC §2-705, 706.

44. UCC §2-709, 710.

45. UCC §2-711-717.

46. UCC §2-712 & 716.

47. The term "seasonably" is used throughout the UCC. *See, e.g.*, UCC §§1-204, 2-508 & 2-602.

48. UCC §2-615.

49. UCC §2-615.

50. UCC §2-610.

case.⁵¹ Some courts hold that the breach of warranty claims would fall under the UCC statute of limitations while the ordinary negligence claims would fall under state negligence rules which might have a shorter limitation and could bar a plaintiff's negligence claim entirely.⁵²

WARRANTIES

One of the most important aspects of the UCC with regard to the sale of goods is the role that warranties play in a sales transaction. For example, an express warranty by a seller is an assurance of the existence of a fact on which the buyer can rely.⁵³ An express warranty represents the extent to which the seller stands behind the quality of its product. Warranties can come in various sorts depending upon the nature of the transaction. There are three general warranties: "warranty of title," "express warranties," and "implied warranties."⁵⁴ Warranties provide a measure of confidence in a sales transaction that the goods will work for their intended purposes and that the seller stands behind the quality of its product.

An express warranty is an affirmative statement by the seller regarding the quality, condition, description, or performance potential of the goods.⁵⁵ These statements are often found in the seller's advertisements, brochures, or on the product itself (via a label) and can be oral or written. The words "warranty" or "guarantee" do not have to be used since any "affirmation of fact or promise made by the seller" will do.⁵⁶ However, statements of opinion do not create an express warranty. Rather, these are considered puffery or "puffing" language.

51. *See, e.g., Arnold v. Riddell, Inc.*, 853 F.Supp. 1488 (D. Kan. 1994) (breach of warranty claim was more in tort law than in contract law, and though the two year statute of limitation under Kansas law for tort claims was more applicable than the UCC four year rule involving the sale of an alleged defective football helmet, the court actually held that the ten year statute of repose was more relevant in this case and therefore plaintiff's claim was therefore timely).

52. *See, e.g., Williams v. Fulmer*, 695 S.W.2d 411 (Ky. 1985) (state supreme court and court of appeals affirmed lower court decision that wrongful death claim involving a motorcycle helmet that was based upon negligence, breach of express and implied warranties of merchantability and fitness for a particular purpose did fall under the Kentucky four-year statute of limitations for the breach of warranty claims involving the sale of goods rather than the one year limitation for personal injury claims even though the negligence claims would fall under the shorter period).

53. UCC §2-313 (Express warranties).

54. UCC §2-312-318.

55. UCC §2-313.

56. *Id. See also Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 592 (Del. 2000) (affirmation of jury award to plaintiff under breach of warranty theory as the result of an off-road motorcycle helmet injury resulting in quadriplegia. Court noted that §2-313 of Delaware warranty law is identical to the words in UCC§2-313).

Puffery is part of the sales pitch by salespersons though buyers might later allege that certain statements became a basis of the bargain between the seller and buyer.⁵⁷

Implied warranties naturally flow from the transaction between the buyer and seller regardless as to whether statements were actually made by the seller.⁵⁸ The law, then, derives an inference from the nature of the transaction and imposes liability on the seller. The implied warranty of merchantability automatically arises in every sale made by a merchant, and stands for the principle that when a product is used as it was intended it should work accordingly for the ordinary purposes for which such goods are used.⁵⁹ It ultimately holds sellers more responsible than buyers when it comes to these commercial transactions, and it is quite relevant in tort claims when a defendant claims that the product was misused or was used for a non-ordinary purpose. This warranty can be disclaimed by the seller of the goods, but in such case the disclaimer must be conspicuous and, according to the UCC, the word "merchantability" must be used.⁶⁰

The implied warranty of fitness for a particular purpose (sometimes referred to as the implied warranty of fitness) is unique and comes into play if the seller knows the particular purpose for which a buyer will use the goods and knows that the buyer is relying on the seller's skill and judgment.⁶¹ For example, if the buyer need a particular type or quality of helmet, paint, pads or playing surface, and the seller was aware of this need, then an implied warranty of fitness for a particular purpose would certainly apply especially if the product was inappropriate or did not work correctly in the special circumstance.

An extended warranty is simply a warranty that a purchaser buys to extend the warranty of a product beyond the time limitation for the repair or replacing of the goods after the original date of sale.⁶² Even third parties such as retail stores offer extended warranties of their own products that they sell on behalf

57. See, e.g., *Frederickson v. Hackney*, 198 N.W. 806, 807 (Minn. 1924) (pre-UCC case applying the doctrine of *caveat emptor*-let the buyer beware-and noting that it is impossible to create an implied warranty regarding a bull calf's future breeding capacity because such a characteristic was impossible to predict).

58. UCC §2-314, 315

59. UCC §2-314 (Implied warranty of merchantability).

60. UCC §2-316 (2) (Exclusion or modification of warranties).

61. UCC §2-315 (Implied warranty of fitness for a particular purpose).

62. Daniel Keating, *Measuring Sales Law Against Sales Practice: A Reality Check*, 17 J.L. & COM. 99, 116-117 (1997).

of the various manufacturers.⁶³ The purchaser pays a premium at or near the time of sale as an "insurance policy" of sorts so that if the product needs repair after the warranty period then the seller or manufacturer must oblige. Meanwhile, sellers get extra cash up-front from the Buyer.⁶⁴

Most manufacturers will either disclaim warranties of their goods or provide limited warranties. Interesting legal issues can be raised, however, regardless of the express warranties (or their disclaimer) particularly for refurbished and reconditioned (as opposed to remanufactured) products.⁶⁵ In *Gentile v. MacGregor Mfg. Co.*, the Superior Court of New Jersey had to address the issue as to whether or not reconditioners of football helmets would be considered sellers under the New Jersey version of the UCC and whether reconditioning constituted a sale of goods when litigation ensued following an injury to a high school football player who was making a tackle.⁶⁶ David Gentile, the minor plaintiff, and his parents sued both the Moorestown Township Board of Education (for negligent coaching), the manufacturers and two subsequent reconditioners of the helmet.⁶⁷ The Superior Court of New Jersey held for the defendant reconditioners on the breach of warranty claims and granted their motion for summary judgment since the reconditioning of football helmets did not involve the sale of goods and therefore Article 2 was inapplicable in that case.⁶⁸ However, the same New Jersey court denied summary judgment to the defendants regarding the strict liability claims and in doing so extended potential strict liability to the reconditioners of the helmets as well as the original manufacturers.⁶⁹

In 2003, the UCC was significantly amended to modernize the Act and reflect electronic commerce.⁷⁰ The original version of Article 2 required that

63. Sometimes referred to as a service agreement (or service contract), these agreements do not have to have the words "full" or "limited." See, e.g., FTC.GOV., *A Businessperson's Guide to Federal Warranty Law*, Dec. 2006, available at <http://www.ftc.gov/bcp/online/pubs/buspubs/warranty.htm> (last visited June 30, 2007).

64. Consider the role of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301-2312 (2008), which relates to consumer sales and is enforced by the Federal Trade Commission (FTC). Daniel G. Lloyd, *The Magnuson-Moss Warranty Act v. the Federal Arbitration Act: The Quintessential Chevron Case*, 16 LOY. CONSUMER L. REV. 1 (2003).

65. *Gentile v. MacGregor Mfg. Co.*, 493 A.2d 647 (N.J. Super. 1985).

66. *Id.* at 648 (one inside label stated "reconditioned for the 1975 playing season" and other label stated "CAUTION: Serious neck or head injury can result while playing football despite our efforts to protect the individual").

67. *Id.*

68. *Id.* at 650.

69. *Id.* at 652.

70. NCCUSL.ORG., *supra* note 9. No state has yet adopted the AUCC at the time of this writing.

any contract for the sale of goods priced at \$500 or more had to be evidenced by a written agreement in any form if a court was called upon to provide an equitable remedy for an alleged breach reflecting the black-letter contract law principle known as the statute of frauds.⁷¹ The amended UCC (AUCC) increases the minimum amount to \$5,000 as part of its modernizing amendments.⁷² Other changes include the fact that the term "writing" has been replaced by the term "record" which includes not only traditional paper writings but electronic forms, and that the original statute of limitations of four years from the time the goods are delivered is extended to up to five years in certain situations.⁷³

LITIGATION

Litigation involving the UCC generally is too numerous to list and the case law is filled with state and federal decisions. However, the application of the UCC in sport-related litigation appears to rest on a mixture of traditional negligence, products liability and breach of warranty claims rather than a traditional breach of contract claim. This makes sense particularly since the pro-commerce UCC allows sellers and buyers opportunities to repair or replace defective goods or shipments. The few published sports law decisions range from personal injuries due to defective products from helmets (especially football helmets)⁷⁴ to trampolines⁷⁵ to equine sales⁷⁶ in addition to

71. UCC, §2-201.

72. Walter A. Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263 (1997). See also, Joseph A. Zavaletta & Edward B. Hymson, *Widgets to Windows: The "Webolution" of Commercial Sales*, 6 COMP. L. REV. & TECH. J. 243 (2002); Lee Kissman, *Revised Article 2 and Mixed Goods/Information Transactions: Implications for Courts*, 44 SANTA CLARA L. REV. 561 (2004); John M. Norwood, *A Summary of Statutory and Case Law Associated with Contracting in the Electronic Universe*, 4 DEPAUL BUS. & COMM. L.J. 415 (2006).

73. Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What the NCCUSL Finally Approved*, 6 DEL. L. REV. 41 (2003).

74. See, e.g., Brian James Mills, *Football Helmets and Products Liability*, 8 SPORTS LAW. J. 153 (2001).

75. *Liesener v. Weslo, Inc.*, 775 F.Supp. 857 (D. Md. 1991) (duty to warn in Maryland is essentially the same as the duty under the UCC with regard to the implied warranty of merchantability, and both manufacturer and retailer were held harmless for serious injury due to obvious dangers when trampoline owner failed to read instruction manual, but did read adequate warning notice on the trampoline which stated that somersaults caused serious injuries).

76. Anne I. Bandes, *Saddled with a Lame Horse? Why State Consumer Protection Laws Can be the Best Protection for Duped Horse Purchasers*, 44 B.C. L. REV. 789 (2003) (traditionally courts applied the doctrine of *caveat emptor* in equine sales, though most modern courts now find more

weight-loss products⁷⁷ and sports memorabilia.⁷⁸ Claims that coaches or athletic directors should be held liable under the UCC for selecting the goods or products in question under breach of warranty theories have failed, though non-UCC claims involving negligence or negligent supervision theories have been deemed plausible.⁷⁹ Claims that event or amusement park tickets constitute goods have failed for purposes of the applicability of the UCC since tickets represent intangible rights not governed by the UCC.⁸⁰

HELMETS

The results in various football helmet cases are mixed and usually rest on jury decisions and expert testimony as to whether or not a manufacturer produced a helmet that was defective either in warning, design or the manufacturing process.⁸¹

In *Eldridge v. Riddell, Inc.*, for example, a jury ruled in favor of Riddell, a sporting goods manufacturer, after an American football player died as a result of neck injuries he suffered when tackling an opponent.⁸² The plaintiff claimed that Riddell had negligently failed to market an accessory chin roll which might have prevented the particular injury if it were attached to the

equitable solutions for buyers claims brought under either the UCC or state consumer protection acts when a state defines a horse as a "good" under the consumer protection act).

77. *Morris v. Nutri/System, Inc.*, 774 F.Supp. 889 (D. Vt. 1991) (plaintiff's claims of breach of express and implied warranty with regard to the food products of the food counseling program were illegitimate under the UCC though claims for negligence and fraud with regard to safety could proceed).

78. *Wehry v. Daniels*, 784 N.Ed. 2d 532 (Ind. Ct. App. 2003) (admission by the parties to an oral rather than written agreement involving the sale of a Formula One racing helmet for the price of \$500 or more constituted an exception to the statute of frauds). *See also*, *Momax, LLC v. Rockland Corp.*, No. 3:02-CV-2613-L, 2005 U.S. Dist. LEXIS 6201 (N.D. Tex. April 11, 2005).

79. *Hemphill v. Sayers*, 552 F. Supp. 685 (S.D. Ill. 1982).

80. Tickets are normally considered "non-goods" rather than goods. *See, e.g.*, Bonna Lynn Horowitz, *Computer Software as a Good Under the Uniform Commercial Code: Taking a Byte Out of the Intangibility Myth*, 65 B.U.L. REV. 129, 136-139 (1985), citing *Peterson v. Wildcat Mountain Mgmt. Corp.*, 34 U.C.C. Rep. Serv. 1127, 1133 (D.R.I. 1982) (concluding that the sale of a ski lift ticket is the sale of a non-good). *See also*, *Rosetti v. Busch Ent. Corp.*, 87 F.Supp. 2d 415, 418 (E.D. Pa. 2000) (purchase of an admission ticket to an amusement park does not constitute a good under the UCC and therefore breach of warranty inapplicable).

81. *Bell Sports, Inc. v. Yarusso*, 759 A.2d at 585-586. *See also*, *Gentile v. MacGregor Mfg. Co.*, 493 A.2d at 648 (Article 2 did not apply to reconditioned football helmets since reconditioning did not constitute a sale though strict liability theory was applicable). *But see*, *Fiske v. MacGregor*, 464 A.2d 719 (R.I. 1983) (manufacturer of a football helmet's facemask was held liable in the amount of \$3.5 million (reduced to \$2.1 million after application of comparative fault principles) for the plaintiff's injuries during a high school football game resulting in quadriplegia to plaintiff).

82. *Eldridge v. Riddell, Inc.*, 626 So. 2d 232 (Fla. Ct. App. 1993).

helmet. However, the jury did not believe the product was defective in its design, the device could not have protected against that type of injury, and the chin roll device was not patented until 1982, after the injury occurred. The appellate court affirmed that there was no breach of a duty owed in negligence, that there was insufficient evidence to demonstrate negligent testing of the product and to show that the product was the proximate cause of the injury.⁸³

In *Hemphill v. Sayers*, plaintiff Mark Hemphill alleged that his football helmet was defective and in an unreasonably dangerous condition when placed in the stream of commerce when he participated in a football game and, as a result, seriously injured his spine.⁸⁴ The defendants included Southern Illinois University, its football coach, athletic trainer and athletic director Gale Sayers, and the legal action involved claims of negligence, failure to warn, and negligent supervision.⁸⁵ Claims were also brought against Riddell Sporting Goods, Inc., and Bleyer Sport Mart, Inc. for breach of implied warranties under Illinois commercial law.⁸⁶

The breach of warranty claims were dismissed by the federal District Court (Illinois) which emphasized that under Illinois' version of UCC §2-315 (implied warranty of fitness for a particular purpose) it applied only to warranties made by a seller to a buyer. The defendants, university employees, were not the sellers.⁸⁷ Similarly, under the Illinois' version of UCC §2-314 (implied warranty of merchantability) the university defendants were not "merchants" and therefore the implied warranty of merchantability did not apply to them as well.⁸⁸

Riddell, the actual manufacturer of the helmet, defended by advocating that it lacked privity of contract with Hemphill and therefore under §2-314 and §2-315 the claim should have been dismissed.⁸⁹ The court agreed and went even further. It referenced the fact that Illinois had adopted Alternative A to UCC §2-318 which stated,

83. *Id.* at 233.

84. *Hemphill*, 552 F.Supp. at 693.

85. *Id.* at 687.

86. *Id.*

87. *Id.* at 689.

88. *Id.* The court also dismissed the strict liability claims against Riddell, Inc., the manufacturer of the helmet, and the university's employees especially since the university employees had no part of the production or marketing of the football helmets.

89. *Id.* at 690.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this Section.⁹⁰

Since Illinois adopted Alternative A rather than Alternatives B or C, both of which create much larger classes of plaintiffs who might lack privity of contract to the seller or manufacturer, the court declined to expand liability under §2-318 to Hemphill, and held that he was outside the "distributive chain" and that he was not entitled to warranty protection.⁹¹

OTHER CASES

Though helmet cases are plentiful, published decisions involving other types of sporting goods are extremely limited. However, the application and relevancy of non-sporting good cases is varied. For example, in *Cohen v. North Ridge Farms, Inc.*, an equine consignment sale, it was discovered after the sale that the horse had a flaccid epiglottis.⁹² The buyer attempted to rescind the sale after the auction, but the court dismissed the claim holding that the conspicuous "as is" disclaimer of all warranties express or implied, including fitness for a particular purpose, precluded the buyer's various tort and breach of contract claims particularly since the buyer did not inspect the yearling prior to the sales purchase.⁹³ The court also frowned upon the fact that the plaintiff relied heavily on pre-UCC cases to establish the legitimacy of his claims.⁹⁴

In a winter sport personal injury case, a minor purchased a ski lift ticket at a Pennsylvania ski resort and suffered injuries. While skiing, he crashed into a ski lift tower as a direct result of an icy slope.⁹⁵ His complaint included a mixed variety of claims including negligence and breaches of express and

90. *Id.* at 690-691.

91. *Id.* at 692.

92. *Cohen v. North Ridge Farms, Inc.*, 712 F.Supp. 1265 (E.D. Ky. 1989) (The court also noted that even though the plaintiff alleged a violation of the Kentucky Consumer Protection Act that this law was inapplicable since a thoroughbred horse is not considered a consumer good).

93. *Id.* at 1272. *Compare* *Travis v. Washington Breeders Assoc., Inc.*, 759 P.2d 418 (Wash. 1988) (Rescission of yearling sales contract was allowed as jury interpreted it to have violated the Washington Consumer Protection Act).

94. *Cohen*, 712 F.Supp. at 1271.

95. *Chang v. Camelback Ski Corp.*, 43 Pa. D. & C. 4th 81 (Ct. Pleas Penn. 1999).

implied warranty under the UCC in that the ski slope was not reasonably safe and fit for the purposes for which it was used. The court was not persuaded by the plaintiff's argument and found that even if there was a contract between Chang and the defendant that it certainly did not involve a sale of goods since the use of a ski slope did not fit into the definition of goods in any section of the UCC.⁹⁶

CONCLUSION

Those involved in the buying or selling of goods, including sporting goods and fitness equipment, should be aware of the role of the UCC in commercial transactions as a default legal resource and reference. The UCC also applies in varying instances from equine (horse) sales, to weight-loss products sales, and to any other transaction involving the sale of goods. The UCC is a pro-commerce codification of common law contract principles and, in effect, it encourages buyers and sellers to draft precise agreements to suit their needs. The UCC is a model act that all states have adopted in whole or in part, and courts look to its guidance when the buyers and sellers of goods have failed to otherwise address breach of contract issues and relevant contract remedies on their own.

Sport law cases involving the UCC demonstrate that plaintiffs allege breach of express or implied warranty claims coupled with combinations of negligence, strict liability and products liability as shown in helmet cases, *Gentile*, *Eldridge* and *Hemphill*. State consumer protection acts could also weave their way into a claim involving the sale of consumer goods particularly if the sale involved an unfair or deceptive act or practice. The UCC appears not to apply to the sale of tickets as goods since several courts have opined that tickets do not fit the definition of goods, the fundamental aspect of Article 2.

It is unlikely that one would formally study the role, themes or provisions of the UCC unless he or she pursued the study of contract law at the undergraduate or graduate levels. Still, having a fundamental understanding of the UCC, the role that express and implied warranties play in a sales transaction, and why the UCC is relevant allows the sport manager, any buyer or seller of goods, or any sales contract drafter to appreciate its role in commercial transactions. Though the UCC is a default reference to interpret sales contracts "unless otherwise agreed" by the parties themselves, the states have adopted it and it encourages consistency in interstate and intrastate

96. *Id.* at 89.

commercial transactions. The UCC is pro-commerce; it emphasizes good faith throughout its provisions, enables sellers and buyers to maintain enduring business relationships by allowing for the cure of defective orders or deliveries, and might even encourage a party to waive a *de minimis* breach of contract in some instances rather than emphasizing the common law contract rush to the courthouse to litigate.

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