

**General Notes:**

- We'll argue Acme and Hoover are each liable for the full cost of replacing floors, thus arguing in the alternative in case one claim fails. This secures the most money, though unjust enrichment is not permitted.
- Each argument for damages under UCC seeks remedies to be liberally administered to put Bud in as good a position as he'd be if contract correctly performed (UCC§1-106).
- In each case, the largest damages will be sought first, with alternative remedies presented as fallbacks.

**Bud v. Acme Flooring**

**What law applies?**

- Bonebrake: The predominant thrust of contract isn't easily determined because costs of goods(flooring) and services(installment) are equal. UCC yields better results for Bud, and Acme's form specifies UCC. Still, both UCC and Common Law will be analyzed for diverging outcomes.
- Access to CL will be via UCC§1-103 if necessary.

**Enforceability:**

**Offer & Acceptance**

- Common law: No contract was formed. Bud's purchase order was offer. Acme's acknowledgement form added terms and was not a mirror image acceptance (Restatement§59).
- UCC: A contract is formed without the additional terms (UCC§2-207).

**Consideration**

- A promise (install floors) for a promise (pay \$20,000x75=\$1,500,000).

**Promissory Estoppel**

- Both parties induced action by performance and a remedy to avoid injustice can be enforced under Restatement§90 (see damages). *If* common law applies (see above) the remedy granted for breach will be limited as justice requires.

**Content of the deal:**

**UCC§2-207**

- Under UCC§2-207(1), Acme's confirmation was acceptance with additional terms. Bud and Acme are merchants (UCC§2-104), therefore UCC§2-207(2)(b) applies and those terms become part of deal unless they materially alter it. Term 8 is kicked out. It materially alters deal because it limits Bud's ability to sue.
- Forms agree that hardwood parquet be used.

**Express Warranties**

- Acme's acceptance stipulated sealed hardwood parquet. UCC§2-313(b) requires the floors conform to description.

**Implied Warranty of Merchantability**

- Acme's floors must pass without objection in the trade as "hardwood parquet" and be fit for the ordinary purposes for which such goods are used (including cleaning) (UCC§2-314).

**Implied warranty: Fitness for Particular Purpose**

- Acme would likely argue Bud didn't mention his plans to use a SteamVac to clean the floors. If he did, we'll use UCC§2-315 and argue he relied on Acme's skill to furnish suitable goods for that purpose.

**Exclusions:**

Examining goods would not reveal defects so no exclusion of warranties (UCC §2-316(3)(b)).

**Misunderstanding:**

- Acme knew Bud meant solid hardwood rather than engineered, so Bud's meaning prevails (Restatement§§20(2),201(2)).

**Breach?**

- Acme breached express warranty that floors are sealed hardwood parquet.
- Acme breached warranty of merchantability. Floors would not pass without objection in trade under description "hardwood parquet."
- Floors can't be SteamVac'd. Acme breached warranty of fitness for particular purpose, provided Bud made Acme aware of this purpose and relied on their expertise.
- *If* common law applies, and *if* a contract was formed, Acme would try to argue substantial performance. However, the difference in wood materially altered the deal, evidenced by damaged floors (Restatement§241).

**Remedy/Damages**

- Under *Hadley* or UCC§2-715(2), Bud can recover lost profits. Bud told Acme closure meant lost profits, and they're not speculative because Bud's business is established.

**Revocation:**

- Bud could try to revoke acceptance of floors (UCC§2-608).
- Acme will argue a reasonable time passed. However, Bud's just now aware of substantial defects that were previously undiscoverable and that impair their value to him.
- They might argue a change in condition of goods, but we counter it's a result of defect (UCC§2-608).

**Expectation:**

- If Bud revokes (UCC§2-712) or uses (UCC§1-106) he can sue for difference between cost of cover (75x\$15,000) and contract price (percentage of \$1,500,000)

allocated to wood). Also add  $75 \times ((\text{lost profits during reinstall}) + (\$50\text{Bona Kits}) + (\text{incidentals}) - (\text{expenses saved}))$ .

- If bud uses UCC§2-714, he can recover difference between the value of the floors and the value they'd have had if they'd been as warranted + incidentals + consequential.

**Reliance:**

- $75 \times (\text{Contract price } \$20,000) + (2 \text{ days lost profits}) + (\$50\text{Bona kits}) + (\text{incidentals})$  minus (value of flooring if unreturned to Acme).
- We'd also seek money Bud spent on SteamVacs (150x\$200). Acme will argue these were expenses after performance rather than in reliance. We'll counter Bud relied on warranty of the materials which, unbeknownst to Bud, Acme breached.

**Restitution**

- To prevent unjust enrichment Acme will return contract price (\$1,500,000) minus any value added to Bud's floors.

**Defenses:**

- Acme will claim term 8 precludes Bud from action for breach. We'll counter that the term is not part of the deal (see above). Even if it was, the two year period begins when breach is discovered, which was only recently (UCC§2-725(2)).

**Statute of Frauds**

- Under UCC, contract over \$500 is within the statute. The forms are writings under UCC§2-201(2).

**Mitigation**

- Bud mitigated with Bona, preserving wood while seeking remedy.

**Misrepresentation**

- Acme misrepresented floors as hardwood rather than engineered and knew assertion was contradicted by fact (Restatement§162(1)(a)). Bud could rescind contract on this basis (Restatement§164(2)) if doing so made strategic/economic sense.

**Bud v. Hoover**

**What law applies?**

- Bonebrake: Predominant thrust is contract for goods (vacuums), with minor assembly service. The UCC applies.

### **Enforceability:**

#### **Offer & Acceptance**

- Bud's order was offer. Hoover's acknowledgement was acceptance, though not a mirror image. Under UCC§2-207, a contract was formed without Hoover's additional terms.

#### **Consideration**

- A promise (vacuums and assembly) for a promise (payment \$200x150).

#### **Promissory Estoppel**

- Bud relied on Hoover's promise to send functional vacuums, which is enforceable promise under Restatement§90 via UCC§1-103.

### **Content of the deal:**

#### **UCC§2-207**

- Under UCC§2-207(1), Hoover's confirmation was acceptance with additional terms. Bud and Hoover are merchants (UCC§2-104), therefore UCC§2-207(2)(b) applies and terms become part of the deal unless they materially alter it. Term 6 materially alters deal because it limits the warranty. The vacuum boxes contain warranty terms which materially alter deal and should also be rejected. We'll separately attack warranty disclaimers in case judge takes Easterbrook approach and rules Bud had reasonable time to reject warranties but didn't.

#### **Parol evidence**

- Hoover may argue salesperson's email and conversation with Bud are parol evidence. But forms lack merger clause and are not a complete integration. They can be supplemented by emailed information because it does not contradict those writings (UCC §2-202(b)). Suitability for commercial use might contradict the p.29 warranty (if valid). However, conversation also admissible as communication necessary to establish liability for consequential damages which Hoover attempted to disclaim. Ideally, Kushsylvania is Corbinesque rather than Willistonian state.

#### **Express Warranties**

- Salesperson's email warrants vacuums suitable for hard floors, even delicate ones. UCC§2-313(b) requires vacuums conform to "hard floor cleaner" description. Also warranted against defects in workmanship.

#### **Implied Warranty of Merchantability**

- Hoover's vacuum must pass without objection in trade as a hard floor cleaner and be fit for ordinary purposes (cleaning) for which such goods are used (UCC§2-314).

#### **Implied warranty: Fitness for Particular Purpose**

- Bud made salesperson aware of commercial nature of cleaning, and relied on salesperson's expertise (UCC§2-315). Hoover could counter that Bud did not specify engineered flooring, but email warranted use on all hard floors.

**Disclaimers:**

- Hoover's disclaimers are not part of deal under UCC§2-207(2).
- If disclaimers are part of deal, then Hoover's attempts to disclaim both implied warranties are ineffective. Disclaimers are not conspicuous in size or location (p.29 in manual, within box) (UCC§2-316(2)).
- Their disclaimer for commercial operation is trumped by warranty of fitness (UCC§2-317(c)).
- No exclusion of warranties because examining goods would not reveal defects (UCC §2-316(3)(b)).

**Breach?**

- Hoover breached express warranty of workmanship (vacuums leak). Vacuums unsuitable for hard floors.
- Warranty of merchantability breached. Vacuums damage hard floors and would not pass without objection in trade under "hard floor cleaner" description.
- Warranty of fitness for particular purpose breached because vacuums damage commercial hardwood floors.

**Remedy/Damages**

- In any remedy involving consequential damages. Hoover attempted to disclaim liability, but disclaimer not part of deal. (UCC§2-702(2)(b)). We'll argue under UCC§2-715(2)(b) for damages based on breach of warranty resulting in property damage to floors (75x\$15,000 for repair). Hoover's attempts at disclaimer of warranty are ineffective (see above).
- We'll also ask for consequential on lost profits while floors replaced, and lost business due to stinky bong-water. Mathematical certainty of damages unnecessary (UCC§2-715[comment 4]). Hoover will argue this was not foreseeable. However, their salesman was aware of commercial context. Ideally, Bud mentioned "time is money" with salesperson. We'll also add cost of time employees spent assembling vacuums (salesperson promised this service).

**Revocation:**

- Bud could try to revoke acceptance of vacuums. Hoover will argue a reasonable time passed. However, he's just now been made aware of a substantial defect that was previously undiscoverable and that impairs their value to him (UCC§2-608).
- Hoover might argue for use of warranty service. However, vacuum defect is likely fundamental and remedy would be ineffective (UCC§2-719(2)).

**Expectation:**

- Bud purchased replacement vacuums and can recover difference in cost 75x(\$250(Bissells)+\$25(shipping)+consequential(floors/profits/assembly/\$50 Bona kits)+incidentals-\$200(Hoovers)).
- Alternatively, Bud could seek difference between the value of vacuums and the value they'd have had if they'd been as warranted. (UCC§2-714).

**Reliance:**

- 75 x (\$200(cost of vacuums) + consequential(floors/profits/assembly/\$50Bona kits) + incidentals) – value of vacuums if unreturned.

**Restitution**

- To prevent unjust enrichment Hoover will return contract price (75x\$200) minus value of vacuums if unreturned.

**Defenses:**

**Statute of Frauds**

- Contract over \$500 is within the statute. The forms are writings covered by UCC§2-201(2).

**Mitigation**

- Bud mitigated damage by ceasing use of vacuums and using Bona.

**Bud v. Jesse**

**Preliminary Notes:**

- Bud can expect claims against him by people who purchased Czech bongs believing they were Jesse bongs. Bud can implead Jesse for indemnity based on Jesse's fraud/misrepresentation.
- Bud can expect claim by Jesse for \$100,000 for bongs received.
- All use of common law (below) via UCC§1-103.

**What law applies?**

- Contract for goods (bongs), UCC applies.

**Enforceability:**

**Offer & Acceptance**

- Jesse's text is a counter offer based on conversation. Bud's text is acceptance.

**Consideration**

- A promise of bongs for a promise to pay.

**Promissory Estoppel**

- If no contract based on texts, Bud relied on Jesse's promise of bongs, which is enforceable promise with remedy limited as justice requires (Restatement§90).

### **Content of the deal:**

- Installment and output contract for approximately 500 bongos/month at \$60/bong for one year. Jesse's changes to terms ineffective due to duress/undue influence/pre-existing duty (see defenses).

### **Parol Evidence**

- Jesse may argue the conversation prior to texts is parol evidence. We counter that the texts are not a total integration evidenced by lack of a merger clause, Jesse's reference to Bud's offer, and a lack of description of goods. The conversation supplements the writing (UCC §2-202(b)). Ideally, Kushsylvania is Corbinesque rather than Willistonian state.

### **Express Warranties**

- The conversation stipulated first quality bongos from Jesse's shop with no more than 5 bubbles. Jesse's text confirmed he'd produce them.

### **Implied Warranty of Merchantability**

- Bongos must run within variations permitted in agreement (no more than 5 bubbles). UCC§2-314(d).

### **Breach?**

- Jesse will argue Bud breached by not paying \$100,000. We counter that Jesse breached first.
- In months 7,8,9, Jesse breached duty to provide roughly 500 bongos/month. Jesse will argue this was his output. We counter he did not meet good faith requirement by switching production to Nordstrom glass (UCC§2-306[comment2]).
- Jesse breached express warranty because he did not personally manufacture the Czech bongos in his shop.
- Czech bongos with more than 5 bubbles breach warranty of merchantability.
- In installment contracts, when non-conformity substantially impairs value of the whole contract, there is a breach of whole. We'd argue the Czech bongos impair value of whole contract (Bud's sales dropped off as quality declined). Jesse could argue Bud accepted installments without notifying of cancellation, but we'd argue defects were undiscoverable and cancellation is seasonable. Alternatively, we'd argue material breach (defects) on last 3 installments which Jesse did not assure cure of (UCC§2-612(3)).

### **Remedy/Damages**

- Under UCC§2-715(2), Bud can seek consequential damages of lost profits due to damaged reputation to his bongos and Joints. Jesse will counter this is speculative, but Bud could get expert testimony on the impact to his business, as well as records of sales. Moreover, UCC§2-715[comment 4] rejects doctrine of certainty.
- Bud could try to reject the Czech bongos still in his possession for failure to conform to the contract (UCC§2-612(3)).
- If rejection barred, Bud could try to revoke acceptance of Czech bongos in his possession (UCC§2-608). Jesse will argue a reasonable time has passed but we

counter that Bud's just now aware of a substantial defect (inferior quality) that was previously undiscoverable, impairing their value to him (UCC§2-608(2)).

**Specific Performance:**

- If Bud still wants them (he might not due to decline in sales) he could request specific performance (UCC§2-716). This would require 1500 Jesse bongs (if not 2100) for final 3 months, plus 850 bongs that would have been delivered if Jesse supplied 500/month per course of dealing (UCC§1-205). Bud "cannot replace" Jesse's work and inability to cover is strong evidence specific performance necessary.

**Expectation:**

- Bud only needs damages on breaching installments (last 6 months).
- Consequentials + incidentals + difference between his anticipated profit (6 x \$90/bong x 500/month) and his actual profit (((\$90/bong x 650(months7,8,9) + \$50/bong x 1400(months10&11) – payments or bongs owed to Jesse.
- Alternatively, Bud could seek difference between value of Czech bongs and value they'd have had if they were Jesse bongs (UCC§2-714).

**Reliance:**

- Consequentials + incidentals + Jesse returns payments received from Bud on unsold installments, and Bud will return bongs or their value.

**Restitution**

- Bud will return any merchandise he is still holding in exchange for any payments Jesse received for them.

**Defenses:**

**Statute of Frauds**

- Jesse will argue the texts are not a writing, nor were they signed. We'll argue:
  - a) The text is written, and his name appears as a signature, or his Droid supplied it as an agent (UCC§2-201(1)).
  - b) Regardless, Bud and Jesse are merchants. Jesse had reason to know of the confirmation writings (UCC§2-201(2)).
  - c) A contract valid in other respects is enforceable when payment made/goods accepted (UCC §2-201(3)(c)).
  - d) If necessary, use promissory estoppel (Restatement§§139,375).

**Pre-existing Duty**

- Jesse had a pre-existing duty to perform contract as originally written. Attempt to modify requires a writing (UCC§2-209(3)). No additional writing.

**Duress/Undue Influence**

- Jesse attempted to modify using duress. Jesse will argue Bud had reasonable alternatives. However, Bud was back ordered, faced irate customers and loss of

business, and any “cover” was impossible due to uniqueness of Jesse’s bongs (Restatement§175).

- If duress argument failed we’d push undue influence, stressing that Jesse used his position as Bud’s relative and bong supplier to force modification quickly (Restatement§175).

### **Illegality**

- Jesse could argue contract based on illegal goods under federal law (see Tommy Chong’s case). We’d counter Bud is selling legally in-state, or that bongs have legal uses (tobacco), or that court should ignore the potential illegal uses (see Whorehouse case).

### **Fraud/Misrepresentation**

- Jesse made a fraudulent and material misrepresentation that the Czech bongs were his (Restatement§162). Jesse could argue that contract was for “all I produce” and that he’s producing these in Czech factory. However, the contract required bongs “from [Jesse’s] shop.” Even if “I produce” was ambiguous, meaning is interpreted against drafter (contra proferentem).
- Enforcing contract is in Bud’s interest, but he could void contract on this basis if doing so made strategic/economic sense (Restatement§164(2)).

### **Misunderstanding**

- There is no misunderstanding. Jesse knew Bud wanted Jesse’s personal work. (Restatement§20(2)(b)).

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