MODEL ANSWERS
PART 2
#2390

TO: K Buyer, Inc.
FROM: Attorney
RE: Recoverability of All or Part of $1 million Spent on RAEL Plane.

The contract between Buyer (B) and Seller (S) is for the sale of goods (plane), therefore the UCC applies. The K is over $500, so it is thus within the Statute of Frauds and rqt. a writing. There is a writing that satisfies the SOF, signed by the parties and including quantity which is the most impt. element for 2-201. Thus it satisfies the SOF. There is an enforceable K.

Warranties

S expressly warranted the plane against "malfunction not attributable to normal depr. or owner's N" in the writing. B may assert that he has rights with regard to this warranty. The issue with the tail assembly and other repairs, and whether they would be covered by this express warranty. Per the K the warranty term is 3 months. Upon B's attempt to extend the term to 2 yrs. S refused and B returned the plane.

This turns attention to the K's remedy limitation clause, which limits B's remedy to repair/replacement of malfunctioning parts, and no conseq. This remedy limitation is proper under 2-719 which allows the limitation of remedies for warranties.

B will argue however that enforcement of this warranty is unconscionable because enforcement of it frustrates the primary purpose of the K, sale of a working plane. S will counter that this remedy limit is not unconsc. and will probably point to the Usage of Trade and Course of Performance (B had brought the plane in for 2 prior repairs). Additionally, as this is a market in used airplanes it is reasonable that there may be some problems with the plane which the buyer should anticipate and the seller's limited time warranty is typical of the industry.

Implied Warranty

Under UCC 2-314 and 2-315 the implied warranty of merchantability and FPP are established. These warranties can be waived by a conspicuous statement in the writing, (and for merch. it must be by name).

Here S will claim that the bold type disclaimer on the 1 pg. K form is sufficient to waive these 2 implied warranties and since merch. is named S has a strong argument.

B however could contend that S acted in bad faith by selling a plane that he had not inspected (per the facts). B may point to Usage of Trade and be able to show that sellers of used planes have a duty to inspect their goods and ensure merchantability. B's argument is not strong however especially in light of the fact t hat B did not inspect the plane prior to purchase. Seller's offer to allow B to inspect will probably negate any likelihood of success with this argument.

Other Warranties?

B may attempt to assert that a warranty was created when S said it was a "good deal" because of the "terrific price" for the plane. This will very likely fail because a court will deem this salesman puffing.

What Are the Remedies?

Assuming that the seller breached by tendering non-conforming goods, although this may be difficult to show, B has several UCC remedies available to it.

Upon tender of goods under the UCC a B has a right to a reasonable time to inspect the goods to ensure conformity Perfect Trader Rule (2.601). Per the facts the B refused the oppty. to inspect the plane prior to the sale and didn't have an engineer look at it until October 95. The K was executed (delivery) on Sept. 1, 95. This 1 month time limit is beyond a reasonable time and B's attempt to reject the goods will likely fail. If B was going to

attempt to reject for non-conformity he would have had to do it sooner likely so this is probably not a good option.

The better option for B is Revocation of Acceptance (2-608). The Buyer in a UCC K has a right to revoke acceptance if there is a defect that substantially impairs the value of the goods to the buyer. The buyer has a reasonable time for revocation, however it is more difficult to show because the defect must be substantial. Since B returned the plane to S he has acted properly to revoke his acceptance. S however will assert that B has no right to revocation because it is too late and the problem (future repairs) is not substantial, but expected and typical when buying used good (trade usage) and since B had the oppty. to inspect prior to sale and chose not to he is acting in bad faith and is in breach of the K.

Assuming this is a valid revocation of acceptance (questionable) the Buyer has all of the 2-711 buyer's remedies available to him including the right to cover and receive the difference in cover and K price + incid/conseq. from the Seller, or possibly market damages from the Seller. This is unlikely however as discussed.

The more likely situation is that B's return of the plane will be deemed a breach by the Buyer. S will thus be entitled to Seller's remedies under the UCC b/c of wrongful rejection by B.

Under 2-703 Seller's remedies are addressed. The most likely is resale. Per the facts S has lined up a possible buyer and has notified B (Olsen). If this resale is proper S is entitled to 2-706 damages [(K price - resale price) + incid - cost sud]. This calculation will yield a $500K damage for dif. in selling price for resale (2.5M - 2.0M) and S will be entitled to any costs to fund the substitute buyer these s/b minimal b/c Olsen contacted S upon return by B.

If the resale is deemed bad then S is entitled to market damages under 2-

708(1) (K price - mkt). This is probably not a lost value type sale but if it is then S is entitled to profit + incidentals - cost sud. This is also $500K [$2.5M (K price) - 2.0 (cost)]. This may be a good option b/c Olsen came to S _____ he could probably have found another plane if B didn't return this one.

Overall however whether the resale is good or if not or if this is deemed a Lost Profit Sale it looks like S is entitled to $500K in damages and since S has $1 mill of B's deposit B is entitled to at least $500K of that.

If B can show unconscionability on the part of S then B may be able to recover the full $1 mil (via S's failure of merchantability or failure of S to inspect prior to sale). But these arguments are probably not that strong.

Since S's argument that B breached by returning after the oppty. to inspect is strong B should negotiate with S and either get the $500K back or see if S is willing to attempt another sale and use the $1 mil as a downpayment; this will be most beneficial to both parties; S gets profit on another plane and B gets a plane.

PART 2
#2252

This is a K for the sale of goods, so the UCC applies. It's over $500 so the statute of frauds applies and is satisfied by the written K. There is no liquidated damages clause.

I. Formation

The formal written and signed contract in addition to the exchange of the plane for $1M forms a binding K.

Due to the lack of evidence of seller having knowledge of defects in the plane, an argument of misrepresentation would be very attenuated. The real questions lie in interpretation, breach, and remedies.

II. Warranties

A. There is an express warranty. The K provides for replacement or

repair of parts for three months, unless malfunction is attributed to ordinary depreciation or negligence by buyer. All K's for sale of goods have implied warranties of merchantability and fitness for particular purpose. There are no other warranties implied from the facts. The only possibility is a trade usage argument, i.e. "It's customary to warranty planes in some way . . ." Since there is no evidence, I won't consider this possibility.

B. Both the warranty of merch. and fitness for P.P. are successfully disclaimed. Seller used "merch." in disclaimer, and it looks obvious. It's in large print on the front side of a one page K. No special language was needed to disclaim fitness for P.P., only the disclaimer. There is also a disclaimer that would apply to additional warranties (i.e. trade usage or oral), but no evidence, so the point is moot.

C. Buyer limited remedies in the K. This clause need not be "conspicuous." Seller limited remedies to repair and replacement of parts. This only applies to the warranty, as stated in the K (for malfunctioning parts). The warranty may fail its essential purpose. If the purpose of the remedy is to keep the plane safe and functional, the limitation to replacement of parts may be inadequate. Any physical injury caused by the plane cannot be limited (UCC 2-717(3)).

III. Remedies

A. Buyer

It appears seller has a very tight case. If by some hocus-pocus the court deems seller in breach (by warranty maybe or other hocus-p) buyer may get damages. Buyer may cover or get market based damages.

If buyer covers:

Damages = cover price - K price + incidentals - exp. saved (this is assuming cover is reasonable)

If buyer cannot cover (market based):

Dams = market price - K price + I - E.

In both situations buyer would get $1M deposit back.

For breach of warranty buyer's dams would be:

Value as warranted - value as tendered (in this case buyer keeps plane).

Buyer may also try to revoke acceptance under UCC 2-608. 1 month would probably be considered a reasonable time to inspect a plane. However, the defects could have been discovered.

Buyer's mechanic was on vacation at the purchase time. Buyer could have hired someone else to inspect. The court would probably allocate the fault to buyer, since seller suggested inspections.

B. Seller

1. Seller can resell under UCC 2-706. The sale to Olson will qualify if resale is proper. The price seems a bit low, but this is up to the court. Also it appears his notice to buyer was OK.

Dams = K price - resale price + I - E (such as amt. he would have spent under buyer's warranty).

2. Seller may choose not to resell and get 2-708(1) damages.

K price - market price + I - E.

3. If seller has unlimited access to planes -- may be a lost volume seller and get 2-708(2) dams (i.e. 2 profits - overhead).

4. If resale is impossible seller can get 2-709 action for the price. This means buyer has to pay the full K price. In this case seller would have to hold the goods for the buyer.

IV. Buyer may want to work out some sort of deal. Chances for success are not great, and chances for paying dams seems likely. Buyer could propose:

A) Discounted price for plane in exchange for waiving all present and future claims relating to the plane.

B) Additional consideration for an extended warranty?

PART 3
#2323

TO: TDR
FROM: 2323
RE: Schrundulators (Sch)
DATE: 5/15/96

I. This is a K for the sale of goods or the UCC will apply. The waiting requirements of §2-201 (S/F) for a sale of goods over $500 is satisfied. Consideration is apparent and we have a legally enforceable K. The Q _____ what are the terms of the deal.

II. 2-207

The SEI PO was an offer to buy the Sch's. Within 5 days ACS responded with a definite and seasonal expression of acceptance. At this point the UCC would find a K has been formed between the parties: What terms?

As this is a deal between merchants -- all of the offeror's terms are part of the deal and all those terms contained in the acceptance also became part of the deal unless (a) they materially alter the K, (b) are expressly limited by the terms of the offer (not in this case -- no _____ in the offer) or (c) objection to _____ is given within a reasonable time.

The purpose of 2-207 is to avoid _____ surprise and hardship. Here ACS added terms of a material nature to their acceptance (not a conditional acceptance however, so the K was formal). These terms should be _____ as mere proposals to the K and not part of it. Thus, the term providing for inspection should drop out and the UCC default rule of 2-206 should govern acceptance and rejection of goods.

The NUM clause likewise should not be included. It is of little importance, however, as we shall see below. The oral warranty provided by the salesman came before the K, thus is restricted by the PER not the NUM. Finally the limitation of the remedy must be considered material and found not to apply. Without agreement by SEI to _____ its enforcement is clear to

provide undue surprise and hardship and is a term which needs to be made clear, _____ 2-207(2) and negotiated for _____. So far the terms are as provided in SEI's offer plus the UCC default rules and gap filling provisions of 2-207.

Generally, a party has a right to inspect the delivery and then reject acceptance. But if the party exercises ownership against the interests of the seller then the party will be found to have accepted. _____ a test on the goods en masse would appear to qualify as acceptance. Except, the goods may be covered by warranty.

Express warranty. The pre-contract representation by the sales rep created an express warranty 2-313(2). First the Sch's would pass the "test" and if they didn't, they could be returned. As this was an oral rep made prior to the K it is subject to the PER. Note: If the first rep. is disallowed, the second one by the Vice-Pres. will be allowed as the PER does not cover post K modifications and the NUM is probably ineffectual.

Under UCC 2-202 we must look for evidence that the parties intended the written K to represent a full integration of their agreement before excluding prior representations. There is no effective _____ clause. The notice must be terms; conditions govern this K is ineffective as it does not provide that these are the only terms, nor is it conspicuous enough to show that SEI intended it to act as such. Thus, this warranty will be admitted to show what the terms of the deal really are as a consistent and additional term of the K.

In addition the implied warranty of merchantability (2-314) still applies, as it was never successfully disclaimed. We don't know the general trade usage: quality of Schs, thus it is impossible to determine if they would pass without objection in the trade even if they can't pass the test SEI subjected them to.

Also, there is the implied W of fitness for a particular purpose. SEI claims that ACS should have reasonably known what SEI was going to do. This is evidenced by the fact the sales rep. _____ about the testing process. SEI appears also to have relied on ACS expertise in the B.Z., thus establishing the requirements for a W for a PP.

However, ACS could argue that (a) the sales rep didn't know the particulars of the testing process and (b) it successfully disallowed implied warranty in paragraph 7. If this form was signed and returned by SEI, ACS has _____ argument here.

As regards the express warranty ACS will assert that the samples tested by SEI (2-313(4)) were the same as those delivered and that SEI could've/should've tested those samples in the same way. That since the samples were the same, that is their express warranty and that the PER will not allow conflicting prior oral evidence to dispute a written or express warranty (2-316(2)). While this is a good argument, 2-313 comment 4 provided that since 2-316 provides expressly that a conflicting warranty will take precedence over a disclaimer that the purpose of the section will not be _____ by the PER. Thus, in the case of a conflict the warranty is allowed in, and the disclaimer here providing the sample should be disregarded _____ of the added protection of the oral express warranty. Here it would appear that SEI should be allowed to return the Sch, if it can show that the Schs actually broke down during the test.

They can reject the parts. If they do this they encounter the paragraph seven limitation of remedy. As discussed, this is probably not valid, and will fail to limit SEI's recovery. Upon rejection seller will have a right to have up to July 1. Barring this they are liable for the full expectation retests of SEI. (Market price - K price 1 + incidentals + consequentials (here, it will have to be shown that delaying new product introduction was reasonably

foreseeable to ACS)). In addition, as we saw in the computer purchase case, if there are no Schs that can do what they were promised to do, SEI may recover a mythical figure representing the value (?) of goods not in existence under 2-714(2) ($72,000 in cost) ($60K in consequentials).

Even if ACS is found not to have breached their warranties that the Schs would survive the test and did not breach the K -- delivered 6K ASC model B2A Sch at $12 each, then SEI can still reject the goods and get damages.

SEI could also merely ask for restitution which would be whatever they paid ACS. Or reliance, which here would be all the $ they spent, plus any additional money spent because of the breach. This would be appropriate as in Sullivan if lost profits on the sale of the lawnmowers (the new business) were difficult to establish.