

**STARTING OFF RIGHT
IN LAW SCHOOL**
SECOND EDITION

**BONUS MATERIAL:
ORGANIZING YOUR READING**

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ORGANIZING YOUR READING

In my experience, few students do poorly in the first year of law school because they don't do enough work; they do poorly because they work long hours doing the wrong things. One of the biggest problems is that students work the same way for their legal writing courses as they do for their casebook courses. If you are using the book as preparation for both legal writing and casebook courses, you might want to read the "Organizing for Legal Writing" section right after Chapter 8 and the "Organizing for Exams" section after Chapter 9. If you are interested only in exams, read only "Organizing for Exams" after Chapter 9.

Organizing for Legal Writing

In legal writing courses, students are given the facts of a controversy at the beginning of their work. That means their case reading will be done only after they know what is being asked of them. They are reading with a purpose. Most of your legal writing projects will involve you representing either a plaintiff or defendant. Your class might be divided in half or your class will be matched with another class, each representing one party. You usually will be given confidential information about your client. You always will know in which jurisdiction you are working. I taught a legal writing class in which the following implied warranty of merchantability problem was an early assignment. My problem was set in Florida.

Half of my class received the following memorandum.

Memorandum

To: Associate
From: Senior Partner
Re: Brian Bancroft (implied warranty of merchantability)
Date: October

This morning I met with Brian Bancroft, a paralegal in our real estate department. He just started as a first year student at the Justice School of Law. He told me that since he doesn't leave work here until 5, he doesn't have time to get a real meal before class. He has been frequenting the food service of one of the upper level students. He said that last week he bought a tuna salad sandwich from the student and broke a tooth when he bit down on a tuna bone. He was smart enough to save the bone. For the time being, assume that it is a tuna bone. He does not have any dental insurance and wants to know if there is any way he can recover the cost of his dental bills from the student who sold him the sandwiches. He learned that the student, Julia Kidd, is a pastry chef at La Parisienne, This week he wrote down the text of the sign she puts on her car when she sells the food.

STRUGGLING LAW STUDENT FOOD SERVICE

COFFEE	\$.75
SANDWICHES	\$3.00
DOUGHNUTS	\$.50

Evidently, she buys the coffee and doughnuts at the local doughnut shop and the sandwich ingredients from a supermarket.

I seem to remember that the implied warranty of merchantability applies to the sale of food. Please write a memo outlining what chances of recovery Brian has here in Florida.

The other half of the class received the following memorandum.

Memorandum

To: Associate
From: Senior Partner
Re: Julia Kidd (liability under implied warranty of merchantability)
Date: October

This morning I spoke with a Julia Kidd, a pastry chef at La Parisienne, the shop on the first floor of our building. She is also a part-time student at the Justice School of Law. Because she has little money, she decided to help pay for her tuition by selling food to the evening law students. Julia arranged for her local supermarket to sell her large quantities of tuna salad, roast beef, turkey and cheese at a discount. Each day before school she made and wrapped the sandwiches and bought coffee and doughnuts from the local doughnut shop. She parked her car in front of the law school every night between 5:00 and 6:00. She made a sign for the front of her car that said:

STRUGGLING LAW STUDENT FOOD SERVICE

COFFEE	\$.75
SANDWICHES	\$3.00
DOUGHNUTS	\$.50

Last week Brian Bancroft, a fellow student, bought a tuna salad sandwich and a cup of coffee from her. He ate his sandwich as he was walking toward the building. Ms. Kidd said that the next thing she knew he was screaming in pain and running back to her car. He was holding a small bone that he said he bit into when he ate the tuna salad sandwich. She said that this week he told her he had broken a tooth and expected her to pay for the dentist's bills. Julia would have a tough time paying for the bills. She asked me if we could help when I stopped in at La Parisienne for a croissant this morning. We will be handling this case pro bono. Please prepare a short memo telling me what you think her liability would be under the implied warranty of merchantability here in Florida.

My students began by reading the text of the statute and developing an outline to guide their reading.

Implied Warranty of Merchantability (Draft Outline)

Rule: Section 2-314 of the Uniform Commercial Code provides that “a warranty that the goods shall be **merchantable** is implied in a contract for their **sale** if the seller is a **merchant** with respect to goods of that kind.” The serving of food is covered by 2-314.

Merchant: A merchant (Section 2-104) is “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.”

Sale: A contract for sale (Section 2-106) “includes both a present sale of goods and a contract to sell goods at a future time. A sale consists in the passing of title from the seller to the buyer for a price.”

Merchantability: Section 2-314 (2)(c) provides that goods to be merchantable must be at least such as are “fit for the ordinary purposes for which such goods are used.”

All students in the class then researched the implied warranty elements and how they have been interpreted by the courts of Florida and other jurisdictions. They realized early on that there was a sale here since Julia Kidd got a fixed price for her food. There would be no need to dwell on arguments for sale. There would be a question whether she was a merchant and all students read the few cases from other jurisdictions to argue the point. They also read the merchantability cases. One aspect of the problem

they knew they did not need to argue was the test for merchantability. *Zabner*, although it was only an appellate court case, eliminated any later discussion of foreign/natural. There, however, were no tuna sandwich cases in Florida so they needed persuasive precedent from other jurisdictions. They read many of the cases in this book. They had a format for case briefing similar to the one that follows. Most legal writing programs will require a particular format.

Case Brief—Ex parte Morrison’s Cafeteria of Montgomery, Inc.

CITATION:

Ex parte Morrison’s Cafeteria of Montgomery, Inc. v. Haddox, 431 So. 2d 975 (Ala. 1983)

PARTIES:

Haddox - plaintiff, appellee, victim
Morrison’s - defendant, appellant, merchant

PRIOR PROCEEDINGS:

The trial court (Circuit Court) found for the plaintiff in a jury verdict. Defendant appealed. The bases of appeal were JNOV and request for a new trial. The appellate court (The Court of Civil Appeals) affirmed. The defendant filed a writ of certiorari, and this case was decided by the Supreme Court of Alabama.

THEORIES OF PLAINTIFF:

implied warranty of merchantability, argued for the reasonable expectation test

OBJECTIVES:

Mrs. Haddox wanted medical expenses for the injury to her son.

FACTS:

Rodney Haddox (a three-year-old) choked on a one-centimeter fish bone in a small piece of fried fish (fish almondine) that Mrs. Haddox had bought at Morrison’s Cafeteria. The fish was not described as boneless, nor advertised as a fillet, nor advertised as a child’s plate because of the possibility of bones.

ISSUE:

Is Morrison’s liable under the implied warranty of merchantability when it sold the victim a piece of fish which contained a 1cm piece of fish bone on which he choked?

HOLDING:

Using the reasonable expectation test, the court held that Morrison’s was not liable.

REASONING:

For the fish to be unmerchantable using the reasonable expectation, one would need not to expect bones in fish. However, it is common knowledge that fish have bones. Also, a one-centimeter bone does not violate any government regulation concerning fillets. It is commercially impractical to remove bones.

DICTA:

Might have had a different result if representation that fish was boneless, if the bone was larger, or if there many bones.

After compiling a number of case briefs, the students got lost in the detail of each case. They had an advantage in this problem that they didn’t have in later unrelated problems. They had read *Starting Off Right in Law School* for their orientation so they had a good understanding of the issues. In most problems you will encounter, you will not have had prior knowledge of the topic. Don’t be frustrated if

you find that after reading several cases, you need to go back to the first case you read because you then have an understanding of the topic that you didn't have at the beginning. Re-reading and re-writing is a fact of life in legal writing classes.

The next step we took as a class was to develop categories of cases.

The *O'Dell* case is a good place to start to develop categories of argument. The *O'Dell* court considered the amount of processing a food undergoes to be an important consideration in deciding whether a naturally occurring offending substance should be expected. The relevant discussion starts with the paragraph on the top of page 75 that begins, "In the fast moving world today..." and continues through the next two paragraphs. The conclusion is that to be expected there must be a probability that the offending substance would be found, not just a possibility. "So if one opens a can of processed oysters, certainly there is a possibility a pearl can be found but the probability of finding a pearl is remote." Cases can then be categorized by whether or not they involve processed food.

Another category is the manner of eating the food. "It seems logical some consideration should be given to the manner in which the food is normally eaten in determining if a person can be said to 'reasonably expect' an item in processed food."

Other categories can be advertising or recipes. The scallops were advertised as boneless in *Nadeau*. The *O'Brien* court dwelt on the fact that the chicken pie recipe called for boneless chicken, unlike the fish chowder recipes in *Webster*, none of which called for deboning the fish.

The students then expanded the basic outline.

Implied Warranty of Merchantability (Draft Outline)

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Merchantability: Section 2-314 (2)(c) provides that goods to be merchantable must be at least such as are "fit for the ordinary purposes for which such goods are used."

1. Processed food

Finding pearl in can of oysters is different from finding a pearl in a raw oyster. Look to the expectation of the consumer for the food as served or processed, not in its natural state. As more food processed, better laws to protect consumer. The court distinguishes between the bone in a whole fish (expected) and a bone in fish patties or fish sticks (not expected), a pearl in an oyster bought in the shell (expected) and a pearl in a can of oysters (not expected). Remanded for trial. *O'Dell v. DeJean's Packing Co., Inc.*, 589 P.2d 399, 402

2. Nature of food (related to reasoning of processed food)

When a child choked on a 1cm bone in fish, restaurant was not liable. Commercially impractical to remove bones from fish; small bones OK, but not large or many bones; well known that fish have small bones; government standards allow for small bones. *Ex parte Morrison's Cafeteria of Montgomery, Inc.*, 431 So. 2d 975, 979

It is commercially impossible to remove bones. *Webster v. Blue Ship Tea Room, Inc.*, 198 N.E.2d, 309

3. Manner of eating

“It seems logical some consideration should be given to the manner in which the food is normally eaten in determining if a person can be said to ‘reasonably expect’ an item in processed food.” Don’t “nibble along” while eating hamburger. (*O’Dell v. DeJean’s Packing Co., Inc.*, 589 P.2d 399, 402

4. Preparation of food

Chicken with thick crusty batter prevents inspection of anything underneath it. *Yong Cha Hong v. Marriott Corporation*, 656 F. Supp. 445, 448

5. Advertising

“[I]f there had been a representation that the fish was boneless, my conclusion might well be different.” *Ex parte Morrison’s Cafeteria of Montgomery, Inc.*, 431 So. 2d 975, 979

6. Recipes

“We note the emphasis placed on fish chowder recipes by the court in *Webster*. Those recipes did not call for the removal of fish bones. However, the recipes for chicken pie cited by the plaintiff specifically call for the removal of all bones. In addition, the defendant’s own recipe begins with the purchase of boneless chicken meats from its supplier. It is this difference in the nature of chicken pie as opposed to fish chowder which allows us to distinguish the present case from *Webster*.” *O’Brien v. Dora Ferguson Catering*, 1988 Mass. App. Div. 150, 152

You will notice that the case citation includes the page reference for the information. You do not want to be hunting through the case for the point you want to make. There will be too much time between the making of the outline and the writing of a document to trust this information to your memory. Some of the information in my outline was quoted, some was not. It is not uncommon to go back to a case and find that you no longer think you have correctly represented the argument. The page reference will save you a lot of grief.

Every legal writing program has its own formats to follow so the major point to be taken from the above information is its concept—everything must be organized so you can process it.

Organizing for Exams

In a legal writing course, a problem on Section 2-314 of the Uniform Commercial Code could take half a semester. In a casebook course in Contracts, it might occupy part of a day's reading. I, therefore, start this section with general advice about constructing an outline for an entire course then move to how that might apply to the small segment about the implied warranty of merchantability.

There are some very important differences in how you organize for exams versus how you organize for a writing project. In casebook courses, you are reading cases to learn the rules of law and how to demonstrate that knowledge. When you read a casebook chapter like the one in this book, you have no client in mind. You have to learn everything. Exams have no jurisdiction; you are expected to know all possibilities in every jurisdiction. You can start your organizing even before you read the cases.

Everyone may need a different approach to outlining, but everyone should end up with essentially the same product. Everyone needs a short outline of every course organized by legal theory, and a one page checklist. One of the most common reasons for poor student performance on exams is that students spend so much time learning the material from their outlines that they don't leave any time for the most important part of exam preparation, writing out practice exams (covered in the last chapter of this book).

Many students tell me that they have to write everything first (sometimes 150 pages). Then as they learn some material they shorten it to perhaps 75 pages, then to 25, then to 10. Others couldn't imagine writing 150 pages. I am going to suggest another approach—outlining as an expansion process rather than a reduction process. Using context materials, compose a draft outline using a rule sentence, a list of elements, and any rules for those elements. After reading each chapter in your casebook, insert the information about each case under the element of the legal rule that was at issue in the case. As you read your casebook chapter, refine the rule and list of elements, and then modify your outline to reflect the changes. When you reach the end of the course, reduce the entries for each element of each legal rule to the bare bones necessary for study. Then try ordering the topics you covered in the courses into analysis based checklists. You may find that the order in which you read the material in your casebook is not the order you should use to analyze an exam question. You can find more detail about this approach in *Starting Off Right in Torts* and *Starting Off Right in Contracts* by Nygren and Katz.

I think your checklist is your most important study aid. You can memorize a checklist if your exam is closed book. You can assume that your professor will want to test you on most of the topics covered in the course. Sometimes if you mentally run down your checklist as you are reading an exam question, you will see issues that you had not seen before in a convoluted fact pattern. You can search for issues rather than waiting for them to come to you.

We will use the implied warranty of merchantability to practice my approach. Although my method works for me, it might not work for you. You have to find your own best method, but give mine a try.

Following is what your draft outline might look like before you read any cases. It consists of the rule and the elements. You would have learned about the foreign/natural and reasonable expectation jurisdictional differences from your context reading.

Implied Warranty of Merchantability (Draft Outline)

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Merchantability: Section 2-314 (2)(c) provides that goods to be merchantable must be at least such as are “fit for the ordinary purposes for which such goods are used.”

Foreign/Natural Test: Under the foreign/natural test the presence of a harmful substance makes the food unmerchantable only if the substance were foreign to the food.

Reasonable Expectation Test: Under the reasonable expectation test only if the harmful substance is not reasonably to be expected is the food unmerchantable.

After you have read your cases, you can feel fairly confident that you will be able to figure out where each one fits into the rule and elements outline. You may want to put a lot of information for each case as you begin to summarize each legal rule. However, as you get closer to exam time you will want to shorten the information about each case to no more than a few sentences. Following is a sample outline for the cases in Chapter 9 of the book. If you have read the Organizing for Legal Writing section of this supplement, you will see that the outline there is much more elaborate because you would have read exhaustively about the topic to analyze your problem. In a casebook course, your outline for the implied warranty of merchantability will be limited to what you read and what was discussed in class.

Implied Warranty of Merchantability (Outline)

Rule: Section 2-314 of the Uniform Commercial Code provides that “a warranty that the goods shall be **merchantable** is implied in a contract for their **sale** if the seller is a **merchant** with respect to goods of that kind.” The serving of food is covered by 2-314.

Merchant: A merchant (Section 2-104) is “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.”

When a caterer helped to cook food at his church fundraiser, he was acting as a volunteer not a vendor. (*Wentzel*)

Sale: A contract for sale (Section 2-106) “includes both a present sale of goods and a contract to sell goods at a future time. A sale consists in the passing of title from the seller to the buyer for a price.”

When patron was injured by glass in a free drink served by a casino, it’s a sale because he “purchased” the casino’s services by buying chips. (*Levondosky*)

Merchantability: Section 2-314 (2)(c) provides that goods to be merchantable must be at least such as are “fit for the ordinary purposes for which such goods are used.”

Foreign/Natural Test: Under the foreign/natural test, the presence of a harmful substance makes the food unmerchantable only if the substance were foreign to the food.

“Bones which are natural to the type of meat served cannot be legitimately be called a

foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones.” (*Mix*)

Reasonable Expectation Test: Under the reasonable expectation test, only if the harmful substance is not reasonably to be expected is the food unmerchantable.

Advertising

Unprocessed scallops have shells but “boned scallops” are advertised as having no shells. Look at the nature of the food and established custom to be expected by the consumer to determine reasonable expectation. (*Nadeau*)

You will notice that I did not include anything from *Carl*. I included the case in the chapter because I think it should spark discussion. Not all cases are well reasoned, and I think this may be one of them. If I were writing an exam question based on these few cases, I would make sure the food would have been labeled as being pitted, boneless or some such adjective.

It may surprise you that the names of the cases are the last bit of information in each outline entry in both the legal writing outline and this one. That is because the concepts are the most important bits of information. In the legal writing outline, the full citation for the case and page number are given because it will be necessary to refer to specific cases.

Individual cases are usually not important in exam courses. I always include the case names so that I can easily check my understanding of the case later, but as you will see in Chapter 10, most law school exam answers contain no case names. You are using arguments from cases decided in many jurisdictions. Case names would be irrelevant. Some professors suggest that you can use the names of important cases on an exam as a shorthand for a particular legal idea, but very few will expect you to know more than a very few important cases in detail in most of your casebook courses. The exceptions are Civil Procedure, Constitutional Law and Criminal Procedure where Supreme Court cases dominate.

Following is the Julia Kidd example (from the Organizing for Legal Writing section) as an exam question. Note that here there is a question of a sale since there is no price, just a donation. Since exams are in no jurisdiction, you will need to address the outcome under the foreign/natural test. You would essentially follow your outline to answer the question. This is dealt with in depth in Chapter 10.

Question

The evening students at Justice School of Law were hungry and tired. The cafeteria shut down at 5 p.m. Julia Kidd, the pastry chef at Cafe Parisienne (and a Justice student) had an idea. She decided that she could earn some extra money to pay for her law school tuition if she ran a coffee and food service for students.

Julia arranged for her local supermarket to sell her large quantities of tuna salad, roast beef, turkey and cheese at a discount. Each day before school she made and wrapped the sandwiches and bought coffee and doughnuts from the local doughnut shop. She parked her car in front of the law school every night between 5:30 and 6:30. Because she had no license, she put up the following sign:

SUGGESTED DONATION

COFFEE	\$.75
SANDWICHES	\$3.00
DOUGHNUTS	\$.50

One Friday night at 6:20 Brian ran to Julia's car, grabbed a tuna sandwich and coffee, handed her \$2.00 and headed for the entrance, eating as he walked. Suddenly he screamed in pain. He had broken a tooth when he bit down on a tuna bone in the tuna sandwich. He sued Julia under the implied warranty of merchantability. What result?