

HOW THE UCC CAN EXPLAIN THE METAPHYSICS OF REAL ESTATE

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Quite often undergraduate students taking the first real estate principles class protest the amount of law contained in lectures. Prompted by this complaint, the authors began to ponder about the nature of real estate in a way business students could more readily understand, i.e., from the perspective of other business transactions. This article briefly compares a real estate conveyance with the sale of an ordinary consumer good Apple's iPad, in the context of a UCC transaction. By tracking the two sales, the hope is that students and real estate professionals alike will appreciate the true nature of real estate—or rather the metaphysics.¹ By understanding why some legal protections are adhered to in a real estate transaction, while not in the sale of a typical consumer good, we isolate and clarify the distinguishing features of each transaction while adding to the pedagogical understanding of these areas of study.

INTRODUCTION

In many ways, the physical nature of real estate overshadows the other world of real estate, the world of rights, restrictions, and obligations—the realm of the law. However, without an understanding of how the law operates, one may realistically conclude that real estate is “nothing but dirt.” Undergraduate students taking an introduction to real estate course, soon realize that making an overnight fortune by “flipping” real estate is not the focus of the course. In fact, students, due to the current state of the economy, quickly understand that real estate is not the once considered fool-proof money-making investment of the past². These same students often voice complaints about the amount of “law” contained in the lectures. With this concern in mind,

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¹ Metaphysics deals with first principles, including ontology, dealing with the nature of existence, and cosmology, dealing with the origin and general structure of the universe) and is intimately connected to epistemology, which investigates the origin, nature, methods, and limits of human knowledge. <http://pespmc1.vub.ac.be/METAPHYS.html> (last visited 1/26/12).

² Rates of return have declined for real estate investments: Real Estate Home Appreciation, (2011). <http://www.realestateabc.com/outlook/overall.htm> (last visited 11/14/12).

the first inclination of a real estate professor may be to explain, why real estate transactions rely so heavily on the law and why other transactions apparently do not rely so critically on legal regulations. Yet, as one ponders the transfer of other goods and how it differs from real estate, it becomes apparent that all transactions could be as detailed and complex as the sale and transfer of real estate. It is usually quite difficult to relay the concept that all transactions contain and can invoke the same level of transactional complexity of a real estate conveyance.

Often we ignore the amount of law surrounding most real estate transactions and wrongly assume that real estate is inherently different. However, as we will demonstrate, transactional legal complexities exist equally for real estate conveyances as well as the everyday sale of ordinary consumer goods. Of course the difference is often that the conveyances of real estate tend to be more formalized, while the extensive regulations of the Uniform Commercial Code (U.C.C.), which apply to the sale of consumer goods, are not invoked unless there is a disagreement or a specific need. Frequently, parties do not care to protect their investment in goods, given that the relative value is typically not as great as that of real estate. It is our hope that by comparing the processes involved in these two transactions, sale of real estate and consumer goods; students will gain a deeper and clearer understanding of both fundamental real estate principles and transactions governed by the UCC. By distinguishing between these two often complex dealings, we expand a pedagogical understanding applicable to both an introduction to real estate course and a second semester legal environment of business course. In this paper we will use the provided unifying scenario to parallel these two transactions in both procedures and characteristics.

I. UNIFYING SCENARIO

To elucidate a deeper and more complete understanding of both transactions, variations of the following scenario will be used to clarify and contrast several elements associated with both a real estate and UCC transaction. Examples based on this unifying scenario will be used to identify the numerous legal nuances associated with these transactions.

The Bradys, Mike, Carol, and Pete, have just closed on their dream home located in a remote Wyoming subdivision named Windy

Acres. Mike is a successful entrepreneur, while Carol is a successful attorney who specializes in water rights law. Mike is planning to continue his work which involves manufacturing state-of-the-art farm implements. Mike figures the 15,000 square foot barn located on the back corner of his 25-acre plot, and next to a county road, is a perfect place to conduct his work which involves several pieces of loud industrial machinery.

To finance the purchase of their dream home, built in 1977, the Bradys entered into a 30 year fixed mortgage. At closing, they were given a copy of the deed and the home owner association's³ covenants and restrictions. Primary mortgage insurance (PMI) was not necessary because the Bradys provided a 25% down-payment. PMI is a policy provided by private mortgage insurers to protect lenders against loss if a borrower defaults. Most lenders require the mortgagors to use PMI for loans with loan-to-value (LTV) percentages in excess of 80%.

Mike and Carol have a 6-year old son named Pete. For his birthday his parents purchased an iPad2. Unfortunately, his best friend Greg found the gift in Pete's backpack. Despite their friendship, Greg, with the help of his parents, returned it to the store for a full refund of over \$800.

II. THE NATURE OF REAL ESTATE

Waxing about the metaphysical aspects of real estate may appear pretentious, yet when one drills below the surface, beyond the mere acceptance that, "Well, real estate is just different," a deeper understanding often unfolds—an understanding based on finance and legal principles. Peruvian economist, Hernando De Soto, in his book, "The Mystery of Capital" states that, "[p]roperty is the realm where we identify and explore assets, combine them and link them to other assets."⁴ De Soto argues that the physical nature of real estate does not

³ An HOA is an organization in a subdivision, planned community, or condominium that makes and enforces rules for the properties in its jurisdiction.

⁴ De Soto, H., *The Mystery of Capital* 47 (2000). De Soto details the ability of the West to extract value from assets and produce capital from the legal constraints and protections placed on the assets. Until the Third World can produce the same or similar legal framework, the amount of dead capital resulting from the use of land in an "extralegal" fashion, will not allow the Third World to compete with developed countries. "Extralegal" is defined as transactions or assets not sanctioned or protected under the law. Thus a shanty house may not be illegal, but yet not

truly determine its worth; rather, it is the ephemeral web of legal protections and its combination with the physical world that gives land its true value. Real estate represents a bundle of rights, with a connection of obligations that in turn, present many opportunities to lose those rights. As an example a holder of a life estate will quickly lose their right to the property if they commit waste, such as destruction of property. Real estate has unique and distinctive characteristics, such as age, architectural design, and location. Further real estate is unlike other assets because it is “heterogeneous and immobile.”⁵ In other words real estate is unique and difficult to move.

Unfortunately, students studying real estate for the first time may have never viewed real estate as a legal construct, but rather a real, tangible asset. Perhaps because real estate is so closely tied to the physical world, students have always known it is difficult to separate the apparent value from the true nature of worth. De Soto goes on to clarify by stating “property is not a physical thing that can be photographed or mapped. Property is not a primary quality of assets by the legal expression of an economically meaningful consensus about assets.”⁶ Students comprehend that real estate must be valuable given its relative worth compared to other assets. When students are asked what makes land so valuable—especially if it is truly just dirt, some understand that it is the utility that real estate can produce, especially given its permanence, its overall importance in our lives, and its relative scarcity.

At its core, real estate, the dirt, the structures, and the improvements that we build on the land cannot sustain the immense value real estate tends to hold without the complex combination of rights that allow the user a base from which to better our lives, either in the personal sense of a residence or in a commercial application where we initiate our businesses.⁷ This nexus of regulation and law

protected under the law. Without this protection, this asset is “dead,” meaning that the value contained in its physical nature, cannot be used to create capital.

⁵ Ling, L. C., & Archer, A. R., *Real Estate a Value Approach* 13 (2000).

⁶ *Supra* note 4, at 157.

⁷“The proof of property is pure concept comes when a house changes hands; nothing physically changes. Looking at a house will not tell you who owns it. A house that is yours today looks exactly as it did yesterday when it was mine. It looks the same whether I own it, rent it, or sell it to you. Property is not the house itself but an economic concept *about* the house, embodied in a legal representation. This means that a formal property representation is something separate from the asset it

permits vast investment to flow from the present and allow for future returns.

In order for returns to be realized, real estate conveyances are a core requirement in a capital market system. With real estate how one takes title, as well as the form of ownership and the subsequent conveyance issues, inheritance problems, the question of good title, and mortgage financing are all areas of legal concern. It is this complexity which may lead students to believe that real estate conveyances are inherently different from other commercial transactions.

Clearly, one of the key distinctions between consumer goods and real estate is the relative value non-durable goods have as compared to a piece of real estate. Because there would be very little utility associated with buying and selling individual “square meters” of real estate, the typical real estate transaction has a large number of units being transacted at the same time. This is one of the reasons real estate has such a relatively high value as compared to other transactions. Thus, much of the following is predicated on the understanding that because of the limited divisibility of real estate into smaller transact able units, one of the most obvious inherent differences is the large relative value of real estate.

In order to maximize the utility of real estate, large quantities are utilized. Assemblages or large developments, often require the stealth actions of developers and often city councils over a number of years. Once the development site is assembled, it is often then subdivided into smaller units or plats. Even so, these units are large enough relative to a person’s portfolio, that they often comprise the single largest asset. The relative value involved in most real estate transactions requires that care be exercised to ensure each transaction is performed exactly as the purchase contract dictates. Attorneys and escrow agents often are employed to ensure understanding and compliance with the purchase agreement causing the transaction costs to increase.

represents.” *Supra*, note 4, at 50.

III. INSURANCE AND TITLE

The first transactional characteristics we review involve the insuring and titling of property. Real estate is clearly a physical or tangible asset. Even though there is a duality involving the physical and legal nature of its existence, the physical nature of real estate often dictates the legal treatment of the asset. In the short term, the land component of real estate cannot be manufactured or destroyed.

Real Estate's immovability and perpetual characteristics necessitate that clear ownership is established and proven so as to avoid future adverse claims of ownership. It is this characteristic that explains the complexity in closing procedures and the need for recordation of title. Consequently, establishing ownership is important because of the lasting consequences such as ownership disputes, property misuse, adverse possession, etc.

In real estate, establishing good title is a major concern as most states have recording acts which set out detailed requirements necessary for establishing one's ownership or title to a particular parcel. Usually these recording statutes require a deed of trust, or any encumbrance against a property, be filed publicly. Filing of the deed in a local office is necessary to ensure complete transfer of title and protect against future adverse claims. Once the purchase agreement has been signed, the doctrine of equitable conversion classifies the property as transferred in accordance with the common law of contracts. Additionally, before any purchase agreement can be finalized, the buyer may be required to purchase some sort of title insurance in order to help identify all encumbrances and legal owners of each parcel. Generally, an attorney will be hired to review an abstract of title and issue a title commitment.⁸

By comparison, consumer goods⁹ are generally only subjected to a voluntary registration process. With consumer goods title passes in any manner on which the parties agree.¹⁰ In fact, with consumer

⁸ A system parallel to these common recording procedures involves the transfer of property through the use of a Torrens system. This system is quite simple and requires a simple certificate of title be created for each parcel which delineates the current owner and all encumbrances.

⁹ In contrast, automobiles have a standardized or centralized title process where registration is recorded. All automobiles have a title, which is a legal document issued by the state Department of Motor Vehicles (DMV).

¹⁰ U.C.C. § 2-401(1) (2003).

goods, physical identification of the goods and detailing insurable interests¹¹ is as important as the determination of title or ownership itself. Distinctions between shipment contracts¹² and destination contracts¹³ decide when the risk of loss¹⁴ is transferred between the seller and buyer, therefore determining who has an insurable interest.

With regards to insurance, real estate regulations provide for casualty insurance which protects against the loss of utility, in many instances, over the useful life of the improvements. Typically, casualty insurance is required because mortgagees insist on protecting their collateral, but also because real estate often constitutes a large portion of the relative wealth in one's portfolio. In contrast, consumer products are often covered by limited or full manufacture warranties.

Imagine if a fire destroys the Brady's property after the purchase agreement has been signed, but before the Bradys have taken physical possession. Who would bear the risk of loss? In this case the Bradys may still bear the risk of loss unless otherwise designated in the purchase agreement.¹⁵ If a seller refuses to deliver possession after signing a purchase agreement, a court can order specific performance, delivering the property to the buyer. If the seller of the Brady's property has second thoughts and refuses to deliver the deed to the property, a court, effectuated with the help of a local sheriff, will demand the property be delivered through an order of specific performance. The basis for this protection is that with real property legal or monetary damages are perceived as inadequate.¹⁶

Buyers of consumer goods can receive protections under the UCC section entitled Insurable Interest in Goods,¹⁷ where the Code provides guidelines for both buyer and sellers of goods with regard to their respective insurable interests. In addition, buyers of real estate are concerned with defects, along with the existence of outstanding liens that may affect the future transferability of the land. The transferability of an iPad is typically not investigated because of the assumption that

¹¹ U.C.C. § 2-501 (2003).

¹² U.C.C. § 2-401(2)(a) (2003).

¹³ U.C.C. § 2-401(2)(b) (2003).

¹⁴ U.C.C. § 2-509(1)(a)-(b) (2003).

¹⁵ Hinkel, Daniel. (2005) *Essentials of Real Estate Law* 126 (5th Edition 2005).

¹⁶ See, S. Schwartz, *The Case for Specific Performance*, 89 *Yale Law Journal* 272 (1979).

¹⁷ U.C.C. § 2-501 (2003).

the merchant has good title and the adverse consequence of having to return the iPad will not affect the buyer's overall asset portfolio. Yet these protections are still present under Article 2.

Uniqueness is another distinguishing element for real estate. Real estate is unique for a variety of reasons including location, view, traffic, and noise. For example, residential lots with a view of a coastline sell for a premium as compared to the same house across the street with a view of an alley. It is also this uniqueness that at times requires the equitable remedy of specific performance rather than monetary damages to resolve a dispute. Consumer products, such as an iPad, enjoy no such uniqueness. If an iPad is stolen or damaged, money damages will be invoked rather than specific performance.

IV. USE AND MISUSE

Our next characteristic involves the use of property. With real estate, how we limit its usage is important because of the potential duration of the restrictions as well as the relative value involved. Covenants that run with the land or equitable servitudes can significantly diminish value.

Just as there is a litany of use restrictions for real estate, there are also restrictions of use for consumer products. Manufacturers place strict prohibitions within their limited warranties¹⁸ and federal intellectual property law dictates strict protections for inventor patents and copyrights¹⁹. However, with consumer products such as an iPad, one is generally not concerned with permission to use the property in a certain way. If someone wanted to use the iPad as a coaster or possibly jail break the device, few, outside of the manufacturer, would complain about its apparent "misuse" because the marginal impact is typically small, yet just as we have for real estate, there are regulations which prohibit and protect against this type of misuse.

Similarly, if one desires a variance to a zoning restriction, the level of oversight and involvement will be much greater. Fines, liens, or even foreclosure can result if we fail to cease our non-conforming use.

Take the Brady's purchase of a new home and assume that

¹⁸ Apple One Year Limited Warranty, <http://www.apple.com/legal/warranty/iphone.pdf> (last visited 12/1/11).

¹⁹ Infringement of Patents, 35 U.S.C. 271 (2011).

after a few months their neighbors begin to complain about the constant noise from Mike's array of industrial machinery. Do the neighbors have any remedies? Yes, if a properly recorded deed identifies an encumbrance such as an equitable servitude, the American version of a covenant that runs with the land.²⁰ Assume the original subdivision covenants forbid the use of industrial machinery and the operation of a business within the Windy Acres subdivision. If that is the case, any one of the Brady's neighbors can demand that the Bradys stop all business activities on their property or possibly forfeit the property through foreclosure. The need for equitable servitudes comes from the permanency and value involved with real estate. It is neither feasible nor practicable to risk exposing the value of real estate to unprotected collateral use by neighbors.

iPad Product	Federal Statutes provide penalties for intellectual property violations. Manufacturer restrictions and warranties may be voided if the consumer unlocks or "jail breaks" the device.
Windy Acres Subdivision	HOAs often enforce the codes, covenants, and restrictions that are included in the purchaser's deed. Equitable servitudes and zoning restrictions can prohibit certain uses of land including, the operation of a business.

V. DISCLOSURES

Disclosures are an additional component of both a consumer goods transaction and a real estate sale that can often be overlooked. In the course of a real estate transaction disclosure requirements are exceptionally extensive and encompassing. Federal requirements²¹ dictate complete disclosure in all credit phases of a real estate transaction, along with disclosures that involve consumer safety. For instance, federal legislation demands not only disclosure, but also

²⁰ A covenant is said to run with the land in the event that the covenant is annexed to the estate and cannot be separated from the land or the land transferred without it. Such a covenant exists if the original owner as well as each successive owner of the property is either subject to its *burden* or entitled to its *benefit*. A covenant running with the land is said to touch and concern the property.

<http://legal-dictionary.thefreedictionary.com/covenant> (last visited 11/29/11).

²¹ Truth in Lending Act of 1968 (TILA), 15 U.S.C. 1601 (2009).

education through pamphlets, especially with regard to the potential presence of lead paint²² in housing built before 1978. Assume the sellers of the Windy Acres property forget to disclose the presence of lead based paint in the main house. If Pete, acting on a dare from Greg ingests some paint chips, and subsequently falls ill, the sellers of the Windy Acres property may be liable.

When financing is required, the Truth in Lending Act (TILA),²³ the Department of Housing and Urban Development (HUD), and the Real Estate Settlement and Procedures Act (RESPA)²⁴ all demand full upfront disclosure of credit terms. With real estate, past use, development, and history of the surrounding neighborhood can provide clues about the future with regard to appreciation and use. Real estate investors are clearly concerned with receiving the appropriate disclosures and property reports. If for example, latent defects or the presence of hazardous materials that can substantially affect the utility of property are not disclosed, both buyers and sellers may be subject to potential liability.

Common law²⁵ requires merchants to disclose all known latent defects and often imposes strict liability for failure to disclose.²⁶ In contrast, there are relatively few regulations requiring disclosure for an iPad sale. Goods, like iPads, are generally homogenous and consistent. Outside of click-wrap licenses²⁷ which will bind the consumer to settle any dispute through binding arbitration²⁸ in Apple's jurisdiction

²² Residential Lead-Based Paint Hazard Reduction Act of 1992, Title X, 106 Stat. 3672 (1992).

²³ 15 U.S.C. § 1601 (2009).

²⁴ 12 U.S.C. § 2601 (2008).

²⁵ Common law is the system of deciding cases that originated in England and which was later adopted in the U.S. Common law is based on precedent (legal principles developed in earlier case law) instead of statutory laws. <http://definitions.uslegal.com/c/common-law/> (last visited 11/15/11).

²⁶ See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962). In this landmark case the court argues that the notice provision of the express warranty claim did not apply to the manufacturer of a defective lathe.

²⁷ A click wrap license is an end user agreement, concerning the use of a copyright work that is enclosed with software in plastic-wrapped packaging. It includes pre-drafted terms and conditions of sale that consumers are required to agree before unpacking and using the product. <http://definitions.uslegal.com/s/shrink-wrap-license/> (last visited 10/15/11).

²⁸ In this example the arbitration clause would constitute, California common law. While California common law may not be controlling in any other jurisdictions, it may be persuasive.

of choice (California), there is little need for disclosure. Rather, goods are presumed to be fit for their ordinary purpose unless otherwise disclaimed.²⁹ This is not to say there are no disclosures required in an iPad sale. The priorities are simply focused on ensuring that any disclosures or disclaimers related to warranty or quality are clearly and conspicuously written.³⁰ Generally, iPad users need not concern themselves with these issues. If the iPad is defective the UCC provides clear protections for the end user.

Table 2: Disclosures	
iPad Product	Magnuson-Moss Warranty Act. ³¹ Requires full and conspicuous disclosure of warranty terms and type of warranty, limited or full.
Windy Acres Subdivision	RESPA: Requires all fees and costs of a loan be disclosed, must provide a Good Faith Estimate and a HUD-1. Lead Paint: If property built before 1978, owners must disclose possibility may contain lead paint

VI. CONSUMER PROTECTIONS

Consumer protections are closely related to both disclosures and warranties. When buying an iPad, the transaction is generally simple and does not require the elaborate procedure that coincides with a real estate transaction, such as a closing whereby one signs document after document. The sale typically is done with cash or revolving bank credit. One takes possession, never giving much thought about someone else having a claim on the iPad. Consumers generally do not worry about Wal-Mart, or other traditional retailers, having a bad title or selling stolen merchandise.³² The sale produces a receipt which can satisfy the “writing” requirement under the Statute of Frauds, but one hardly pays attention and almost never saves it. The sale is not recorded in public records and there is no public disclosure. If we decide to give or sell the iPad to a friend, the friend is unlikely to require proof of ownership as its relative value to one’s overall

²⁹ U.C.C. §2-314(1) (2003).

³⁰ U.C.C. § 2-316 (2003).

³¹ 15 U.S.C. § 2301 (2010).

³² U.C.C. §§ 2-403, -721, -312, -711 (2003).

portfolio is quite small.

Although the sales of most consumer goods, certainly including an iPad, do not usually necessitate extensive oversight, there are regulations covering the forms used in these transactions. Specifically, when iPad merchants negotiate sales they generally exchange pre-printed boilerplate or generic forms. These boilerplate forms will vary from dealer to dealer with terms adjusted to favor each individual dealer. Under the battle of the forms provisions,³³ the code definitively establishes when a contract has been formed and which conditions are enforceable. As with real estate transactions and the clarity provided by the RESPA, the UCC Article 2 provides some standardization, which facilitates confidence and certainty in everyday transactions such as a consumer sale.

Do buyers of an iPad have a duty to inspect the product? Consumers typically are neither interested in nor required to inspect an iPad given the consumer protection laws in place,³⁴ which often provide the ability to sue the manufacturer or retailer even without privity³⁵ of contract. The reality is that, because of the uniformity of the product, we expect that the iPad will perform as promised. From the consumer's perspective, the potential liability for a malfunctioning iPad is minimal. In contrast, given the idiosyncratic nature of real estate, inspection typically is considered essential as witnessed by the fact that many buyers hire experienced home inspection firms as a matter of due course in the purchase of a home.

In fact, the home buyer can risk substantial liability by not inspecting before completing purchase.” This risk can include liability under the Comprehensive Environmental Response, Compensation, and Liability Act, CERCLA,³⁶ even potentially for new owners if their property contains hazardous material. Assume the Bradys discover that a previous and non-locatable owner had improperly disposed of a large amount of fertilizer on their property and under CERCLA, also known as the superfund; their property is labeled as a hazardous site. Who should pay for the cleanup? The Bradys, as the current owners, may be personally liable for the cleanup of this property unless they can avail themselves of the superfund's narrowly drafted innocent landowner

³³ U.C.C. § 2-207 (2003).

³⁴ 15 U.S.C. §§ 2051-2083 (2004).

³⁵ See, *Reed v. City of Chicago*, 263 F. Supp. 2d 1123 (2000).

³⁶ 42 U.S.C. § 9601-9675 (2009).

(ILO) defense.³⁷

It should be mentioned that depending on the cost of an iPad, the well cited Statute of Frauds³⁸ section requires that the sale of any good for \$500 or more must be in writing to be legally enforceable. While \$500 is a relatively low requirement, this section does add an element of formality to these sales, with the store’s receipt fulfilling the writing requirement. Conversely, the real estate conveyance traditionally is predicated on deeds, abstracts, chains of title and recordation statutes. Generally, state statutes, require that real estate conveyances be in writing, usually in the form of a deed.³⁹

As previously mentioned real estate’s value as compared to non-durable goods is often relatively large. As a result real estate transactions, in part due to their subsequent potential for abuse, are governed by several federal regulations. As an example, federal consumer protection laws have produced standardized transaction documents. Federal regulation, such as the Real Estate Settlement and Procedures Act,⁴⁰ RESPA, which is administered by HUD, has helped standardizing the closing documents and procedures. Consumers can engage in real estate transactions more freely and with greater certainty and confidence owing to these standardized forms.

Table 3: Consumer protections	
iPad Product	UCC 2-207: The paradigm Battle of the Forms dictates which terms of a contract are to be incorporated and enforced. UCC2-314 & 2-315: Merchantability and Fitness for Particular Purpose
Windy Acres Subdivision	TILA (regulation Z): promotes informed use of credit, requires costs of borrowing to be clearly disclosed. CERCLA: encourages through inspection of property and provides liability for previous real estate owners.

³⁷ EPA guidelines on Landowner Liability under Section 107(a) of CERCLA, *de minimis* Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property.

³⁸ U.C.C. § 2-201 (2003).

³⁹ In Colorado, for example; C.R.S. §38-10-108 , requires that a real estate conveyance be completed in writing, the form of which is provided by C.R.S. §38-30-113.

⁴⁰ 12 U.S.C. § 2601 (2008).

VII. WARRANTIES

Generally speaking, real estate warranties, excluding warranties of deed, are not very comprehensive or prevalent, primarily owing to common law traditions of *caveat emptor*. If there are breaches in a real estate contract, remedies at law and equity are typically available. The few common statutory warranties available in residential real estate include the implied warranty of habitability⁴¹ whereby the warranty provides that the landlord or contractor deliver the premises in a habitable condition. Broken pipes, rodents, water leaks, and the like will all be considered violations of this implied warranty.

However, with consumer transactions, the life span of the asset is much shorter and the value involved much lower so that without enforceable warranties, the consumer would be left without a reasonable or effective means of having the seller make right on the sale. The UCC provides two main types of warranties, which may be categorized as either express or implied warranties. The seller creates an express warranty with his words or actions.⁴² Usually any affirmative description of an iPad or other good can create an express warranty.⁴³ If an expression by the seller was part of the basis of the bargain, courts will likely rule that an express warranty was created.

The UCC also provides implied warranties for the sale of goods such as an iPad. The most relevant are the implied warranties of merchantability,⁴⁴ and fitness for a particular purpose.⁴⁵ These provide, respectively, that the iPad will be fit for its ordinary purpose and that the good, the iPad, will meet the buyer's expressed needs.

Again, any type of disclaimer of warranty needs to be conspicuously displayed.⁴⁶ For example, if Pete's iPad gives him a small electrical shock every time he touches the iPad, it is clearly not fit for its ordinary and intended use. As provided by the UCC Pete can get a refund for his iPad as well as any "Incidental and Consequential"

⁴¹ Generally, a state created protection generated through a combination of court rulings and state-specific legislation.

⁴² U.C.C. §2-313 (2003).

⁴³ U.C.C. §2-313(2)(b) (2003).

⁴⁴ U.C.C. § 2-314 (2003).

⁴⁵ U.C.C. § 2-315 (2003).

⁴⁶ U.C.C. §2-316 (2)(2003).

damages he has incurred as result of this defect.⁴⁷

iPad Product	Merchantability: UCC 2-314 Fitness for a particular purpose: 2-315 Express: UCC 2-313 Title: UCC 2-312 Magnuson-Moss
Windy Acres Subdivision	General Warranty Deed: Covenant of Seisin, Right to Convey, Covenant Against Encumbrances, Covenant of Further Assurances, Quiet enjoyment, and Covenant of Warranty

In contrast, with real estate, if a warranty is breached or the buyer is for some reason dissatisfied, potential avenues of recourse vary. Once a buyer takes delivery of the deed and the conveyance is completed, rescission is typically not available, unless there has been fraud.

By comparison, UCC warranties provide an immediate and convenient remedy for the consumer that otherwise would make enforcement cost prohibitive. The UCC therefore lowers the barrier created by common law enforcement and lowers the uncertainty. The UCC allows for recession or more correctly the rejection of goods which do not perfectly comply. For example, under the perfect tender rule,⁴⁸ the buyer has the option and right to reject all, accept all, or reject part of the delivery for failing “in any respect to conform to the contract.” The same holds true under many of the sale-purchase agreements that allow the buyer of real estate a certain time limit to inspect the property.

Continuing with our unifying scenario, assume Pete decides to return his iPad after discovering it only has 10 GB of memory instead of the promised 64GB. The UCC will allow Pete to return the iPad for a full refund. By comparison, if the barn roof collapses or a large sinkhole opens up in the middle of the Brady’s property rendering the barn area unsafe, Mike will no longer be able to operate his business. Even if Mike can no longer operate his business and thus has little use

⁴⁷ U.C.C. §§ 701 *et seq.* (2003).

⁴⁸ U.C.C. § 2-601 (2003).

for such a large property, due to the nature of real estate, he may have no legitimate avenue of recourse.

VIII. REPOSSESSION AND FORECLOSURE

Finally, we will look at the unpleasant transaction characteristic of repossession or foreclosure. Foreclosure is an unfortunate yet increasingly prevalent aspect of real estate transactions due to the large relative wealth and requisite large loans which are frequently involved. For the average consumer, the single largest purchase involves the residential home. As such, financing is almost universally required in the form of a mortgage. Mortgages or Deeds of Trust require the establishment of an executable lien in the event of non-payment. With real estate ownership, the failure to make payments will result in the eventual foreclosure of the property. With most consumer products, due to the relative lack of value, foreclosure or replevin is not a fiscally feasible alternative for creditors.

In many real estate transactions, investors are careful to limit their ultimate liability to loss of the property itself. Limiting liability by using non-recourse debt⁴⁹ is a common and effective method for shielding one's personal assets from catastrophic real estate losses. For instance, if the Bradys stop making payments to the mortgagee or stop paying property taxes, each state has well delineated foreclosure processes whereby the property can be sold to satisfy the outstanding liens and debts against it.⁵⁰

Consumer purchases almost universally involve a completed purchase either into the form of cash or consumer bank credit. The sale of a consumer good could involve a UCC Article 9 security interest.⁵¹ These steps, however, are rarely taken because of the relative lack of value. Similarly to foreclosures, escrows, equitable conversion, and specific performance all are necessary to ensure the proper operation of real estate markets. Again these protections, while available, are infrequently discussed when considering the sale of an ordinary product like an iPad.

As an example, while repossession of Pete's iPad is unlikely, a

⁴⁹ In the case of non-recourse debt for which there is no personal liability, only collateral can be used to satisfy debt.

⁵⁰ <http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp> (last visited 11/15/11).

⁵¹ U.C.C. §9-302(b) (2003).

breach in a sales contract of an iPad will have well-defined remedies. UCC Article 2, Part 7, provides clear guidelines with regard to liabilities and remedies. Unlike a real estate transaction where the buyers have a seemingly perpetual obligation to pay down their debt and/or taxes or face foreclosure, a statute of limitations⁵² puts a precise limit, generally no more than 5 years, on the time during which contract claims can be brought. Further, as with real property, limitations as to what can be recovered in a case of a breached contract can be imposed by contract with mutual agreement of the parties. These limitations are defined under the section entitled Contractual Modification or Limitation of Remedy.⁵³

**CONCLUSION: REAL ESTATE WITHOUT THE LAW IS NOTHING BUT
DIRT.**

By comparing a land transaction to the everyday sale of a consumer good, we expose a fundamental principle which demonstrates that both transactions can invoke the same level of complexity. However, in most instances, this complexity is rarely invoked in the case of an iPad sale due to transaction costs. Without the protections afforded by law, real estate quickly loses its apparent worth. In the realm of real estate, it is the use of law which creates value. Fundamentally, real estate, as with all assets, requires confidence in the enforcement of laws. Without this trust in the protection and enforcement of law, modern development of real estate would have been stunted. We recognize that without the rule of law, few developers would risk a sizeable investment which could be undermined by squatters, zoning violations, or even government takings. These protections allow for the vast capital investments in real estate that our students are so accustomed to seeing.

This article highlights the many similarities and differences between consumer transactions and real estate conveyances. Most casual observers would conclude that because of its relative value, real estate is protected much more than other transfers of ordinary goods. This conclusion is incorrect. What the preceding comparison demonstrates is that all assets can claim similar protection and regulation. Central to our analysis is that, given the relative value in

⁵² U.C.C. § 2-725 (2003).

⁵³ U.C.C. § 2-719 (2003).

the transactions, in most instances, the costs of invoking these protections, in a consumer goods transaction, far outweigh the potential benefits.

Using the above comparison, the real estate student can appreciate why a real estate principles course fixates on transaction minutia, while also appreciating the fact that the same complexity could be invoked in most other consumer dealings. By juxtaposing real estate and an ordinary consumer goods sale, we provide a deeper and demystified understanding that, at its core, the metaphysical, real estate is just like any other asset.