

*July 2023*  
*MPT-2*  
*Drafters' Point Sheet*

*Martin v. The Den Breeder*

The MPT point sheet addresses the factual and legal points encompassed within this MPT. It presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

## **Martin v. The Den Breeder DRAFTERS' POINT SHEET**

This performance test requires the examinee to write an advice letter to Anthony Martin, who purchased a purebred Irish wolfhound puppy he named Ash. A month after the sale, Ash showed signs of an illness that testing showed was caused by a congenital defect. Martin wants to sue the breeder (Simon Shafer, d/b/a The Den Breeder) and recover both the full purchase price for Ash and the cost of treatment for Ash's condition. The task for examinees is to prepare an advice letter assessing the merits of Martin's claim against The Den Breeder.

The File includes the task memorandum; a "format memo" with guidance on how to write a client advice letter, a transcript of the client interview, the contract of sale, an email from Ash's veterinarian, and an article describing Ash's condition. The Library includes selections from the Franklin Uniform Commercial Code and from the Franklin Pet Purchaser Protection Act, and a single case, *Cohen v. Dent* (Fr. Ct. App. 2020).

### **I. FORMAT AND OVERVIEW**

The examinee's task is to draft a client advice letter, using the format set out in the firm's guidelines. In the letter each issue should be identified and phrased as a question, followed by a one- or two-sentence short answer. The examinee should then provide a more detailed analysis of each issue, incorporating the relevant facts and citing appropriate legal authority. The letter should be written in a way that is accessible to the client, defining technical terms and paying close attention to structure and sequence in the discussion.

Note that the task memorandum does not lay out the issues for the examinee to address or provide guidance on how to structure the analysis. However, the *Cohen v. Dent* case has been drafted to prompt a specific sequence for the analysis: the language and clarity of the contract, the Franklin Pet Purchaser Protection Act (FPPPA), and the applicable provisions of the Franklin Uniform Commercial Code.

### **II. FACTS**

This section contains the facts relating to Martin's purchase of the dog, Ash, from Shafer:

- Some time ago, Anthony Martin decided to purchase a dog, and specifically an Irish wolfhound.

- About a month and half ago, Martin contacted a breeder named Simon Shafer, who was doing business as “The Den Breeder” and raising Irish wolfhounds.
- Martin visited Shafer on his property and formed a connection with an Irish wolfhound puppy.
- Shafer quoted a price of \$2,500 for the puppy, which Martin agreed to pay.
- Martin asked about the puppy’s health. Shafer said that all his dogs were healthy, and Martin thought the dogs looked lively and active.
- Specifically, Martin did not ask Shafer whether the puppy had a condition called a liver shunt, the condition which later testing indicated the puppy had.
- Shafer asked Martin to sign a contract, which is included in the File.
- Martin paid the agreed price, took the dog home, and named him Ash.
- After about a month, Martin began to notice unusual behavior in Ash, including confusion, disorientation, and apathy.
- Martin took Ash to his veterinarian, Dr. Claire Turner, who advised Martin that she should test for a condition called a “liver shunt.”
- Two days later, Dr. Turner emailed Martin and confirmed that Ash did in fact have a liver shunt. She included an article explaining the liver shunt condition.
- Dr. Turner estimated the cost of surgery to correct the condition to be at least \$8,000 and indicated that additional treatment would be necessary after surgery.
- In the email, Dr. Turner also offered to complete a state-drafted, state-required form to certify the presence of a congenital defect.
- The news of Ash’s condition angered Martin. He called Shafer, notified him of the test results, and asked Shafer to refund the purchase price and to pay for the surgery to correct the liver shunt.
- Shafer refused. He said that Martin should have gotten Ash tested as soon as he bought him and that a test would have shown the disease. Since Martin waited so long to let Shafer know, Shafer said he had no obligation to pay Martin anything.
- Both Dr. Turner’s email and the attached article indicated that there was no scientific consensus on when to test puppies for liver shunt.
- Dr. Turner said that reputable breeders would do the test and provide the results to their customers.
- However, Martin bought Ash when Ash was eight weeks old. Both Dr. Turner and the article indicate that veterinarians typically suggest testing at a later date. The article suggests testing at 16 weeks, which is later than the time when Martin first noticed Ash’s symptoms.
- The article also reports that testing at any age can produce both false positives and false negatives.

- It is thus unclear whether testing at or soon after the date of sale would have indicated that Ash suffered from a liver shunt.

### III. LEGAL SOURCES

The Library contains excerpts from the Franklin Uniform Commercial Code, excerpts from the Franklin Pet Purchaser Protection Act, and one case, *Cohen v. Dent*.

#### Uniform Commercial Code

##### § 2-314 Implied Warranty of Merchantability

This section defines the implied warranty of merchantability and states that the implied warranty exists for any contract for the sale of goods if the seller is a merchant with respect to those goods. It defines what facts must exist for “goods” to be “merchantable.” Of greatest importance, it states that the goods must “pass without objection in the trade under the contract description” and be “fit for the ordinary purposes for which such goods are used.”

**Note:** An examinee should not confuse this language with the wholly separate “warranty of fitness for a particular purpose,” which has been excluded from consideration in this problem.

##### § 2-316 Exclusion or Modification of Warranties

This section identifies the circumstances in which a contract of sale might exclude or modify the implied warranty of merchantability. Subsection (2) states that any language excluding such a warranty must mention the term “merchantability” and, if in writing, must be conspicuous.

Under § 2-316(3)(a), there are alternate methods for excluding an implied warranty of merchantability, including expressions such as “as is” or “with all faults.” It also describes language that “in common understanding calls the buyer’s attention to the exclusion of warranties” and makes plain that no implied warranty exists.

In addition, if a buyer has had and exercised the opportunity to inspect the goods (or has had the opportunity and refused), no warranty exists as to “defects which an examination ought in the circumstances to have revealed to him.” § 2-316(3)(b),

**Note again:** This excerpt excises any reference to how the implied warranty of fitness for a particular purpose might be excluded.

## **§ 2-714 Buyer's Damages for Breach in Regard to Accepted Goods**

This section states that a buyer of goods that do not conform to the contract specifications (“nonconforming goods”) may recover damages for the seller’s breach. It also states the measure of damages for breach of warranty: “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.”

## **Franklin Pet Purchaser Protection Act (FPPPA)**

This Franklin statute is a redacted version of New York’s “pet shop lemon law.” New York is one of at least 22 states that have enacted a pet lemon law. These laws protect purchasers of animals (usually but not always dogs and cats) in cases where the animal turns out to have a serious illness or a congenital defect. In order to accomplish this goal, a typical Pet Purchaser Protection Act requires the seller to make certain disclosures about an animal that is offered for sale, while also affording the purchaser a remedy if a diseased animal is purchased from the seller. Other than this general outline of pet lemon law features, no one pattern dominates. Because of the diversity of approaches, this Franklin statute and the case that applies it (including the embedded cases) all apply New York law.

The FPPPA, in § 753(b), gives the purchaser of an animal a remedy in two circumstances: appearance of an illness within 14 days that renders the animal unfit for purchase, and appearance of a congenital condition within 180 days (six months) that “adversely affects the health of the animal.” In both cases, a licensed veterinarian must certify the fact that the animal has the stated condition.

If these requirements are satisfied, the buyer has only three remedies under the act: to return the animal for a full refund and reimbursement of the costs of testing the animal; to return the animal in exchange for an animal of equivalent value, plus reimbursement for the costs of testing; or to retain the animal and recover from the dealer/breeder the cost of curing or attempting to cure the condition.

Importantly, § 753(d) states that this statute does not “limit the rights or remedies that are otherwise available to a purchaser under any other law.”

### ***Cohen v. Dent* (Fr. Ct. App. 2020)**

This case discusses the interaction between the FPPPA and the UCC in connection with the sale of a bulldog who developed hip dysplasia, another congenital defect. The case provides examinees with an approved method of analyzing the problem: first, a review of the written contract of sale for the animal; second, the application of the FPPPA, including whether it provides an exclusive remedy; and third, the application of selected warranty provisions of the UCC.

***Contract:*** The court noted that the relevant contract language had been drafted by the seller and that it contained ambiguities that prevented the court from resolving the dispute. Given these ambiguities, the court then noted a traditional rule of construction: to interpret the provisions of an ambiguous contract most strongly against the party who drafted it. The court ruled against the seller's argument that the contract foreclosed the buyer from any other remedy. It then turned to an analysis of the statutes.

***FPPPA:*** The court described the FPPPA generally and noted that the plaintiff had acted within the statutory time period for a remedy for a congenital defect. Given that and given that the plaintiff wanted to keep the dog in question, the court stated that the plaintiff had the right to keep the dog and receive reimbursement for curing the animal.

Note that, in *Cohen*, unlike in the *Martin* case so far, a licensed veterinarian had certified the condition of the animal as required by the statute, using a common form.

Finally, the court also stated that the remedies provided under the Act are not exclusive and rejected the defendant breeder's argument that the plaintiff buyer was limited to remedies under the FPPPA.

***UCC:*** Turning to remedies under the UCC, the court cited a line of cases showing that animals are "goods" within the UCC and that breeders are "merchants" with respect to those goods. It confirmed that contracts for the sale of animals include an implied warranty of merchantability. It confirmed that an animal with a congenital defect is not "fit for the ordinary purposes" for which it was purchased, even where the defect does not cause fatal consequences.

Importantly, the court rejected the defendant's reliance on a case in which the court found that a contract amounted to a waiver of the implied warranty of merchantability where (a) the contract contained an explicit requirement of inspection within two days of purchase, (b) the buyer had failed to have an inspection performed, and (c) an inspection would have disclosed the existence of the congenital defect. The embedded case, *Tarly v. Paradise*, involved just these facts, and the

court in that earlier case rejected the buyer's claim for breach of the implied warranty of merchantability. By contrast, in the *Cohen* case, no explicit requirement of inspection existed.

Of equal importance, the court stated that the plaintiff, Cohen, could both exercise a choice of remedy under the FPPPA *and* recover damages under the UCC's implied warranty of merchantability. And in conclusion, it noted that the measure of damages for breach of this implied warranty (the difference in value between the goods as warranted and the goods as accepted) could include a refund of the entire purchase price of the animal.

#### **IV. ANALYSIS AND RECOMMENDATION**

As noted, the task memorandum does not ask specific questions and so does not call for a particular structure. At the same time, the *Cohen* case provides a structure that examinees may use to frame their analysis: review of the provisions of the contract, assessment of remedies under the FPPPA, and assessment of remedies under the UCC. This section uses this structure.

##### **The Contract**

While not identical to the language in *Cohen*, the contract here shares the same degree of ambiguity. The drafters intended the contract to be "badly drafted," in the sense that it likely did not receive review from an attorney before being used by the breeder.

Specifically, this contract

- does not state any express warranties. The contract does state "To the best of Breeder's knowledge, the dog is in good health at the time of sale." An examinee might raise a question as to whether this states a warranty but should conclude that it does not.
- does not mention and does not explicitly exclude the implied warranty of merchantability. Nor is there language that strongly implies an exclusion of this warranty, such as language stating that the buyer accepts the dog "as is" or "with all faults."
- does not contain any clear limitations on remedies. It does suggest a repair-and-replace remedy for a "serious disease," but that remedy is stated as something the buyer "may" do, not as a mandatory remedy.
- states no remedy for sale of a dog with a congenital defect. The contract does set out a process through which the buyer must seek a diagnosis and inform the breeder of that

diagnosis. But the language does not identify any consequences resulting from such a diagnosis.

An examinee should conclude that the contract is ambiguous and, relying on *Cohen*, interpret the contract against the party drafting it, in this case Shafer. The examinee should thus also conclude that the contract does not foreclose Martin from pursuing remedies under the FPPPA or the UCC.

### **The FPPPA**

The preliminary issue in applying the FPPPA is whether Martin has a cause of action under § 753(a). Martin cannot use the provision requiring 14 days' notice because he did not report the defect until more than 14 days after the sale. § 753(a)(1). However, Martin does meet the provision requiring notice within 180 days: he reported the condition between one and two months (30 and 60 days) after purchase, and the condition can fairly be described as “a congenital malformation that adversely affects the health of the animal.” § 753(a)(2).

An examinee should also address the question whether protections under the FPPPA could be waived by the parties' contract. On this point, the examinee should advise Martin that, because the underlying contract contains ambiguities, it does not act as a waiver of his FPPPA rights.

Martin strongly prefers to keep Ash alive and living with him. This makes the choice between remedies under the FPPPA relatively easy. Only the third option (retain the animal and seek reimbursement for the cost of cure) satisfies this goal. It also reflects the position that Martin identified in his interview.

*Note:* Martin has not obtained the written certification of a veterinarian required by the statute and noted prominently in *Cohen*. Given Dr. Turner's explicit offer to sign such a certification, the examinee should suggest to Martin that he ask her to complete this certification.

Finally, an examinee should note that even though Martin can seek reimbursement for the corrective surgery, he is not limited to that remedy. As noted in *Cohen*, the remedies of the FPPPA do not “limit any rights or remedies” the purchaser may have under other laws. The examinee should advise Martin that he can also pursue a claim for damages under the UCC.



## The UCC

The examinee should lead this section of the advice letter by affirming that the UCC does apply: a dog is a “good” and a breeder is a “merchant” with respect to that good. *See Cohen*.

The examinee should then discuss the application of the implied warranty of merchantability. As noted in *Cohen*, this implied warranty does exist in contracts for the sale of an animal by a breeder. As in that case, Ash experiences a condition that affects his ability to lead a healthy life. This meets the standard stated in the *Cohen* case and in the embedded *Dalton* case. (An examinee might also note that Ash should be considered a “nonconforming good,” as discussed in *Cohen* and the embedded *Jackson* case.)

An examinee should address the impact of the uncertainty about when to test for liver shunt: at 8 weeks (roughly the time that Ash was sold), at 12 weeks (roughly the time that Ash was diagnosed), or at 16 weeks (the time recommended by the article on liver shunts. The court’s discussion of the embedded *Tarly* case is on point. In that case, the underlying contract of sale used language that explicitly required the buyer to get an evaluation of the animal within two days of purchase, the buyer had failed to do so, and an inspection would have disclosed the existence of the congenital defect.

An examinee should look again at the language of the contract between Martin and Shafer and note that it does not contain the same language. In addition, an examinee should note that, unlike in *Tarly*, there is no certainty that an inspection at the time of the sale of Ash would have disclosed the existence of the congenital defect. Given this, an examinee should conclude that neither the language in the contract with Shafer nor the surrounding circumstances suggest that the implied warranty of merchantability has been excluded.

An examinee should note that, as damages for this breach of the implied warranty, Martin may seek a full refund. *See Cohen*. The court in that case relied on the language of § 2-714(2) as the measure of damages: “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.” Or, as the *Cohen* court phrased it, “the difference at the time of sale between the dog as warranted and the actual dog.”

The examinee should cite *Cohen* for the proposition that a dog born with a congenital defect could reasonably be viewed as having zero value, on the assumption that no one would buy an animal known to have a congenital defect. Accordingly, an examinee should conclude that Martin

has a claim for the entire purchase price for Ash, even if Martin also receives reimbursement for the cost of corrective surgery under the FPPPA.

Finally, the examinee should address whether the more general measure of damages under § 2-714(1) applies. That section permits a court to award damages for “nonconformity of tender . . . in any manner which is reasonable.” The examinee should identify an argument that Shafer might make: awarding both the full purchase price *and* the cost of corrective surgery would be unreasonable. The examinee should note that the court in *Cohen* found that the more specific measure for breach of warranty would apply, not the more general measure of reasonableness.