It is important to emphasize that what makes goods fungible is not simply that they are alike, but that they are of an *identical* grade or type. This distinction is illustrated by the facts in the following case.

Case 20.1

BMW Group, LLC v. Castle Oil Corp.

New York Supreme Court, Appellate Division, First Department, 139 A.D.3d 78, 29 N.Y.S. 3d 253 (2016).

Background and Facts BMW Group, LLC, ordered No. 4 fuel oil from Castle Oil Corporation for delivery to BMW's building in Manhattan. BMW paid the retail price for No. 4 fuel oil, but Castle's delivered product did not conform to the order—it appeared to have been mixed with waste oil. Meanwhile, Mid Island L.P. and Carnegie Park Associates, L.P., ordered No. 4 and No. 6 fuel oil for their buildings in New York City from Hess Corporation but also received a blend containing waste oil.

BMW and the other property owners filed a suit in a New York state court against Castle and Hess, alleging that the defendants had delivered goods of lesser value that did not meet the standards governing the parties' contracts.

The court dismissed the complaint on the ground that the plaintiffs did not allege an injury caused by the use of the blended oil. The plaintiffs appealed.

In the Words of the Court

SAXE, J. [Judge]

* * * *

The issue is whether * * * plaintiffs' claims amount to merely "theoretical nonconformities" that do not justify a claim for breach of warranty or breach of contract.

* * * *

* * * *If the goods that are delivered do not conform to the goods contemplated by the sale contract, the purchaser has a cause of action under the Uniform Commercial Code.* [Emphasis added.]

An issue is raised as to whether plaintiffs successfully alleged that the delivered goods were nonconforming.

* * * The Administrative Code of the City of New York * * * defines "heating oil" as "oil refined for the purpose of use as a fuel for combustion in a heating system and that meets the specifications of the American Society for Testing and Materials * * *." The applicable American Society of Testing and Materials (ASTM) specifications for fuel oil * * * establish detailed requirements for the different grades of oil, using such categories as minimum flash point temperature, viscosity, density, and maximum percentages of ash and sulfur.

Plaintiffs essentially allege that, consistent with the ASTM specifications, as well as common commercial usage, and pursuant to the UCC, customers purchasing goods described as No. 4 and No. 6 fuel oil are entitled to presume that they are receiving 100% fuel oil of the specified grade, and not a product consisting of a blend of No. 4 or No. 6 fuel oil with some other types of oil that do not meet the criteria of those ASTM specifications.

[Plaintiffs] allege that "Castle intentionally adulterates its fuel oil products by using other, cheaper oils (primarily used motor and lubricating oil) as filler, resulting in an inferior blended petroleum product." They explain that lubricating oil and fuel oil are different chemical substances, and that lubricating oils are designed with a higher boiling point than fuel oil and do not burn efficiently at temperatures typical in non-industrial heating systems. Additionally, because lubricating oils contain chemical additives not found in fuel oil, burning them in heating systems such as those in plaintiffs' buildings will tend to produce more soot and particulate matter pollution, reducing the efficiency of the heating system and creating an increased risk of fire.

* * * *

* * * *Since we must infer from the complaint that plaintiffs received nonconforming oil deliveries of lesser value than those they contracted and paid for, causes of action for breach of contract and breach of warranty—including plaintiffs' damages—are stated in each action.* [Emphasis added.]

Decision and Remedy A state intermediate appellate court reversed the lower court's dismissal of the plaintiffs' complaint. The appellate court concluded that in their complaint the "plaintiffs successfully alleged that the delivered goods were nonconforming." When used in the plaintiffs' heating systems, the mixed

Spotlight on Andy Warhol: Case 20.3

Lindholm v. Brant

Supreme Court of Connecticut, 283 Conn. 65, 925 A.2d 1048 (2007).

Background and Facts In 1987, Kerstin Lindholm of Greenwich, Connecticut, bought a silkscreen by Andy Warhol titled *Red Elvis* from Anders Malmberg, a Swedish art dealer, for $300,000. In 1998, Lindholm loaned *Red Elvis* to the Guggenheim Museum in New York City for an exhibition to tour Europe.

Astrid Stawiarz/Getty Images

Did Peter Brant, a Guggenheim Museum trustee, do what was necessary to obtain title to an Andy Warhol painting?

Peter Brant, who was on the museum's board of trustees and also a Greenwich resident, believed that Lindholm was the owner. Stellan Holm, a Swedish art dealer who had bought and sold other Warhol works with Brant, told him, however, that Malmberg had bought it and would sell it for $2.9 million. Malmberg refused Brant's request to provide a copy of an invoice between Lindholm and himself on the ground that such documents normally and customarily are not disclosed in art deals.

To determine whether Malmberg had good title, Brant hired an attorney to search the Art Loss Register (an international database of stolen and missing artworks) and other sources. No problems were found, but Brant was cautioned that this provided only "minimal assurances." Brant's attorney drafted a formal contract, which conditioned payment on the delivery of *Red Elvis* to a warehouse in Denmark. The exchange took place in April 2000.[a] Lindholm filed a suit in a Connecticut state court against Brant, alleging conversion, among other things. The court issued a judgment in Brant's favor. Lindholm appealed to the Connecticut Supreme Court.

In the Words of the Court

SULLIVAN, J. [Justice]

* * * *

* * * "A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices * * *" [according to Connecticut General Statutes Annotated Section 42a-1-201(9), (Connecticut's version of UCC 1–201(9)]. *A person buys goods in good faith if there is "honesty in fact and the observance of reasonable commercial standards of fair dealing" in the conduct or transaction concerned* [under Section 42a-1-201(20)]. [Emphasis added.]

We are required, therefore, to determine whether the defendant followed the usual or customary practices and observed reasonable commercial standards of fair dealing in the art industry in his dealings with Malmberg. * * * The defendant presented expert testimony that the vast majority of art transactions, in which the buyer has no reason for concern about the seller's ability to convey good title, are "completed on a handshake and an exchange of an invoice." It is not customary for sophisticated buyers and sellers to obtain a signed invoice from the original seller to the dealer prior to a transaction, nor is it an ordinary or customary practice to request the underlying invoice or corroborating information as to a dealer's authority to convey title. Moreover, it is not customary to approach the owner of an artwork if the owner regularly worked with a particular art dealer because any inquiries about an art transaction customarily are presented to the art dealer rather than directly to the [owner]. *It is customary to rely upon representations made by respected dealers regarding their authority to sell works of art.* A dealer customarily is not required to present an invoice establishing when and from whom he bought the artwork or the conditions of the purchase. [Emphasis added.]

We are compelled to conclude, however, that the sale from Malmberg to the defendant was unlike the vast majority of art transactions. * * * Under such circumstances, a handshake and an exchange of invoice is not sufficient to confer status as a buyer in the ordinary course.

* * * *

* * * A merchant buyer has a heightened duty of inquiry when a reasonable merchant would have doubts or questions regarding the seller's authority to sell. * * * In the present case, the defendant had concerns about Malmberg's ability to convey good title to *Red Elvis* because he believed that Lindholm might have had

a. Unaware of this deal, Lindholm accepted a Japanese buyer's offer of $4.6 million for *Red Elvis*. The funds were wired to Malmberg, who kept them. Lindholm filed a criminal complaint against Malmberg in Sweden. In 2003, a Swedish court convicted Malmberg of "gross fraud embezzlement." The court awarded Lindholm $4.6 million and other relief.