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## Remedies of a Buyer for Breach of Contract under the Uniform Commercial Code

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may withhold goods or stop delivery to an insolvent buyer regardless of the passage of title.<sup>55</sup> The seller may recover goods from an insolvent buyer within ten days of receipt upon discovery of the buyer's insolvency; if there has been a written misrepresentation he may recover at any time.<sup>56</sup> The seller would be able to stop bailees as well as carriers from delivering goods to a buyer and the right of stoppage is broadened so as to stem from almost any breach by the buyer.<sup>57</sup> The seller can collect more in incidental damages.<sup>58</sup>

Third, the rights of the seller are made cumulative; any doctrine of election of remedy is rejected. When the buyer breaches the contract the seller may stop delivery<sup>59</sup> and identify to the contract conforming goods in his possession.<sup>60</sup> If the goods are in the process of procurement or manufacture the seller may complete the process and then identify them to the contract.<sup>61</sup> The seller can then resell the goods and recover damages.<sup>62</sup> If resale is not possible, damages can be recovered for non-acceptance,<sup>63</sup> or in a proper case recovery can be had for the price.

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REMEDIES OF A BUYER FOR BREACH OF CONTRACT UNDER THE UNIFORM COMMERCIAL CODE. — Among those areas of the law in which the Uniform Commercial Code represents an improvement over the provisions of the Uniform Sales Act must be listed the sections of the Code covering remedies available to a buyer of goods where there has been a breach or a failure of performance of a contract by the seller. In general, the Uniform Sales Act presents a buyer with several familiar courses of procedure. When the seller wrongfully detains<sup>1</sup> the goods the buyer may sue for conversion. Where non-delivery occurs he is entitled to recover damages for a breach of the contract.<sup>2</sup> He may accept the goods in event they are tendered in a defective condition and sue for breach

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55. U.C.C., § 2-702 (1952).

56. *Ibid.*

57. U.C.C., § 2-705 (1952).

58. *Id.* § 2-710.

59. *Id.* § 2-705.

60. *Id.* § 2-704.

61. *Ibid.*

62. U.C.C., § 2-706 (1952).

63. *Id.* § 2-708.

1. N.D. Rev. Code § 51-0167 (1943) (Action allowed only when title has passed so as to give the buyer a property interest in the goods).

2. N.D. Rev. Code § 51-0168 (1943) (when property in the goods has not passed).

of warranty. Although these options are given by the Sales Act there is an unfortunate lack of definite solutions for many of the problems which arise in connection with them. The difficulties stem in part from looseness of language, for the Sales Act provisions are not as carefully drafted as they might have been. The remedies available are general in nature and leave a wide avenue of construction open to the courts. As a result it is very seldom that the buyer will be placed in as good a position as he would have enjoyed had the contract not been breached.

The drafters of the UCC have included most of the remedies available under the Uniform Sales Act, but they have amplified the terms and placed the provisions in more clear and concise language, in many instances using actual business terminology. The Code clarifies the position of the buyer by giving him more specific remedies and allowing him to choose the remedy that will best suit his needs. It introduces new provisions not included in the Uniform Sales Act. In preparing the UCC the drafters have continually kept in mind the principle that the one seeking the remedy should be placed in substantially the same position in which he would have been had the contract been performed.

Under the UCC no mention is made as to "when title has passed" or "when title has not passed." The Code has shifted the emphasis from a consideration of the title of the goods to the actual agreement made between the parties.<sup>3</sup> This shift in itself eliminates much controversy, since, under the Sales Act, the question of title had to be determined before any remedy could be assigned to the buyer.<sup>4</sup>

Under §66 of the Uniform Sales Act where property in goods has passed and the buyer has fulfilled all of his obligations under the existing contract the wrongful refusal of delivery of the goods by the seller allows the buyer to maintain an action for conversion<sup>5</sup> of the goods, or he may disregard the tort and sue for breach of contract.<sup>6</sup>

Section 67 of the Sales Act lists the remedies for failure to deliver. Where title to the goods has not passed, and the seller fails to deliver, the buyer may sue and recover damages. The damages that he may recover are those which directly and naturally result

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3. N.D. Rev. Code § 51-0167, 57-0168 (1943); Kelsh and Glaser, *Title Theory and the Uniform Commercial Code*, *supra*, p. 211.

4. *Ibid.*

5. N.D. Rev. Code § 32-0707. (In North Dakota the action for conversion of goods is one of Claim and Delivery).

6. 3 Williston, sales § 595 (Rev. Ed. 1948).

from the seller's breach.<sup>7</sup> These damages, in absence of special circumstances, are the difference between the contract price and the market price,<sup>8</sup> at the time of delivery.

Section 68 of the Sales Act covers Specific Performance. This remedy is available to the buyer at the discretion of the court, acting as a court of equity, where it considers the legal remedy inadequate.<sup>9</sup> Section 69 covers the broadest remedy available to the buyer under the Uniform Sales Act. This is for breach of warranty. Under this section there are three remedies available to the buyer for the seller's breach of warranty. Where the seller delivered goods which were not as they were warranted, the buyer may: (1) keep the goods and bring an action for recoupment; (2) rescind the contract; (3) recover damages for breach of warranty.<sup>10</sup>

Where the buyer seeks to recover under one remedy for breach of warranty, no other remedy is available.<sup>11</sup> Where there has been a breach of warranty by the seller and he refuses to take back goods rightfully rejected by the buyer, the buyer may hold the goods as a bailee for the seller, subject to a lien for the value of his payments, with the right to sell the goods as provided in section 53 of the Sales Act.<sup>12</sup> The damages and the measure of those damages available to the buyer for a breach of warranty are the same as listed in section 67 of the Sales Act.<sup>13</sup>

Under §2-711 of the UCC the drafters have listed the general remedies available to the buyer where there has been a breach of contract. Where the seller fails to deliver or repudiates the buyer may:

- (1) Cancel
- (2) Recover his down payment.

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7. *Wilson v. M. Werk Co.*, 104 Ohio St. 507, 136 N.E. 202 (1922); N.D. Rev. Code § 51-0168 (2) (1943).

8. *Scott v. T. W. Steveson Co.*, 130 Minn. 151, 153 N.W. 316 (1915). (Where seller repudiated agreement to supply buyer with goods prior to termination of agreement, he was liable for buyer's increased expenses in procuring the goods until the date of termination, but not after); N.D. Rev. Code § 51-0168 (3) (1943); 3 Williston, Sales § 599 (Revised ed. 1948).

9. *Campbell Soup Co. v. Wentz*, 172 F.2d. 80 (3rd Cir. 1948). "A party may have specific performance of a contract for the sale of chattels if the legal remedy is inadequate." The adequacy of the legal remedy will be determined by the court.

10. *Tiedeman v. Rasmussen*, 50 N.D. 966, 198 N.W. 550 (1924). *Accord*, *Minneapolis Steel and Machine Co. v. Casey Land Agency*, 51 N.D. 832, 201 N.W. 172 (1924); 3 Williston, Sales § 604 (Revised ed. 1948).

11. N.D. Rev. Code § 51-0170 (4) (1943).

12. *Ruben v. Sturtevant*, 80 Fed. 930 (2d Cir. 1897). The seller refused to receive the property rightfully rejected by the buyer for breach of warranty; the buyer had a right, after exercising reasonable care, to sell the goods at a private or public sale.

13. N.D. Rev. Code § 51-0170 (7) (1943).

- (3) Purchase goods in substitution (cover)<sup>14</sup>
- (4) Recover damages for non-delivery<sup>15</sup>
- (5) Recover goods by demand or tender of unpaid portion of contract price.
- (6) Recover goods by specific performance or replevin.<sup>16</sup>

Each of these remedies is amplified in the following sections.

It is to be noted that there is an omission of the "title theory"<sup>17</sup> of goods, which played an important role in determining the buyer's specific remedies under the Uniform Sales Act.

The security interest of the buyer is considered under §2-711 (3) of the Code. Where the buyer receives goods and rightfully rejects them, he has a security interest over the goods in his possession for all amounts paid, plus expenses for handling. After reasonable notice, the buyer may resell the goods, recovering the difference between the resale price and the contract price. The buyer is accountable for any excess in amount over his security interest.<sup>18</sup> This provision is an amplification of the security interest given the buyer in §69 (5) of the Uniform Sales Act, where the buyer holds the goods as a bailee for the wrongful seller, but subject to a lien for the repayment of any of the price which has been paid, with the right of resale as given by §53.<sup>19</sup> It has been held that where a seller refused to accept a car of grease which was rejected by the buyer for breach of warranty, and the vendor made no objection, the buyer could resell the goods at a private or public sale, and purchase the goods himself.<sup>20</sup>

Section 2-712 of the UCC spells out the concept of "cover," which prior to this time has not been codified, but which developed from the aggrieved buyer doing what he could to maintain his position.<sup>21</sup> This section offers the merchant and consumer the basic remedy of going into the market and making in good faith and without unreasonable delay any reasonable purchase of goods in substitution of those due from the seller. In substance it is equiva-

14. U.C.C. § § 2-711, 2-712. When a buyer purchases goods in substitution he may recover as damages the difference between the contract price and the cover price.

15. U.C.C. § 2-711 (1) (b). The damages the buyer may recover are illustrated in § 2-713. Note 29 *infra*.

16. U.C.C. § 2-711.

17. Note 3, *supra*.

18. U.C.C. § 2-706 (6). The buyer who holds rejected goods and resells them cannot keep any profit made on the sale above the amount of his security interest.

19. *Descalzi Fruit Co. v. William S. Sweet & Son, Inc.*, 30 R.I. 320, 75 Atl. 308 (1910). In a case of perishable goods where the buyer could not store them, he was allowed to sell them on the open market and tender the sale price to the seller.; N.D. Rev. Code § 51-0170 (6) (1943).

20. *Willson v. M. Werk Co.*, 104 Ohio St. 507, 136 N.E. 202 (1922).

21. *Snook v. Olinger*, 36 Idaho 423, 211 Pac. 559 (1922).

lent to the seller's right to resell.<sup>22</sup> Subsection (2) states the damages as the difference between the cost of the cover and the contract price, plus incidental and consequential damages,<sup>23</sup> but less any expense saved in consequences of the seller's breach. Under this section "proper"<sup>24</sup> cover must be found in view of the buyer's position in the market.<sup>25</sup> Subsection (3) clearly states that failure of the buyer to effect cover does not bar him from any other remedy. While this section denotes that the remedy is not mandatory, it must be read in light of the section on consequential damages, which allows recovery for only those damages which could not have been eliminated by cover.

As can be seen, §2-712 of the UCC gives a more accurate measure of damages, and enables the buyer to obtain his prime objective, that of purchasing the goods needed. It would seem that the discretionary powers of the court would be broadly expanded, in the wide usage of such words as "good-faith," "reasonable," etc. However, with each case standing on its own merits, this section need not become controversial.

The provisions respecting a buyer's damages for non-delivery under §2-713 have incorporated and expanded §67 (3) of the Uniform Sales Act so as to provide a more reasonable yardstick of measurement. This section is an alternative remedy to a buyer who cannot or does not cover, and applies only to such buyers.<sup>26</sup> It provides for incidental and consequential damages<sup>27</sup> and restates the rule that a buyer must deduct from his damages any expenses saved as a result of the breach.<sup>28</sup> Under the Uniform Sales Act the action for non-delivery is a basic remedy, with the measure of damages the difference between the contract price and the market price at the time and place of delivery.<sup>29</sup> This measure of damages is expanded in the UCC so as to provide adequate remedies for those buyers placed at a disadvantage in a rising market because of unawareness of the breach.

22. Comments to U.C.C. § 2-712 (1).

23. U.C.C. § 2-712 (2). Further information on Incidental and Consequential damages see § 2-715.

24. Comments to U.C.C. § 2-712 (2). "The test of 'proper' cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or the most effective."

25. *Ibid.*

26. Comments to U.C.C. § 2-712. Cover is not a mandatory remedy. However, any consequential damages awarded will be limited to such as could have been eliminated by cover.

27. Note 24, *supra*.

28. U.C.C. § 2-712 (2).

29. Southern Cotton Oil Co., v. Adams, 69 Ga. App., 88, 24 S.E.2d 719 (1943); see Huggens v. Southeastern Lime and Cement Co., 121 Ga. 311, 48 S.E. 933 (1909).

Under the Code the market price at the time the buyer became aware of the breach, and the place of tender, or in the case of rejection the place of arrival, are the controlling elements in determining the damage. If the market price is difficult to prove, comparable market prices or spot sales prices can be shown under §2-723, concerning the determination and proof of market prices.<sup>30</sup>

Where the buyer accepts goods and gives notice, he may recover damages for non-conformity, or failure of the seller to live up to the contract, where the loss stems reasonably from the ordinary course of events according to the contract.<sup>31</sup> This is the same in respect to allowing the buyer to recover where there has been a breach of warranty as §69 of the Uniform Sales Act. There is, however, one distinct difference to be noted. In this section the Code lays down a definite time and place for determining the loss due to the breach of warranty by the seller. The usual standard for measuring damages is otherwise used,<sup>32</sup> but is not intended as an exclusive measure. The buyer may show special circumstances which show the damage to be of a different amount than the difference between the value of the goods received and the value according to the contract.

Under §2-715 of the UCC incidental damages resulting from the seller's breach include such things as expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected by the buyer.<sup>33</sup> While only a few are listed they are merely illustrative and are not intended to be exhaustive.<sup>34</sup> In general, the incidental damages section is a catch-all to include any reasonable expenses incurred because of the seller's breach.

Not quite so simple is subsection 2 of §2-715, relating to consequential damages. It provides that the seller shall be liable for "any loss resulting from general or partial requirements and needs of the buyer, of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover," plus, "any injury to person or property proximately resulting from any breach of warranty."<sup>35</sup> While this foreseeability test may

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30. Under this section of the Code the courts are granted leeway in determining current price where there is an absence of a current market. The current price may be from a comparable market or from a market at a different time.

31. U.C.C. § 2-714.

32. The standard measure of damages — difference between contract price and market price as used in the Uniform Sales Act.

33. U.C.C. § 2-715 (1)

34. Comments to U.C.C. § 2-715.

35. U.C.C. § 2-715 (2) (b).

be expanded so as to be quite liberal toward the buyer it is also modified by refusing to permit recovery to the buyer unless he can show that the loss could not have reasonably been prevented on his part by covering. The section as a whole seems indispensable to provide adequate relief to both the buyer and the seller, and to offer them maximum protection against the injustice arising out of complicated present-day market conditions.

In attempting to codify any commercial law writers have a difficult task. If a tendency is made to use over-specific terminology the adopted commercial law will soon be antiquated by changing business situations. On the other hand, if the writers generalize, much too broad an interpretation will be left up to the courts.<sup>36</sup> The drafters of the UCC have attempted to attain the middle road between the two above situations. This policy, however, has drawn fire from the critics, who contend that the drafters have not carried the simplicity to a desirable point, and that it still retains many of the abstract words and phrases of the Uniform Sales Act. Yet it would seem that over-simplification would result in exacting remedies from which obvious injustice would arise.

While the code is by no means an ideal solution to all of the problems surrounding the buyer where there has been a breach by the seller, it offers him a greater variety of remedies from which he can choose to place himself in a position nearer to the one in which he would have been had the contract not been breached. In view of the economic changes brought about by our advancing civilization, the UCC, if adopted, will render an improvement over the existing law of North Dakota which furnishes remedies to a buyer.

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CHARLES A. FESTE.

THE POSITION OF THE BONA FIDE PURCHASER OF PERSONAL PROPERTY UNDER THE UNIFORM COMMERCIAL CODE. — The proposed Uniform Commercial Code, in dealing with bona fide purchasers of personal property, has basically retained the law as it exists under the laws of North Dakota and the Uniform Sales Act. The North Dakota code states that where goods are sold by a person not the owner thereof, who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had; an exception is made where the

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36. 57 Yale L.J. 1360 (1948).