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COMMENTS

BUYER'S REMEDIES IN SALES CASES UNDER THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code,¹ adopted in Wyoming on January 2, 1962, is a recognition of commercial realities in terms of legal principles thus making the Code merchants' not lawyers' law. However, the burden of understanding the subtleties of the interrelationships of various Code sections falls abruptly on the lawyer. For this reason, guidelines are needed to assist the practitioner in "cutting a path" through the "maze" that is the Code.

This article is an attempt to provide a guideline for acquiring a "working knowledge" of the provisions of Article 2 relating to buyer's remedies.² No attempt will be made to compare the Code with pre-Code law except when a comparison will facilitate an understanding of the effect of the provision of the Code then under consideration.

The buyer's remedies under the Code depend largely on whether the buyer has finally accepted the goods. Since "acceptance" is the turning point in ascertaining the relative rights of the parties, this analysis will begin with a discussion of the nature and ramifications of "acceptance" before proceeding to develop the buyer's remedies from the standpoint of those available before and after acceptance, as well as those remedies not dependent upon acceptance.

I. ACCEPTANCE

Section 2-606 sets forth the criteria for determining when an acceptance by the buyer has occurred. If the buyer signifies his willingness to assume ownership, fails to make an effective rejection, or does any act inconsistent with the seller's ownership, he is deemed to have accepted the goods tendered by the seller.

1. Hereinafter this article will refer to the Uniform Commercial Code as the Code. The Code sections correspond to their designation in the 1957 *Wyoming Statutes* under Article 34 such that Code § 2-711 appears as § 34-2-711 in the Wyoming statutes.

2. For a discussion of the seller's remedies under Article 2 of the Code, see Comment, 2 *LAND & WATER L. REV.* 199 (1967).

A. Buyer Signifies Acceptance

If the buyer has had a reasonable opportunity to inspect the goods,³ he is treated as having accepted them when he signifies⁴ to the seller that the goods are conforming⁵ or that he will retain them in spite of their non-conformity.⁶ Because such conduct would also constitute acceptance under 2-606(1)(b) and (c), this rule may be intended to have independent significance by application to unusual situations that tend to denote a willingness on the part of the buyer to accept.⁷

An acceptance may be unqualified and extend to all the goods or be subject to some restriction, with the restricted communication of acceptance always remaining subject to its expressed conditions.⁸

Further, after the buyer once rejects a tender, an acceptance under § 2-606 will not occur unless the seller has re-tendered or taken positive steps to indicate that tender is still open.⁹

It has been suggested that the buyer may, without being held to have accepted defective goods, retain a part for use as evidence.¹⁰ However, comment 2 to § 2-515 indicates that the right to retain goods as evidence does not conflict with the seller's right to recall rejected goods and that prompt action by the parties is required. This would indicate the ad-

3. See § 2-513 for a discussion of what is meant by "a reasonable opportunity to inspect."

4. Because of the use of the word "signifies" it is clear that conduct expressing an intention to accept is sufficient, although not involving express words of acceptance, though it need be more than mere payment for the goods made after tender which, in itself, can never be more than one circumstance, not conclusive evidence of an acceptance. § 2-606, comment 3.

5. § 2-106(2) defines "conforming goods."

6. § 2-606, comment 3. Although the comments to the 1962 official text of the Code are not adopted by the Wyoming Legislature, they are necessary indications of the intent and meaning of the Code.

7. A buyer paying for the goods without inspecting them, under a contract in which he has the right to inspect prior to payment, might have engaged in conduct signifying acceptance at the time of payment. If the buyer explicitly states that he accepts, it would appear immaterial whether he had time to inspect or not, even though such right of inspection is clearly provided by the Code. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 230 (1964).

8. § 2-606, comment 3. Although acceptance of part of a commercial unit is not permissible, the buyer is allowed to accept any part of the goods tendered and reject the rest as provided in § 2-601(c). § 2-105(6) defines "commercial unit."

9. § 2-606, comment 4.

10. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 232 (1964).

visability of the buyer's preserving evidence other than by attempting to retain goods until trial. "But in the interest of solving the difficult problem of evidence," confronting the buyer's effort to disprove acceptance, "forward looking courts probably will give § 2-515 a broad construction and will be reluctant to find acceptance in these situations on technical grounds."¹¹

B. Buyer's Inconsistent Conduct

Section 2-606(1)(c), providing that acceptance can be made by acts on the part of the buyer which are inconsistent with the seller's ownership, also tends to overlap the other subsections of 2-606 in that conduct it covers will usually signify acceptance¹² and usually is the result of a failure to make an effective rejection.¹³ The Wyoming Supreme Court in *Park County Implement Co. v. Craig*¹⁴ held that the buyer, by installing a hoist and dump bed on a vehicle purchased from the seller, accepted the goods under § 2-606(1)(c) because such activity constituted conduct inconsistent with the seller's ownership.

In rare cases section 2-606(1)(c) has independent import, *i. e.*, conduct inconsistent with the seller's ownership will not be acceptance under other provisions of § 2-606.¹⁵

In determining whether the buyer's conduct is inconsistent with the seller's ownership consideration must be given to those sections¹⁶ which allow the buyer to take certain ac-

11. *Id.* at 233.

12. § 2-606(1)(a).

13. § 2-606(1)(b).

14. 397 P.2d 800 (Wyo. 1964).

15. This occurs, for example, when a buyer accepts an unsolicited shipment and then refuses to surrender it to the seller. In this situation, the refusal does not amount to an acceptance through failure to make an effective rejection because rejection implies the existence of a contract as indicated by § 2-601 which allows the buyer to reject when the goods "fail in any respect to conform to the contract." On the other hand, the retention of the goods by the buyer could only constitute a signification of acceptance if the seller ratified it, such that, conceivably § 2-606(1)(c) would be applicable when the other subsections of § 2-606 were not. As to the necessity for ratification by the seller, *see Commercial Credit Corp. v. Stan Cross Buick Inc.*, 343 Mass. 622, 180 N.E.2d. 88 (1962) where the court held that acceptance of an installment payment from the wrongful seller of plaintiff's automobile was not such ratification of the sale as would constitute a bar to the plaintiff's recovery for the conversion by the buyer.

16. Sections 2-603 and 2-604 permit a buyer to sell the rejected goods under special circumstances. § 2-604 allows the buyer to store the goods for the seller's account or reship them to him without thereby effecting an acceptance of the goods.

tions with respect to the rejected goods without being deemed to have accepted them. The sections clearly are commensurable with § 2-606 since it states that an acceptance occurs if the action taken by the buyer is inconsistent with a claim that he has rejected the goods. Selling, storing, or shipping the goods for the seller is consistent with a claim of rejection and does not amount to conduct adversely affecting the seller.¹⁷

It should be noted that concepts involving "passing of title" or "acceptance of title have no place in determining whether an act is inconsistent with the seller's ownership or with any other manifestation of acceptance since the Code has abrogated the confusion caused by the questions of title passage."¹⁸

C. Buyer's Rejection of the Goods

Section 2-606(1)(b) provides for acceptance when a buyer fails to make an effective rejection¹⁹ after having had a reasonable opportunity to inspect the goods.²⁰

A failure to make an effective rejection may occur in two situations: (1) the buyer may subjectively intend to reject but fail to comply with § 2-602 or (2) the buyer may intend to accept and not attempt to revoke acceptance.²¹ "Under the Code it is immaterial which of the alternative situations is involved as long as the buyer had reasonable opportunity to inspect."²²

Section 2-601, taken at face value, states the rule often applied under the Uniform Sales Act that there is no room for the doctrine of substantial performance in a commercial transaction. Under this section the buyer, "if the goods or tender of delivery fail in any respect to conform to the contract," has the option of rejecting the whole, accepting the whole, or accepting any commercial unit or units and rejecting the rest. The strict performance rule which this section imposes on the seller, however, is subject to the mitigating

17. § 2-606, comment 4.

18. § 2-606, comment 2.

19. § 2-602 delineates the elements necessary for an effective rejection.

20. See note 3 *supra*.

21. ANDERSON, UNIFORM COMMERCIAL CODE 357 (1961).

22. *Id.* at 358.

influence of other Code sections which, in effect, reinstate the substantial performance doctrine.²³

Section 2-602 outlines the procedure that the buyer must follow in making an effective rejection. If he fails to comply with this procedure he will be deemed to have accepted the goods. Because an acceptance can occur in this manner, it is clear that the buyer must take affirmative action to avoid acceptance, even when nonconforming goods are tendered.

Section 2-602(1) provides two duties with which a buyer must comply in order to make an effective rejection: (1) his rejection must be made within a reasonable time²⁴ after a delivery or tender of the goods²⁵ and (2) he must seasonably notify²⁶ the seller of his election to reject. The rejection may be withdrawn by a later acceptance provided that the seller has indicated that he is holding the tender open, but if the buyer attempts to accept after his rejection has caused the seller to alter his position, the buyer must respond in damages.²⁷

If the seller makes a written demand for particularization, the buyer's notice must state the particular defects up-

23. These provisions include: § 2-612 providing that a buyer may reject an installment under an installment sales contract only if the non-conformity substantially impairs the value of the installment and the buyer may treat the whole contract as breached only if the non-conformity substantially impairs the value of the entire contract; § 2-508 providing the seller with an opportunity to "cure" tender; § 2-608 restricting the buyer's right to revoke acceptance; § 2-614(1) requiring that a buyer accept a commercially reasonable substitute when the agreed manner of delivery, etc., fails; § 2-504 providing that the failure of the seller to make a proper contract with the carrier is grounds for rejection only if a material delay or loss ensues; § 1-203 injecting the "good faith" requirement into all transactions which should prevent rejection for a technicality when the buyer is motivated simply to avoid a bad deal. Also, the agreement of the parties, including trade usages, will affect performance and the right of rejection. All of the above, when coupled with the strict requirements as to the manner of the rightful rejection, definitely reduce the apparent rigidity of the rejection rule. See Comment, *Substantial Performance Under the Uniform Commercial Code*, 16 WYO. L.J. 178 (1962) where the author arrives at a slightly different conclusion.

24. The "reasonable time" given the buyer in which to make a rejection is a relative concept dependent upon the circumstances of the parties, usages of the trade, and the like. § 1-204(2). The reasonable time for giving notice may be fixed by agreement if such time is not clearly unreasonable. § 1-204(1).

25. The UNIFORM SALES ACT also required the buyer to give notice within a reasonable time after he discovered the defect in order to hold the seller liable for breach of contract.

26. Even though the rejection is made within a reasonable time, "it is ineffective unless the buyer seasonably notifies the seller." § 2-602(1). According to § 1-204(3) "an action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

27. § 2-601, comment 2; See also note 19 *supra*.

on which rejection is based, provided the defect is ascertainable by reasonable inspection and is curable,²⁸ or the transaction is "between merchants."²⁹ Failure to state a particular defect in the foregoing circumstances precludes the buyer from relying on the unstated defect to justify rejection or establish a breach.³⁰

Lawsuits frequently follow rejections and it is important for the seller to know the defects upon which the buyer will rely. If the buyer and seller are merchants³¹ the seller is permitted to demand a "full and final" written statement of all defects on which the buyer will rely with the response by the buyer precluding him from relying on an unstated defect.³²

In so far as non-merchants are concerned, there is no right to request or duty to prepare a final statement of objections. The buyer waives his right to rely on an unstated defect only when the seller could have cured it if seasonably notified.³³

In addition to giving notice, a non-merchant buyer, if the goods are in his possession, is a bailee for the benefit of the seller.³⁴ He must not commit any act of ownership over the goods for such an act is wrongful as against the seller. The buyer, if he has no security interest under § 2-711(3), must hold the goods with reasonable care for a time sufficient to permit the seller to remove them.³⁵

28. § 2-508 supplies the seller with a unilateral, but limited right to "cure" defects in goods upon a rejection by the buyer. Under this section a seller who has made a nonconforming tender which has been rejected may replace the original tender within the original contract period. If the seller whose tender was rejected had reason to believe that the tender would be acceptable, with or without a money allowance, he is given an extended period in which to make a substitute tender. § 2-508, comment 2.

29. § 2-605. "Between merchants" is defined in § 2-104(3).

30. § 2-605.

31. § 2-104(1) defines "merchants."

32. § 2-605(1)(b). If the defect would not have been revealed by reasonable inspection there is no waiver. § 2-605(1).

33. See ANDERSON, *supra* note 21, at 353.

34. See ANDERSON, *supra* note 21, at 345.

35. § 2-602(2)(b). If the seller is in control of the goods or if he personally tenders them, the non-merchant buyer has no obligation to care for the goods. § 2-603, comment 2. If in advance of, or contrary to instructions by the seller, the buyer disposes of the goods by storage, reshipment or resale, he must reimburse the seller for any losses suffered. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap to Article Two*, 73 YALE L.J. 199, 262 and 263 (1963).

Section 2-603 imposes additional duties on the merchant buyer who rightfully rejects goods. This section is applicable only if the seller has no agent or place of business or anyone representing his interests at the market of rejection and the buyer has possession or control of the goods.³⁶ Unless the merchant buyer has a security interest in the goods he must follow any reasonable instructions received from the seller³⁷ and, in the absence of such instructions, make a reasonable effort to resell them for the seller's account if they are perishable or threaten to decline in value speedily.³⁸

An interpretation of the correlative concept of "reasonable instructions," which under § 2-603 the buyer must follow if the buyer is a merchant in possession or control of the rejected goods and the seller has no agent at the market of rejection, requires a balancing of inconvenience to the buyer against undue loss to the seller. The Code provides only that the "instructions" are not reasonable if on demand indemnity for expenses is not forthcoming.³⁹ Although the buyer has a common law right to recover expenses, the right to payment would not arise until after the expenditure had occurred.⁴⁰ The Code alleviates the common law burden on the buyer by providing for a right of indemnity before expenses are incurred, since if the buyer feels insecure about reimbursement, he may demand indemnity and if it is not forthcoming, he can protect himself by ignoring the seller's instructions.⁴¹ Assuming that the seller is willing to indemnify the buyer,

36. The buyer's duty under § 2-603 is applicable only if he is in "possession or control" of the rejected goods. "These are intended as words of wide, rather than narrow, import. In effect, the measure of the buyer's 'control' is whether he can practicably effect control without undue commercial burden." § 2-603, comment 2. When nonconforming goods are delivered by a carrier to the buyer, the buyer would have possession, control, and the obligation to comply with § 2-603. However, if the seller, refusing a rejection, leaves the goods with the buyer, the latter would have assumed no burden under § 2-603 if the seller was present at the market of rejection. The buyer would otherwise assume the burden under § 2-603 even though the goods had been thrust upon him wrongfully. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 240 (1964).

37. For the purpose of determining a buyer's duty to follow the sellers instructions, knowledge peculiar to the trade practices or the goods is sufficient to classify a buyer as a merchant under the Code. § 2-104(1).

38. § 2-603(1).

39. *Ibid.*

40. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 240 (1964).

41. § 2-603, comment 3.

the buyer is entitled to a sales commission upon reselling according to the seller's instructions.⁴²

If instructions are not forthcoming within a reasonable time,⁴³ a merchant buyer possessed of rejected goods which are perishable⁴⁴ or threaten to decline in value speedily⁴⁵ must make a reasonable effort to resell them.⁴⁶

In the case of non-perishables there is no duty to resell. The buyer, if the seller gives unreasonable instructions⁴⁷ or fails to give instructions within a reasonable time,⁴⁸ may store the goods, reship them to the seller, or resell them for the seller's account.⁴⁹

It should be noted that § 2-604 is neither restricted to merchant buyers nor are its provisions an exhaustive delimitation of the alternatives available to the rejecting buyer, but rather, the alternatives therein provided are merely illustrative of the type of conduct required of the buyer.

If the contract involved is an installment contract,⁵⁰ the buyer's right of rejection is more circumscribed. "Installment delivery is required or authorized: (1) when the contract expressly so provides; (2) when, absent an express contract provision either way, particular circumstances make it commercially unreasonable either to require the seller to

42. The normal Commission in the trade or a reasonable sum not to exceed 10% of the gross proceeds is the basis established by § 2-603(2) for ascertaining the amount collectable as a commission.

43. Although a "reasonable time" is defined in § 1-204(2), the waiting period determinative of a "reasonable time" must be ascertained in view of the circumstances of the parties. However, it would appear that the time period during which the buyer must retain the goods is the same "reasonable time" given the seller to transmit instructions under § 2-603.

44. The Code does not indicate what is meant by "perishable goods" but presumably the normal meaning of the term will govern.

45. For an analysis of the process of determining when goods are of a kind that "threaten to decline in value speedily," see 105 U. PA. L. REV. 837, 870 (1957).

46. § 2-603(1).

47. Whether the instructions are unreasonable and what response the buyer may make should be judged by the test of "good faith" as defined in § 1-203.

48. Unreasonable instructions are to have the same effect as if no instructions were given. § 2-604, comment.

49. § 2-604. The buyer is entitled to reimbursement under § 2-603(2) for expenses incurred in the salvage sale. When he is acting pursuant to the seller's instructions, § 2-603(1) provides that if the buyer demands indemnification the seller's instructions must provide for reimbursing the buyer for his expenses.

50. An installment contract is one providing for delivery of goods in lots and the separate acceptance of each lot as delivered. § 2-612(1).

'deliver, or to require the buyer to receive contract goods in a single lot.''⁵¹

Under § 2-612 the buyer may reject any installment if the goods are nonconforming and substantially impair⁵² the value of the installment to the buyer. However, upon rejection, the seller can compel acceptance if the non-conformity can be cured and the buyer is given adequate assurance⁵³ that the defect will be cured.⁵⁴

For a substantial breach of the installment, whether correctable or not, the buyer is not entitled to immediate cancellation of the contract. However, if a substantial portion of the contract is yet to be performed, the buyer is entitled to reasonable assurance that the remaining installments will conform. If the seller fails to supply adequate assurance, the buyer may cancel the remainder of the contract.⁵⁵

If the non-conformity as to any one or more installments does substantially impair the value of the whole contract, the buyer may reject the installment and utilize all the remedies available for breach of contract. The buyer may waive the defect and reinstate the contract by: accepting a nonconforming installment without seasonably notifying the seller of cancellation;⁵⁶ bringing an action against the defaulting party with respect to past installments only; or demanding performance by the seller with respect to future installments.⁵⁷

Before concluding the discussion of the buyer's right of rejection, the distinction between a wrongful and an ineffective rejection should be noted. The failure to make an effective rejection ⁵⁸ results in acceptance of the goods under

51. Phalan, *Uniform Commercial Code—Sales—Summary of Buyer's Remedies*, 16 U. PITT L. REV. 209, 218 (1955).

52. Whether there is a substantial impairment depends upon all the circumstances. § 2-612, comment 4.

53. See § 2-609 as to the meaning of "adequate assurance."

54. § 2-612(2). See § 2-612, comment 5 relating to a price allowance as curing a non-conformity.

55. § 2-609. Because the Code divorces installment breach from repudiation the relevant inquiry is whether the non-conformity substantially impairs the value of the contract not whether it indicates an intent or probability that the future deliveries also will be defective. However, an overt communication unequivocally showing an intent to repudiate could be manifest by means of an installment breach. In such a case, even though the value of the contract was not substantially impaired, the buyer could treat the contract as repudiated. § 2-610.

56. § 2-612(3). § 2-612, comments 6 and 7.

57. § 2-612(3).

58. § 2-602 provides that an ineffective rejection occurs either because the buyer fails to give notification within a reasonable time or fails to par-

§ 2-606. Consequently, after failing to effectively reject, the buyer is liable as an acceptor of the goods either on an action for the contract price under § 2-709 or an action for damages under § 2-708.⁵⁹ The ultimate effect is the same as if the buyer signified acceptance⁶⁰ or conducted himself in a manner inconsistent with the seller's ownership.⁶¹

Conversely, if the buyer wrongfully,⁶² but effectively, rejects he becomes liable to the seller not for acceptance but for breach of contract.⁶³ If the buyer fails to accept when he is under a duty to so do, as where the goods are conforming, his non-acceptance constitutes a breach of contract entitling the seller to non-price remedies.⁶⁴ Hence, wrongful rejection does not amount to acceptance entitling the seller to price remedies, as does the failure to make an effective rejection, as long as the procedural requirement of § 2-602 for effective rejection have been met.

D. Buyer's Revocation of Acceptance

Although the buyer is deemed to have accepted the goods upon any of the previously discussed grounds, he may, in limited situations, revoke his acceptance and place himself in the same position in which he would have been had he initially rejected the goods.⁶⁵

In order to revoke acceptance it must be shown that the goods are nonconforming⁶⁶ to such extent that the value of the goods to the buyer is substantially impaired.⁶⁷ If the

ticularize the basis for rejection under § 2-605.

59. Comment, 2 LAND & WATER L. REV. 199, 200 (1967).

60. § 2-606(1) (a).

61. § 2-606(1) (c).

62. Wrongful rejection occurs when the buyer, although complying with § 2-602 as to manner of rejection, rejects conforming goods or bases rejection on other improper grounds under § 2-601 or § 2-612.

63. § 2-602, comment 3.

64. *Ibid.*

65. § 2-608(3). Since there is no requirement that the buyer elect between rescission and recovering damages, the Code unlike the Uniform Sales Act, allows the buyer to revoke without forfeiting his right to recover damages. Further, the buyer is given the option of exercising the power of revocation not only with respect to the entire delivery but also as to any lot or commercial unit tendered. § 2-608.

66. § 2-106(2) defines "conforming goods."

67. § 2-608(1). The criterion of substantial impairment is based not on an impairment according to the "reasonably prudent man" test, but upon the subjective basis of impairment according to the circumstances of the buyer. § 2-608, comment 2. In *Grucella v. General Motors Corp.*, 10 Pa. D. & C. 2d. 65 (1956), the court held that the revocation was improper when the purchased automobile vibrated and whined at speeds in excess of 30 m.p.h. since the defect did not substantially impair the value to the buyer.

buyer knew of the non-conformity when he accepted the goods, it is necessary to show that he accepted upon the reasonable assumption that the non-conformity would be cured.⁶⁸

If the buyer was unaware of the non-conformity when he accepted, he must show that acceptance was reasonably induced either by the difficulty of discovering the defect⁶⁹ or by the seller's assurances that the goods were not defective.⁷⁰ Stated conversely, the buyer may not revoke acceptance if: he accepted having no reason to assume that the non-conformity would be cured; he did not know of the non-conformity because of failure to make a reasonable investigation; or following the acceptance, the non-conformity is seasonably cured by the seller.

Following the policy of the common law and Uniform Sales Act, § 2-608(2) provides that the revocation "must occur within a reasonable time"⁷¹ after the buyer discovers or should have discovered" the non-conformity and before the goods have undergone a "substantial change in condition" not caused by their own defects.⁷²

Revocation is not effective until notification is given the seller.⁷³ Although no particular form or content of notification is specified by the Code, the Code does indicate that a more detailed notice must be given in order to revoke than is needed to reject.⁷⁴

The buyer who justifiably revokes acceptance has the same rights as if he had rejected the goods in the first place.⁷⁵

68. § 2-608(1)(a). Obviously in this situation the seller's nonconforming tender has prejudiced the buyer's right of rejection and justice demands that the buyer be allowed to revoke and utilize the remedies that would have been available had he rejected initially.

69. § 2-608(1)(b). In this situation the buyer accepted under a mistake of fact which he is permitted to rectify upon subsequently discovering it.

70. § 2-608, comment 3. In this case revocation is justified on grounds of mistake or fraud.

71. If the buyer does not revoke within a reasonable time he loses his right to reject the goods. By failing to reject, the buyer has engaged in conduct inconsistent with the seller's ownership. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 244 (1964).

72. If for any reason other than their own defects, the goods have changed substantially while in the buyers possession, there can be no revocation since often such change is the result of exploitation by the buyer. *Id.* at 245.

73. § 2-608(2).

74. § 2-608, comment 5. Presumably the buyer must particularize the defects upon which the non-conformity is based as well as the grounds upon which revocation is made. HAWKLAND, *supra* note 71, at 245.

75. § 2-608(3).

However, the effect to be given to a wrongful revocation is not made entirely clear by the Code.

It has been stated that the buyer is liable as a rejector for a breach of contract upon a wrongful revocation of acceptance.⁷⁶ Support for this contention is based on three sections of the Code, *viz.*, 2-703,⁷⁷ 2-709,⁷⁸ and 2-608.⁷⁹ In view of the fact that the interpretation allows the buyer to defeat the seller's right to a price action and because of the 'dubious reasoning employed to arrive at such a conclusion,⁸⁰ it is felt that a wrongful revocation leaves the goods accepted whether the revocation is: (1) after a "reasonable time" has elapsed, or (2) based on conforming goods or goods whose defect does not substantially impair their value, or (3) based on an un-

76. Peters, *supra* note 35, at 241. But see, *supra* note 59, at 204.

77. § 2-703 states that "Where the buyer wrongfully rejects or revokes acceptance or fails to make a payment due" the seller has several alternatives with regard to such breach. It does not necessarily follow that this is an indication that wrongful rejection and revocation are equivalent. § 2-703 is a general index of remedies available to the seller upon the buyer's default, whether such default leaves the goods *accepted* (as is the case with failure to make payment on accepted goods which is one of the enumerated defaults) or whether the default is a breach leaving the goods *not accepted* (as does repudiation and wrongful rejection also enumerated therein) is not indicated. As a result, § 2-703, is at most an ambiguous indication of the equivalency of wrongful rejection and wrongful revocation.

78. § 2-709(3) states that "After the buyer has wrongfully rejected or revoked acceptance . . . a seller who is held not entitled to the price . . . shall . . . be awarded damages for nonacceptance." This would seem to indicate an equivalency of wrongful rejection and revocation. In comment 5 to § 2-709, however, the Code specifies that goods accepted within the meaning of this section "include only goods as to which there has been no justified revocation of acceptance" from which necessarily follows that an *unjustified* revocation leaves the goods accepted, which might explain the Code's failure to distinguish wrongful rejection and revocation in this instance.

79. § 2-608(3) in stating that the buyer who revokes acceptance "has the same rights and duties with regard to the goods involved as if he had rejected them" has been interpreted as indicating that a buyer who wrongfully revokes is subject to the same liability as a wrongful rejector. The interpretation appears to be strained. By equating rightful revocation with rightful rejection it does not necessarily follow that the addition of "wrongful" to both sides of the equation will leave the equivalence in balance.

80. See notes 77, 78, and 79 *supra*. As further support for the conclusion that a wrongful revocation leaves the goods accepted, one need only analyze § 2-608, together with accompanying comments, to ascertain that a groundless (wrongful) revocation has the same effect as no revocation at all. Thus, § 2-608(1) in elaborating the grounds for revocation requires that there be a substantial impairment in value caused by the non-conformity of the tendered goods. Obviously, if there is no defect it can't substantially impair the value of the goods and the buyer may not revoke his acceptance. Second, § 2-608(2) in prescribing the manner of revocation, correlates the "reasonable time" given the buyer to notify the seller, with the time given the buyer to discover the grounds for revocation. If there is no basis for revocation the buyer can not discover it and "reasonable time" is without meaning. Finally, § 2-607, comment 1, in vesting the seller's right to a price action at the time of the buyer's acceptance, would have no meaning if the buyer by wrongfully revoking could overcome the seller's right to a price action and require the seller to prove damages or the impracticability of resale in order to recover.

reasonable assumption that the seller would "cure," or (4) based on faulty inspection.

Before discussing the various remedies provided the buyer, the subject of anticipatory repudiation⁸¹ warrants isolated analysis in order to adequately illustrate its special treatment under the Code. Anticipatory repudiation of an executory contract under the common law was a manifestation by the promisor that he would commit a material breach of the contract in the future or that he would not render substantial performance. The doctrine was often applied by the courts as requiring the same degree of absoluteness of repudiation whether the aggrieved party was seeking alleviation from performing conditions precedent to the promisor's duty or whether he desired to sue for breach of contract.

The Code rejects this approach and sets out in § 2-609 the rule relating to insecurity arising from a decline in the promisor's ability or willingness to perform. § 2-610 provides the rule where there is an unequivocal manifestation of an intent to repudiate.⁸²

In order to maintain the security of each party and to permit each to ascertain whether he will in fact receive performance, either party is entitled to make a written demand for adequate assurance⁸³ of due performance whenever he has a reasonable basis for insecurity.⁸⁴

81. The Code provisions relating to anticipatory repudiation are found in sections 2-609 and 2-610.

82. These sections contain one omission which should be noted at the outset. They fail to define the central term, for nowhere is there an indication as to what conduct, specifically, will constitute a repudiation.

83. A determination of what constitutes adequate assurance is governed by the good faith requirement of the demanding party viewed in light of all the circumstances. No specific standard is prescribed by the Code concerning the form or nature of assurance. A sufficient assurance may range from the one extreme of the giving of a "good credit report" together with expressions of willingness to perform by a party of high reputation, to the opposite extreme of requiring "security" or a "guaranty." Anderson, *Repudiation of a Contract Under the Uniform Commercial Code*, 14 DEPAUL L. REV. 1, 9 (1964).

84. As between merchants the test for determining when reasonable grounds for insecurity arise is a commercial one. Any facts that would indicate to a reasonable merchant that the other party might not perform on time should be sufficient. The Code gives the following examples of events which might result, according to commercial standards, in reasonable grounds for insecurity: a seller's making of defective deliveries to other buyers with similar needs; the repetition by the party upon whom demand is made of conduct which caused insecurity in other transactions; insecurity existing in performance of other contracts unrelated legally to the contract in question. § 2-609, comment 3. Insolvency of a "credit" seller would certainly provide "reasonable grounds for insecurity" although it is not specifically stated in the Code. An assignment which delegates performance

If the party upon whom a proper demand is made fails to provide any assurance within a reasonable time, not to exceed 30 days,⁸⁵ the demanding party may treat the failure as a repudiation and proceed under § 2-610. The same alternative is provided in the event an assurance is provided but is inadequate.⁸⁶

Section 2-610 is confined to cases involving an overt communication of an intention to repudiate or conduct rendering performance impossible or demonstrating a clear indication of non-performance.⁸⁷ Excessive demands with respect to a performance under the contract to which the demanding party is not entitled will also amount to a repudiation.⁸⁸

Upon a repudiation by the seller the buyer may suspend his own performance and await performance by the repudiating seller or resort to remedies for breach.⁸⁹ Thus, the aggrieved buyer may suspend his own performance⁹⁰ and, without prejudice to his rights, urge the seller to withdraw his repudiation. Care must be taken not to delay for a period longer than is commercially reasonable for the buyer may find that by delaying he failed to take proper steps to minimize damages.⁹¹ The buyer awaiting a withdrawal by the seller becomes subject to a retraction of repudiation by the seller.⁹²

is said to provide reasonable grounds for insecurity entitling the non-assigning party to "due assurance that any delegated performance will be properly forthcoming." § 2-210, comment 6. In short, "whether the demanding party properly deems himself insecure is to be determined in light of all the circumstances and in keeping with his obligation to act in good faith." ANDERSON, UNIFORM COMMERCIAL CODE 375 (1961).

85. § 2-609(4).

86. *Ibid.*

87. In order for the aggrieved buyer to treat the contract as repudiated under § 2-610, the performance to which he is entitled, but in danger of losing, must be such as to substantially impair the value of the contract to the buyer. § 2-610, comment 3. When the repudiation is based on a failure to provide adequate assurance it is not necessary to demonstrate substantial impairment except as it relates to justification of the demand for adequate assurance. ANDERSON, UNIFORM COMMERCIAL CODE 381 (1961).

88. § 2-610, comment 2.

89. § 2-610.

90. In *Swift Canadian Co. v. Banet*, 224 F.2d 36 (3d Cir. 1955), the court held that, assuming the aggrieved party is ready to perform, the court will not require the vain act of performing when the other party has repudiated.

91. § 2-610, comment 1. A commercially unreasonable delay will invoke the rule of avoidable damages. *But see*, Anderson, *supra* note 83, at 11, where the author states that an unreasonable delay results in a complete loss of any remedy available to the buyer.

92. § 2-611. If the buyer has not cancelled the contract or materially changed his position, the retraction provided it clearly indicates the seller's intention to perform and contains adequate assurance if it were demanded

If the buyer decides not to await performance he may resort to his remedies for breach even though he had previously notified the seller that he would wait for performance, provided such action occurs prior to a retraction by the seller.⁹³

The specific remedies for the seller's repudiation will be discussed below in relation to the general remedies available to the buyer upon the seller's breach.

II. REMEDIES PRIOR TO ACCEPTANCE

Section 2-711 is an index of the remedies available to the buyer who has rejected the goods, rightfully revoked acceptance, or has been the victim of a repudiating or non-delivering seller.⁹⁴ This section provides that the buyer may cancel the contract and recover not only the purchase price paid but also damages measured by § 2-712 relating to "cover," or by § 2-713 regarding "market" damages.

Sections 2-711 and 2-720 clearly indicate that rescission or cancellation as referred to in the Code does not constitute common law rescission which barred recovery of damages.⁹⁵ Section 2-720 provides that "unless the contrary clearly appears, expressions of 'cancellation' or 'rescission' . . . shall not be construed as a renunciation or discharge or any claim in damages for antecedent breach." The buyer may still renounce his rights by an express declaration to that effect.⁹⁶

A. Buyer's Recovery of Damages

Although the aggrieved buyer may be entitled to the utilization of judicial process to acquire contract goods wrong-

under § 2-609, operates to restore the status quo. It is clear that the buyer awaiting a retraction may at anytime, without notifying the seller, alter his position and by so doing eliminate the seller's opportunity to retract. § 2-611.

93. § 2-610, comment 4.

94. If the circumstances compel acceptance or retention of the tendered goods, the buyer's right to damages under § 2-711 is limited by the requirement that he make a proper case for rejection or revocation. § 2-711, comment 1.

95. Although the Code did not control in *American Paper & Pulp Co. v. Deneberg*, 233 F.2d 610 (3d Cir. 1956), the court referred to the fact that the Code changed the effect of rescission where applicable. § 2-711 abrogates the unreasonable rule that a buyer may not both rescind and recover damages. This is accomplished by equating rescission and termination "except that the canceling party also retains any remedy" that he might otherwise have for breach. § 2-106(4).

96. Although the declaration need be in writing and signed, it need not be supported by consideration. § 1-107.

fully withheld,⁹⁷ he will, as a practical matter, be forced to rely upon the less drastic remedies of recovering damages based on "cover" or "market."

Section 2-712 allows the buyer to procure goods in substitution for those due from the seller. The buyer's damages will be measured by the difference between substitute and contract price, provided the cover transaction is made in a reasonable manner, in good faith,⁹⁸ and without undue delay.⁹⁹ Section 2-712 specifically provides that in measuring the difference between substitute and contract price the amount spent on the market shall be taken into account with adjustments arising out of possible pre-payment of any or all of the purchase price allowed as "incidental damages."¹⁰⁰

Although the Code favors substitution, it does not compel the buyer to so act. His failure to effect cover does not affect any remedy for damages which he might otherwise have under the Code.¹⁰¹ He may still recover damages for non-delivery using the non-delivery rule of § 2-713.¹⁰² Section 2-713, when viewed in light of the remedies listed in § 2-711¹⁰³ and § 2-712¹⁰⁴ clearly indicates that a buyer need not cover unless he so chooses. However, if the cover has been effectuated, damages must be measured accordingly since § 2-712(2) provides that the seller is entitled to the benefit of any saving occurring as a result of cover.¹⁰⁵

97. § 2-716; § 2-502.

98. The buyer, who because of the nature of his business, constantly enters into new contracts for similar goods in a highly fluctuating market, will have a wide range of prices to substitute for the contract price. In these circumstances injured buyers will allocate as a substitute contract that which gives rise to the largest amount of damages. However, absent a showing of bad faith, the substitute price is made an absolute factor in the damage formula. § 2-712, comment 2. This can work both ways since the buyer must give the seller credit for any expenses saved as a consequence of the seller's breach. § 2-712(2). At any rate, the general obligation of good faith seems as adequate as any statutory standard could be in limiting the possibility of manipulations by the parties.

99. § 2-712(1).

100. § 2-715(1) defines "incidental damages."

101. § 2-712(3).

102. "The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered." § 2-713, comment 5.

103. § 2-711 allows the buyer to "cover" and recover damages under § 2-712 or recover damages for non-delivery as provided in § 2-713.

104. § 2-712(3) states that "failure of the buyer to effect cover . . . does not bar him from any other remedy."

105. See Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap to Article Two*, 73 YALE L.J. 199, 260 (1963). *Contra*. HAWKLAND, *supra* note 71, at 249.

If the buyer does not need conforming goods, for himself or for resale purposes, cover is inappropriate and the buyer should avail himself of § 2-713 by electing to recover damages based on the difference between the market price and the contract price. The damages will also include consequential and incidental damages less the expenses saved as a result of the breach.

Under the Uniform Sales Act, the buyer's damages for non-delivery were measured at the time or times when the goods ought to have been delivered. Section 2-713 changes this by providing for computation of damages as of the time the buyer learns of the breach. If the price prevailing at the time the buyer learns of the breach is not readily available, "the price prevailing within any reasonable time before or after the time described . . . may be used."¹⁰⁶ A party intending to offer evidence of a price prevailing at a time other than the one described in § 2-713¹⁰⁷ must notify the other party so that surprise is avoided.¹⁰⁸

Measuring damages at the time the buyer learns of the breach rather than at the time for performance, is commensurate with the "cover" provision of § 2-712. Using the time for performance as the time for measuring damages would force the buyer to speculate on the wisdom of covering as opposed to waiting and seeking damages measured as of the time for performance.

The place where market price is determinable is the place of tender or, "in cases of rejection after arrival or revocation of acceptance, as of the place of arrival."¹⁰⁹ If evidence¹¹⁰ is not available as to the market price at the relevant place "the price prevailing . . . at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the

106. § 2-723(2).

107. The price prevailing at the time when the aggrieved party learned of the breach.

108. § 2-723(3).

109. § 2-713(2).

110. § 2-724 authorizes the use of market reports printed in newspapers, trade journals, or other publications to facilitate the proof of market price. The method of preparing such reports or quotations may be shown in evidence to affect the weight to be given thereto, but such evidence does not affect the admissibility of the reports. § 2-724, comment.

goods to or from such other place.”¹¹¹ Before introducing such evidence, adequate warning must be given to the seller.¹¹² Should a situation arise where there is no market price for the goods in question, damages may be assessed through utilization of a hypothetical market price to guide the measurement.¹¹³

The Code gives the buyer a security interest in goods in his possession or control when he has rightfully rejected or justifiably revoked acceptance.¹¹⁴ Exercise of this remedy does not operate as an acceptance since it is clearly indicated¹¹⁵ that an enforcement of the security interest will not affect a finding that the buyer has made a rightful rejection.¹¹⁶ Nor does the exercise of the security interest impair the buyer's right to secure “cover” or “market” damages. Because this remedy is specifically designed to secure repayment of the price¹¹⁷ and incidental expenses, it extends to expenses reasonably incurred in inspection, receipt, transportation, care and custody of the goods.¹¹⁸ Any resale by the buyer must be conducted in a reasonable manner so as to protect the seller's right to the surplus.¹¹⁹

B. Buyer Reaching the Goods

Normally the remedies of “cover” and damages will be adequate, but if not, the Code provides the buyer with the right to compel the seller to deliver contract goods. Of these provisions, the most important is § 2-716 which defines the

111. § 2-723(2).

112. § 2-723(3).

113. § 2-723, comment. Normally the buyer will prefer to use specific performance or replevin rather than base damages on a hypothetical market.

114. § 2-711(3).

115. § 2-602(2).

116. In *Walter E. Heller & Co. v. Hammond Appliance Co.*, 29 N.J. 589, 151 A.2d 537, 539 (1959),

the seller having undertaken to resume possession was under a duty to do so within a reasonable time. Not only did failure to perform that duty create a liability for storage charges, but defendant [buyer] was not obligated to retain possession indefinitely. On the contrary . . . he was entitled to undertake a good faith sale without further notice . . .”

117. The buyer has made a payment when he was made a cash prepayment or signed a negotiable instrument including accepting a draft or drawing a check. *HAWKLAND, supra* note 71, at 253.

118. The buyer may not keep surplus funds resulting from a resale. A failure to account will result in acceptance by the buyer since such conduct is inconsistent with the seller's ownership. § 2-711, comment 2.

119. § 2-711, comment 2.

buyer's right to specific performance or replevin.¹²⁰ This section is expanded by § 2-502 which allows the buyer to compel delivery if he has prepaid the price and the seller becomes insolvent within 10 days after receipt of the payment.

The buyer is entitled to specific performance whenever "the goods are unique or in other proper circumstances."¹²¹ The term "unique" is not specifically defined although it appears that uniqueness in a reasonable commercial setting is the significant point. The parallel right to replevin rests on an inability to effectuate a cover under § 2-712. The relationship of cover to uniqueness is not indicated except to the extent that inability to cover is considered as one of the "other proper circumstances" entitling the buyer to recovery.¹²²

The Code also provides the buyer with a right of specific performance in the event of the seller's insolvency.¹²³ Thus, if the seller becomes insolvent within 10 days after receipt of the first installment of the purchase price of goods which have been identified to the contract, the buyer may recover such goods upon tender of the unpaid balance.¹²⁴

Although a buyer must persuade a court to grant specific performance, he has a right to replevy goods that have been identified to the contract if after reasonable effort he is

120. § 2-716 has the effect of liberalizing the law by eliminating the necessity that the goods be "specific or identified" as previously required by the Uniform Sales Act. Further, in keeping with the policy of a court of equity to dispose of all elements of the controversy, it is provided that in granting specific performance the court may include in its decree such terms and conditions as to damages or other relief as the court may deem just. § 2-716(2).

121. § 2-716(1).

122. § 2-716, comment 2. This would seem to indicate that specific performance will be granted even though the goods are not "unique," if damages will not make the buyer whole. This is consistent with § 1-106 which provides that remedies "shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."

123. § 2-502. In this situation, cover is inadequate since the buyer is not made whole if he is forced to buy other goods in the market and hold an insolvent seller for damages.

124. The buyer is prevented from reclaiming goods that were not identified to the contract. § 2-502. Payment prior to identification makes the "buyer" a creditor with the result that allowing him to reclaim goods would constitute a contradiction of § 60 of the Bankruptcy Act. However, even though identification is a requisite that would seem to distinguish a "buyer" and a "creditor" there is room for concern as to the eventual outcome of the validity of the provisions of § 2-502. See, Note, *The Commercial Code and the Bankruptcy Act: Potential Conflicts*, 53 NW. U. L. REV. 411, 424 (1958); 104 U. PA. L. REV. 91, 103 (1955); Shanker, *Bankruptcy and Article 2 of the Uniform Commercial Code*, 40 REF. J. 37, 41 (1966).

unable to cover¹²⁵ or the goods have been shipped under a security reservation¹²⁶ which has been discharged.¹²⁷ The buyer must, of course, tender any balance owing on the purchase price.

The "identification" requirement is satisfied at the time of making the contract if the goods are then in existence.¹²⁸ As to future goods, identification does not occur until the goods are in some way designated by the seller as the goods to which the contract refers. Thus, in the case of future goods the replevin action is severely limited since early identification is not in the seller's best interest and will rarely occur.

The buyer will not be able to exercise the remedy of replevin in derogation of the rights of third parties. If rights of a competing purchaser are involved and the seller is a merchant, the buyer in the ordinary course of business prevails over the first buyer who has entrusted the seller with the goods.¹²⁹

III. BUYER'S REMEDIES AFTER ACCEPTANCE

Although acceptance by the buyer has certain ramifications to be seen later, it does not bar the buyer's right to damages if he has given the seller notice of breach¹³⁰ within a reasonable time.¹³¹ If notice is not given the seller within a reasonable time,¹³² the buyer is barred from asserting any remedy to which he might otherwise be entitled. Thus although acceptance entitles the seller to the contract price,¹³³

125. § 2-716(3) provides a right of replevin "if after reasonable effort he [buyer] is unable to effect cover . . . or the circumstances reasonably indicate that such effort will be unavailing."

126. When the place of delivery is the place of shipment but the price is not due until the goods have arrived, seller may consign to himself or his order. § 2-505.

127. § 2-716(3).

128. § 2-501(1).

129. "[R]ights of other purchasers of goods and of lien creditors are governed by" other articles of the Code. § 2-403(4).

130. The burden of proof with respect to any non-conformity is on the buyer. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 253 (1964).

131. § 2-714.

132. "The time for notification is to be determined by applying commercial standards to a merchant buyer." While in the case of a non-merchant different standards are used "so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." § 2-607, comment 4.

133. In the case of a partial acceptance under § 2-601, the price is apportioned on the contract. § 2-607, comment 1.

§ 2-717 enables the buyer, acting within a reasonable time, to recover an offset or recoupment for any 'defects. If the damages exceed the price, the buyer may recover under sections 2-714 and 2-715.

It should be noted, as previously discussed,¹³⁴ that a buyer who accepts, although he is precluded from rightfully rejecting the goods, may under limited circumstances revoke acceptance and recover as if no acceptance had taken place.

A. Buyer's Right to Damages

If the buyer has accepted a non-conforming tender¹³⁵ and given the proper notice,¹³⁶ he becomes entitled to damages under § 2-714. In an action involving breach of warranty, the damages will be measured not as of the time of tender, as in the case prior to acceptance, but at the time of acceptance.¹³⁷ For non-warranty breaches § 2-714(1) does not require that damages be measured at any particular time but enables a determination by any reasonable method.¹³⁸

In non-warranty cases, where the breach relates to manner of delivery rather than quality of goods delivered, the buyer may recover "the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."¹³⁹ This provision accepts the normal rule of damages by allowing recovery for any loss which is an ordinarily foreseeable result of the breach.

Section 2-714(2), in dealing with remedies for breach of warranty, provides that the seller must be given credit for the value¹⁴⁰ to the buyer of the accepted goods. The buyer is entitled to damages sufficient to increase the value of the goods to that which it would have been had the goods con-

134. See note 80 *supra* and accompanying text.

135. § 2-106(2) defines "conforming."

136. No formality of notice is required by § 2-607(3) and any language which reasonably indicates the buyer's reason for withholding his payment is sufficient.

137. § 2-714(2).

138. The time of acceptance may often be the appropriate time for measuring damages. A buyer who has "accepted" does not have the problem of "cover" which is the reason damages are measured at the time of tender in situations where the goods have not been accepted.

139. § 2-714(1).

140. § 2-714(2) uses the term "value" rather than "price" in order to assure the buyer that a favorable bargain will be protected. This allows damages to reflect the difference between the contract price and the price the goods would bring if conforming on the date of acceptance. § 2-714, comment 3.

formed to the contract. Special circumstances, however, may show proximate damages of a different amount.

Section 2-717 allows a buyer to recoup any damages resulting from breach of the contract by deducting the amount of damages from any part of the price still due under the same contract. The buyer is obligated to notify the seller of his intention to recoup. This usually will occur at the time the contract price is paid. The seller, unless he makes it clear that he has accepted payment under reservation of rights,¹⁴¹ will be barred from disputing the recoupment if the payment is made by a check marked "payment in full."¹⁴²

B. Buyer Reaching the Goods

Normally when a buyer has accepted the goods he will have no need for specific performance or replevin. However, where the goods are unique, the buyer may revoke acceptance and then acquire non-defective goods that can only be supplied by the particular seller involved.¹⁴³

IV. BUYER'S REMEDIES NOT DEPENDENT ON ACCEPTANCE

As previously discussed, acceptance has substantial significance in determining the remedies available to the buyer under the Code. However, some remedies available to the buyer do not depend on whether the buyer has accepted the goods. Our concern is now focused on these remedies.

Whether the buyer elects to "cover"¹⁴⁴ or to claim 'damages for non-delivery'¹⁴⁵ or for non-conformity,¹⁴⁶ he may also, under proper circumstances, recover incidental and consequential damages as provided in § 2-715.

A. Buyer's Right to Incidental Damages

Incidental damages recoverable by the buyer on the seller's breach include, in addition to normal damages, any reasonable expenses incurred in inspection, receipt, transporta-

141. § 1-207.

142. § 3-802.

143. HAWKLAND, *supra* note 130, at 265.

144. § 2-712.

145. § 2-713.

146. § 2-714.

tion, care, or custody of goods rightfully rejected by him.¹⁴⁷ Further, the buyer may recover reasonable expenses or commissions paid in properly effecting a "cover" as well as expenses related to the delay or other breach by the seller.¹⁴⁸ A determination of the reasonableness of expenses is governed by the "good faith" requirement imposed in § 1-203. In *Mack v. Coogan*,¹⁴⁹ where a boat sank upon launching, the cost of transporting the boat to the launching site, the cost of labor incurred to recover it after sinking, and the cost of arranging for return of the boat to the seller, were properly recoverable as damages under § 2-715.

B. Buyer's Consequential Damages

The consequential damages recoverable by the buyer are those meeting *Hadley v. Baxendale*¹⁵⁰ requirements of notice, i.e., reasonably foreseeable from the buyer's known needs which could not be minimized.¹⁵¹ Specifically, consequential damages will include losses resulting from general or particular needs of the buyer of which the seller had reason to know at the time of contracting and which the buyer could not reasonably have prevented by "cover" or otherwise.¹⁵²

Although the buyer can recover lost profits, provided the seller had reason to know that a resale was contemplated, speculative damages are not allowed. Because the burden of proving damages is on the buyer, expected profits are not recoverable unless there is proof that they clearly would have been earned had the breach not occurred. In *Harry Rubin and Sons, Inc. v. Cons. Pipe Co. of America*,¹⁵³ the buyer was not allowed to recover for loss of goodwill when he could not supply his customers, the court stating: "there is no indication that the Uniform Commercial Code was intended to enlarge the scope of buyer damages to include a loss of goodwill. In the absence of specific declaration in that respect . . . damages of this nature would be entirely too speculative . . ."¹⁵⁴

147. § 2-715(1); 2-715, comment 1.

148. *Ibid.*

149. 8 Pa. Chest. 233 (1958).

150. 9 Exch. 341 (1854).

151. § 2-715(2).

152. *Ibid.*

153. 396 Pa. 506, 153 A.2d 472 (1959).

154. *Id.* 153 A.2d at 476.

Wyoming has enlarged upon the remedy pertaining to consequential damages for breach of warranty. In view of the special nature of the subject it will not be elaborated upon here.¹⁵⁵

C. Buyer's Remedy for Fraud

The Code extends the remedies for non-fraudulent breach to cases involving injury by fraud or misrepresentation.¹⁵⁶ A rescission or rejection or return of the goods does not bar a claim for damages or other remedy. This has the effect of placing the remedy for fraud on the same level as those for non-fraudulent breach. It will be noted that § 2-721 is designed only to prevent the doctrine of election of remedies from injuring one who has utilized his remedy for fraud. It does not state the elements of the fraud remedy which are to be determined by common law.¹⁵⁷

V. MODIFICATION OF BUYER'S REMEDIES

Sections 2-718 and 2-719 allow the parties considerable latitude in which to fashion their own remedies by including modifications in the terms of the contract. Although the parties do not have unlimited freedom to modify their remedies, reasonable limitations will be given effect.¹⁵⁸

Section 2-718(1) allows the parties to specify or liquidate damages that either party will be entitled to receive upon breach of the contract. Under this provision the amount so specified must be reasonable as determined in light of the following: (1) "anticipated or actual harm caused by the breach," (2) "the difficulties of proof of loss," or (3) "the inconvenience of non-feasibility of otherwise obtaining an adequate remedy."¹⁵⁹ However, a stipulation of damages that is reasonably related to the anticipated harm at the time of the stipulation is not necessarily invalid because it fails to forecast damages correctly since the test of validity involves

155. See White, *Sales Warranties Under Wyoming Law and the Uniform Commercial Code*, 14 Wyo. L.J. 246 (1960).

156. § 2-721.

157. § 1-103.

158. § 2-718, comment 1; § 2-719, comment 1.

159. § 2-718(1). An unreasonable provision is void as a penalty if too large and invalid as unconscionable if too small. § 2-718, comment 1.

establishing that either actual or anticipated harm bears a reasonable relation to liquidation damages.¹⁶⁰ Conversely, even if the provision does not reasonably reflect a fair forecast of anticipated harm as of the time of its making, it is validated by events that put it in line with damages that actually occur.¹⁶¹

In the absence of a provision for liquidated damages, the Code, in an attempt to prevent oppression of the buyer, requires that the seller return to the buyer as much of any deposit as exceeds the seller's actual damages. If the seller cannot prove greater damages, he is limited in his recovery to twenty percent of the value of total performance or \$500, *whichever is smaller*.¹⁶² Hence, the seller is entitled to those expenses without proving them but he is entitled to a more substantial recovery only if he can prove his loss.¹⁶³

Section 2-719 allows the parties to substitute or restrict the non-damage remedies authorized by the Code. But § 2-719 contains broad rules that are also applicable to damage restrictions allowed by § 2-718. Thus, a damage limitation must not be unconscionable and consequential damages limited with respect to those recoverable for personal injury to the person are unconscionable *per se*.

A contractual limitation on remedies, as opposed to damages, must be reasonable and may not be unconscionable. If it is unconscionable, it is void and the parties are then entitled to the general remedies provided by the Code.¹⁶⁴ The bounds of reasonableness, although not articulated expressly, are indicated by § 2-719(2) which destroys the effect of a consensual remedy that has failed of its essential purpose.¹⁶⁵

Section 2-719(1) raises the presumption that consensual remedies are cumulative rather than exclusive. This neces-

160. *Denkin v. Sterner*, 10 Pa. D. & C.2d 203 (1956), held that where the agreement permitted the seller to enter judgment against the buyer for the full purchase price the provision was void as a penalty. The court indicated that to permit recovery of such an amount without a showing of what goods were identified to the contract and what goods could be readily resold, would in effect, be to allow unreasonably large liquidated damages "which is unconscionable."

161. § 2-718(1).

162. § 2-718(2)(b).

163. § 2-718(3).

164. § 2-719, comment 1.

165. This result is based on the notion that an unreasonable remedy should not be permitted to stand.

sitates a statement that the remedies provided are to furnish the only relief available if that is the intention of the parties.

The buyer can do little to enhance his damages by contract. Of course, he can extract high performance standards, multiple and diverse express warranties, communicate information about possible business losses to be expected in default, and draft a generously compensatory liquidated damage clause; but there is nothing in § 2-719 to warrant confidence in vastly improving the rights already provided to the buyer by the Code.

VI. LIMITATIONS ON BUYER'S REMEDIES

In addition to valid self regulation, the remedies provided by the Code are subject to § 2-725 which adopts a statute of limitations for breach of contract for sale; regulates the contractual modifications of such limitation periods; and states when a cause of action arises. As § 2-725 relates only to actions for breach of a contract for sale, it does not apply to actions for fraud or other actions not predicated upon breach of contract.

When an action is brought within four years after the cause of action accrues but is then terminated under circumstances entitling the buyer to bring a second action, he is not required to do so within the initial four year period but is given six months after termination of the original action, even though the six months period runs beyond the original four year period.¹⁶⁶ This privilege is, of course, denied if the first action was terminated by voluntary discontinuance or dismissed for failure to prosecute.

The cause of action accrues when the breach occurs, even though the aggrieved party was unaware of the breach.¹⁶⁷ This seems unduly harsh until it is remembered that commercial interests are best served by quickly bringing finality to such transactions.

CONCLUSION

In general, the remedies provided by the Code represent

166. § 2-725, comment.

167. § 2-725(2).

a comprehensive and impressive network of alternatives open to the buyer upon breach by the seller. However, as has been indicated throughout this discussion, there are many hidden pitfalls and areas of total ambiguity. The difference between wrongful rejection and wrongful revocation, the distinction between wrongful and unjustified revocation, and the distinction between wrongful and ineffective rejection are just a few examples of provisions needing clarification.

Further, as the Code stands, it requires a search through not only Article 2 but the remainder of the Code to ascertain provisions limiting and explaining any section then under consideration. In view of the length of the Code, this is an onerous burden that could be rectified by a more detailed cross-referencing and comprehensive treatment in the comments.

Finally, many of the cases indicate that the court is either completely baffled by the Code or is desirous of adhering to prior law. This is accomplished through evasion and contradiction of the apparent meaning of the Code which only adds confusion to an area of the law that needs little assistance in this regard.

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