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A Teaching Note on Remedies for Breach of Contract under the Uniform Commercial Code

Richard J. Hunter, Jr.[1], John H. Shannon[2], Henry J. Amoroso[3]

[1] Professor of Legal Studies, Seton Hall University; Adjunct Professor of Legal Studies, University of Tulsa
[2] Professor of Legal Studies, Seton Hall University
[3] Associate Professor of Legal Studies, Seton Hall University

Correspondence: Richard J. Hunter, Jr. Tel: 908-285-8632, Email: hunterri@shu.edu

Abstract
This article explains the various remedies and categories of damages that are available to an aggrieved buyer or seller in the case of a breach of contract under the Uniform Commercial Code. Sections of the Code will be cited, as well as relevant cases, and detailed explanations will be provided as well for each Code Section.

Keywords: Administrative Strategy, Crisis, School Leaders, Academic Administration

1. Introduction

Damages for breach of contract are "intended to give the injured party the benefit of his bargain" (see *Martin v. U-Haul Co. of Fresno,* 1988). The goal is to put the injured party in "as good as position as he would have been in had performance been rendered as promised" (see *Brandon & Tibbs v. George Kevorkian Accountancy Corp.,* 1990; Donnelly, 2022).

Achieving this goal will involve finding an appropriate remedy, which may entail awarding monetary damages or imposing a remedy such as specific performance (Szladitz, 1955) or replevin under certain circumstances.

The Uniform Commercial Code (UCC or Code) was created specifically to "address two problems in United States business:

- the increasingly complex legal and contractual requirements of doing business deriving from some states, and
- differences in state laws that made it difficult for business people from different states to do business with one another" (Stimmel, Stimmel & Roeser, 2023).

Remedies may be viewed in light of the general perspective of the authors of the Uniform Commercial Code regarding its purpose and effect, found in Section 1-103:

> "The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions."

The purpose of this article is to explain the various remedies and categories of damages that are available to an aggrieved buyer or seller in the case of a breach of contract under the Uniform Commercial Code (Phalan, 1955). Sections of the Code will be cited, as well as relevant cases, and detailed explanations will be provided for each Section of the Code as well (see generally McCormick, 1935).

1.1. Implications of the Statute of Limitations

As a preliminary matter, it is important to understand the implications of the Statute of Limitations on contractual remedies, which may limit or even preclude a party's ability to seek damages as an appropriate remedy (see generally Irby, 2021).

Under Section 2-725:

> "(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

2. What Happens if it Becomes Apparent that a Contract is Breaking Down?

A vexing and persistent problem under the common law would arise if one of the contracting parties, *prior to the date of contractual performance*, indicated that they would be unable or unwilling to perform for whatever reason. Originally, common law courts provided no real comfort under these circumstances, holding that the rights of the parties would only be "fixed" or would "ripen" as of the date specified in the contract for performance.

The writers of the Uniform Commercial Code were especially sensitive to protecting the rights of all parties to a contract under these circumstances.

There were several important concepts incorporated into the UCC which were *not* originally part of the common law that were specifically designed by the writers to deal with these circumstances as well.

2.1. Anticipatory Repudiation (see Feldhausen, 2023)

Over time, as the common law began to adopt a more proactive view relating to a promisor's options and rights, the doctrine of anticipatory repudiation would achieve acceptance and recognition (see Poole, 1978). Bailey and Desiderio (2020, p. 29) noted: "An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for … performance has arrived."

The writers of the Code concurred in this view. The first of these was the doctrine of *anticipatory repudiation*, found in Section 2-610 of the UCC.

> "When either party repudiates the contract [makes an unequivocal statement that he/she will not perform] with respect to a performance not yet due, the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:
>
> (a) for a commercially reasonable time await performance by the repudiating party; or
> (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
> (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704)."

The case that changed the prior common law and arguably resulted in the inclusion of "anticipatory repudiation" in the UCC is *Hochster De La Tour* (1853).

Hochster v. De La Tour

118 ER 922 (1853)

Brief Fact Summary: Defendant and Plaintiff entered into a contract for Plaintiff to accompany Defendant on a tour starting on June 1. Defendant contacted Plaintiff on May 11, stating that he had changed his mind. He refused to compensate Plaintiff. Plaintiff brought suit against Defendant on May 22. Plaintiff found a new job that would begin on July 1.

Defendant argues that if Plaintiff is not willing to accept Defendant's cancellation of the contract, then Plaintiff should have waited, being ready and willing to perform the contract until the time that the contract was to be performed.

Issue. Was the lower court correct to find for the Plaintiff even though the time that the contract was to be performed had not yet occurred?

Held. Yes

Synopsis of Rule of Law. If two parties enter into a contract to be performed at a designated time in the future, and one party refuses to perform the contract before the designated time the parties agreed to perform, the other party may sue before the contract was to be performed. That party need not wait until the time for performance has passed. Defendant had made it clear that he will not perform the contract.

Discussion. The court laid down a rule about suing for damages on a breach of contract where the performance was to be at a future date. Instead of making the injured continue to prepare to perform when that party knows it is useless to do so, the court's ruling allows injured parties to mitigate their damages by seeking alternate employment and still sue for the damages they sustained because of the breach.

Section 2-723 of the Code provides:

> "(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 or Section 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.
>
> (2) If evidence of a price prevailing at the times or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or 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 goods to or from such other place.
>
> (3) Evidence of a relevant price prevailing at a time or place other than the one described in this Article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise."

Desiderio (2019) writes:

> "An anticipatory breach of a contract—also known as an anticipatory repudiation—'can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach'" (see *Princes Point LLC v. Muss Dev. LLC*, 2017).

Desiderio (2019) continues: "For an anticipatory repudiation to be deemed to have occurred, "the expression of intent not to perform by the repudiator must be 'positive and unequivocal.'" With even more emphasis, the First Department has stated that "[i]t is clear that there must be a definite and final communication of the intention to forego performance before the anticipated breach may be the subject of legal action" (citing *Rachmani Corp. v. 9 East 96th St. Apartment Corp.*, 1995).

2.2. "Reasonable Grounds for Insecurity"

The second is the discussion of the concept of "*reasonable grounds for insecurity*" found in Section 2-609 (see *By-Lo Oil Co. v. ParTech, Inc.*, 2001), which begins with a statement of the expectations of each party relating to performance of a contract and the circumstances under which a party is able to demonstrate reasonable grounds to believe that their counterpart might be unable or unwilling to perform their part of the bargain, triggering a demand for "adequate assurances of due performance" (Kryla-Cudna, 2021).

> "(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
>
> (2) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards (trade usage).
>
> (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.
>
> (4) After receipt of a justified demand, failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract."

Relating to the required communication from a buyer, Paley (2023) writes:

> "The seller should never over-demand what it needs as assurance from the buyer. Unreasonable requests could be considered a repudiation of the agreement by the seller. What the seller asks for should be sufficient to satisfy its insecurity regarding contract performance and nothing further. For example, requesting some form of proof that the buyer has the money to fulfill its obligations generally is viewed as an acceptable request."

> "Unjustified or overly burdensome demands that serve to harass a buyer would not be considered good faith demands. In most cases, a demand for adequate assurance should not include additional material terms that are not in the original agreement, such as earlier payment deadlines, or deposit obligations, or letter of credit or bonding obligations. In addition, a seller should not demand more than is required under the original contract coupled with a threat that the contract will be automatically terminated if those demands are not met. Courts have found that type of demand to be an anticipatory repudiation of the contract by the seller. Whatever is requested should be reasonable and in accordance with generally accepted commercial standards and practice."

This same reasoning can be applied to a demand for adequate assurances of performance made by a buyer to a seller.

3. Sellers Remedies in General: Section 2-703: Protecting the Seller's Position

Once a breach of contract has occurred, however, the UCC provides several options and remedies to the non-breaching party in order to protect their positions and keep any further consequences of the breach from occurring. Section 2-703 contains the main discussion of seller's remedies upon breach by the buyer (see Hawkins, 2019).

> "Where the buyer *wrongfully rejects*, or *revokes acceptance* of goods, or *fails to make a payment due* on or before delivery, or *repudiates* with respect to a part or the whole, …
>
> then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may:
>
> (a) withhold delivery of such goods;
> (b) stop delivery by any bailee as hereafter provided (Section 2-705);
> (c) proceed under the next section respecting goods still unidentified to the contract;
> (d) resell and recover damages as hereafter provided (Section 2-706);
> (e) recover damages for non-acceptance (Section 2-708), or in a proper case the price (Section 2-709);
> (f) cancel.

4. What Happens if a Seller Learns that the Buyer is Insolvent? Section 2-702

Closely in tandem with Section 2-609 relating to addressing "reasonable grounds for insecurity" is Section 2-702 which deals with the possible insolvency of a buyer, potentially affecting the buyer's ability to pay for the goods or complete the contract. Tuovila (2023) writes: "Insolvency is a type of financial distress, meaning the financial state in which a person or entity is no longer able to pay the bills or other obligations. The IRS states that a person is insolvent when the total liabilities exceed total assets."

> "(1) Where the seller discovers the buyer to be insolvent, he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2-705).
>
> (2) Where the seller discovers that the buyer has received goods on credit while insolvent, he may reclaim the goods [writ of replevin] upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply.

> (3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them."

What should the seller do with regard to any unfinished goods at this point? Section 2-704 provides two related options to the seller under these circumstances.

The first option is found in Section 2-704, "Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods," which states:

> "(1) An aggrieved seller under the preceding section may
>
> (a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control; [This involves an action of the seller to *segregate* and *label* the goods, clearly indicating that these were the goods under the contract.]
> (b) treat as the subject of resale, goods which have demonstrably been intended for the particular contract even though those goods are unfinished.
>
> (2) Where the goods are unfinished, an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, either complete the manufacture and wholly identify the goods to the contract, or cease manufacture and resell for scrap or salvage value, or proceed in any other reasonable manner."

An important question arises: When should a seller *never* complete the manufacture of unfinished goods? The key to understanding Section 2-704 lies in the concept of "specially manufactured goods" found in Section 2-201 of the Code. Under most circumstances involving the manufacture of "specially manufactured goods," a seller would not be able to resell the goods in the regular or "ordinary course" of the seller's business. Law Insider (2023) described specially manufactured goods as follows: "… those goods which are specially manufactured based upon information furnished to Seller by Buyer or prepared by Seller alone or in conjunction with Buyer and/or specifically for the manufacture of such goods."

Another option available to a seller is to take positive steps to assure that the goods do not "fall into the hands" of a buyer who has committed a breach or who has indicated that they will not perform. Section 2-705, "Seller's Stoppage of Delivery in Transit or Otherwise," deals with this option available to the seller:

> "(1) The seller may stop delivery of goods in the possession of a carrier or other bailee [such as a warehouseman] when he discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods….
>
> (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.
> (b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages."

In practical terms, the seller may be required to pay a bailee or third party (for example, a shipper or warehouseman) for their services, but will be able to recover any amounts paid or obligated as incidental damages from the buyer.

5. Seller's Resale Including Contract for Resale: Section 2-706

An important or preferred option available to a seller is to attempt to resell the goods that were the subject matter of the contract. In this way, the seller is protecting their own position and may also be protecting the buyer from substantial damages. This section of the Code provides the basic formula for determining damages for a seller.

> " (1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof.
>
> Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price…
>
> together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach."

The Code provides specific guidance as to the details of the resale:

> "Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.
>
> (3) Where the resale is at *private sale* the seller must give the buyer reasonable notification of his intention to resell.
>
> (4) Where the resale is at *public sale*:
>
> (a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and
> (b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and
> (c) if the goods are not to be within the view of those attending the sale, the notification of sale [in a newspaper ad, for example] must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and
> (d) the seller may buy."

Interestingly, the Code addresses the issue of accountability for any potential profits made by a seller in the course of any resale, and states in Section 2-706: "The seller is not accountable to the buyer for any profit made on any resale."

In addition, a third party, a "person in the position of a seller," may acquire rights under a contract and may withhold or stop delivery under Section 2-705 and resell under Section 2-706, and also recover any incidental damages under Section 2-710. Under Section 2-707, a person in the *position of a seller* may be "an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller." A "person in position of a seller" may also be the seller's assignee (Benfield, 1974). An example of incidental damages for such a party might be a brokerage or agency fee or any fees incurred by a secured party in recovering the goods that were the object of a security interest under Article 9 of the Code (Hunter & Shannon, 2020).

Finally, the Code provides an important statement relating to a party termed a "*good faith purchaser for value*" who might purchase the goods that were the object of the resale: "A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section" (see Martin, 2019). "Good faith" is defined under Section 2-315 as "honesty in fact" and in the case of a merchant, the "observance of reasonable commercial standards" (see generally Sepinuck, 2018).

5.1. Seller's Choice to Seek Damages Under Section 2-708

In some cases, a seller may choose not to resell the goods, but will instead seek to recover monetary damages for a breach. This choice is reflected in Section 2-708, "Seller's Damages for Non-Acceptance or Repudiation."

> "(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price,
>
> together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.
>
> (2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is the *profit* (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."

5.2. Seller's Decision to Sue for the Price: Section 2-709

There may be circumstances where a seller foregoes damages based on resale and seeks the contract "price" instead. The Code lays out these circumstances:

> "1) When the buyer *fails to pay the price as it becomes due*, the seller may recover, together with any incidental damages under the next section, the price
>
> (a) of *goods accepted*, or of *conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer*; and
> (b) of *goods identified to the contract* if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

In a case where the seller is seeking the price, the seller has additional responsibilities.

> (2) Where the seller sues for the price, he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. *The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold*."

In addition to seeking damages incurred in reselling the goods or in seeking the price under the previous Code Sections, a seller may seek *incidental damages* under Section 2-710. Incidental damages to an aggrieved seller include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach" (see Hawkins, 2019).

In many jurisdictions, if the seller is successful in reselling the goods for *more* than the contract price, the seller will still be entitled to recovery of any incidental or consequential damages.

The *Chicago Roller Skate* (1970) case brings together many of the main points relating to seller's remedies.

Chicago Roller Skate Mfg. Co. v. Sokol Mfg. Co.

177 N.W.2d 25 (1970): Supreme Court of Nebraska.

NEWTON, Justice.

This is an action for damages for breach of contract. A jury was waived and trial had to the court. Defendant purchased of plaintiff truck and wheel assemblies with plates and hangers for use in the manufacture of skate boards. The skate board fad terminated and several weeks later, defendant returned, without plaintiff's consent, a quantity of the merchandise purchased. There was due plaintiff the sum of $12,860. The merchandise was not suitable for other uses and could not be resold. It was held by plaintiff for 7 months. Plaintiff offered a credit of 70 cents per unit which defendant neither accepted nor rejected. Plaintiff then disassembled, cleaned, and rebuilt the units to make them suitable for use on roller skates. The undisputed evidence shows the rebuilt units had a reasonable value of 67 cents and 69 cents. In the salvage operation plaintiff incurred an expense of $3,540.76. Profits lost amounted to an additional $2,572. Plaintiff, disregarding its expense, credited defendant with 70 cents per unit and brought suit for the balance due of $4,285 for which sum it recovered judgment in the trial court. We affirm the judgment.

Section 1-103, U.C.C., provides: "Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, * * * or other validating or invalidating cause shall supplement its provisions."

Section 1-106, U.C.C., provides in part: "(1) The remedies provided by this act 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 but neither consequential or special nor penal damages may be had except as specifically provided in this act or by other rule of law."

Section 1-203, U.C.C., states: "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement."

Section 2-718(4), U.C.C., provides: "Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments * * *."

In accordance with section 2-709, U.C.C., plaintiff was entitled to hold the merchandise for defendant and recover the full contract price of $12,860. Plaintiff did not elect to enforce this right, but recognizing that there was no market for the goods or resale value and that they were consequently worthless for the purpose for which they were designed, it attempted to mitigate defendant's damages by converting the goods to other uses and credited defendant with the reasonable value of the goods as converted or rebuilt for use in roller skates. In so doing, plaintiff was evidencing good faith and conforming to the general rule requiring one damaged by another's breach of contract to reduce or mitigate damages. See *Selig v. Wunderlich Contracting Co.*, 160 Neb. 215, 69 N.W.2d 861.

The Uniform Commercial Code contemplates that it shall be supplemented by existing principles of law and equity. It further contemplates that the remedies provided shall be liberally administered to the end that an aggrieved party shall be put in as good a position as it would have been in if the contract had been performed. Here the buyer was demanding of the seller credit for the full contract price for goods that had become worthless. The seller was the aggrieved party and a return of worthless goods did not place it in as good a position as it would have been in had the contract been performed by the buyer paying the contract price. On the other hand, the crediting to defendant of the reasonable value of the rebuilt materials and recovery of the balance of the contract price did reasonably reimburse plaintiff. This procedure appears to be contemplated by section 2-718(4), U.C.C., which requires that a seller paid in goods credit the buyer with the reasonable value of the goods.

It is the defendant's theory that since the goods were not resold or held for the buyer, the seller cannot maintain an action for the price. We agree with this proposition. We also agree with defendant in its contention that the controlling measure of damages is that set out in section 2-708(2), U.C.C. This section provides that the measure of damages is the profit which the seller would have made from full performance by the buyer, together with any

incidental damages resulting from the breach and costs reasonably incurred. Defendant overlooks the provision for allowance of incidental damages and costs incurred. The loss of profits, together with the additional costs of damage sustained by plaintiff amount to $6,112.76, a sum considerably in excess of that sought and recovered by plaintiff. Although the case was tried by plaintiff and determined on an erroneous theory of damages, the error is without prejudice to defendant. There being no cross-appeal, the judgment of the district court is affirmed. Affirmed.

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6. Buyer's Remedies in General

We now turn to remedies available to a buyer in the case of a breach by the seller (see Phalan, 1955). An overview of buyer's remedies is found in Section 2-711:

> "(1) Where the seller *fails to make delivery, or repudiates, or the buyer rightfully rejects (non-conforming), or justifiably revokes acceptance,* then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may *cancel* and whether or not he has done so may *in addition to recovering so much of the price as has been paid*:
>
> (a) "*cover*" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
> (b) recover damages for non-delivery as provided in this Article (Section 2-713).
>
> (2) Where the seller fails to deliver or repudiates, the buyer may also
>
> (a) if the goods have been identified, recover them as provided in this Article (Section 2-502), which states: " Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price" or
> (b) in a proper case obtain *specific performance* or *replevy* the goods as provided in this Article (Section 2-716)."
>
> (3) On rightful rejection or justifiable revocation of acceptance, a buyer has a *security interest* in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may *hold such goods and resell* them in like manner as an aggrieved seller (Section 2-706)."

6.1. "Cover"; Buyer's Procurement of Substitute Goods: Section 2-712.

Perhaps the most important and practical remedy available to a buyer in case of a breach by the seller is the remedy of cover, which in a sense is the mirror of the seller's remedy of resale. Section 2-712 states:

> "(1) After a breach within the preceding section, the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price], together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach."

6.2. Buyer's Damages for Non-delivery or Repudiation: Section 2-713

The buyer against whom a breach has been committed may seek this remedy under circumstances where the buyer does not have an immediate need for the goods. In essence, the buyer will be "banking" any damages to be used in some point in the future at the discretion of the buyer.

> "(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price, together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.
>
> (2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival."

Section 2-724 provides information relating to market quotations.

> "Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility."

In practice, the buyer should bring to court at least three price or market quotations indicating market price, a process which has been greatly facilitated today through the use of the Internet. Remember that it is incumbent on the buyer to do so "in good faith," observing "reasonable commercial standards" under UCC Section 2-314 (see Markovitz, 2012).

6.3. Buyer's Damages for Breach in Regard to Accepted Goods: Section 2-714

Section 2-714 applies where the buyer has accepted goods and has notified the seller that the goods do not conform to the contract. The buyer is now seeking damages for the non-conformity.

A buyer may revoke his or her acceptance of a non-conforming good if the non-conformity "substantially impairs its value to the buyer," and

1. the product was accepted on the reasonable assumption that its non-conformity would be cured, and it has not been cured in a timely manner, or
2. if the product was accepted without discovery of such non-conformity, where the buyer's acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

Section 2-715 states:

> "(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount" (see generally Hunter, Shannon, & Amoroso, 2023).

6.4. Buyer's Incidental and Consequential Damages: Section 2-715

In addition to the remedies found in the proceeding Sections relating to cover and other contract damages, an aggrieved buyer may seek both incidental and consequential damages.

Incidental damages resulting from the seller's breach include *expenses* reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

Under Section 2-715, consequential (special) damages resulting from the seller's breach include:

> "(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know, and which could not reasonably be prevented by cover or otherwise; and
> (b) injury to *person or property proximately resulting from any breach of warranty."*

As in the case where a seller is able to resell the goods for *more* than the contract price, if a buyer is able to "cover" and can find a "reasonable substitute good" for *less* than the contract price, the buyer may still be entitled to recover incidental and or consequential damages as appropriate.

6.4.1. Consequential Damages

Consequential damages are caused by special circumstances occurring beyond the terms or conditions of the contract itself. Such damage, loss, or injury does not flow directly and immediately from the act of the breaching party, but from some of the *consequences or results* of such an act. In order for a court to award consequential damages, the breaching party must be aware that "special circumstances" will cause the non-breaching party to suffer an additional loss and the non-breaching party cannot be acting in "bad faith" (see Meyers, 2020). In practical terms, the non-breaching party may have to give the breaching party "express notice" of the special circumstances. A type of special or consequential damages may occur in a case where a defective product causes personal injury (see Hunter, Amoroso, & Shannon, 2012; Hunter & Amoroso, 2012).

Let's look at the classic common law case of *Hadley v. Baxendale* (1854).

HADLEY v. BAXENDALE
156 Eng. Rep. 145 (1854)
BACKGROUND AND FACTS
The plaintiffs ran a flour and gristmill in Gloucester, England. The crankshaft attached to the steam engine broke, causing the mill to shut down. The shaft had to be sent to a foundry located in Greenwich so that the new shaft could be made to fit the other parts of the engine. The defendants were common carriers, who transported the shaft from Gloucester to Greenwich. The plaintiffs claimed that they had informed the defendants that the mill was stopped and that the shaft must be sent immediately. The freight charges were collected in advance, and the defendants promised to deliver the shaft the following day. They did not do so, however. Consequently, the mill was closed for several days. The plaintiffs sued to recover their lost profits during that time. The defendants contended that the loss of profits was "too remote." The court held for the plaintiffs, and the jury was allowed to take into consideration the lost profits. The high court reversed.
OPINION
We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

* * * Now we think the proper rule in such a case as the present is this: -- Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.
* * * Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. On the other hand, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract.
****

The English court ordered a new trial, holding that the “special circumstances” that caused the alleged loss of profits to the plaintiff had not been sufficiently communicated by the plaintiffs to the defendants. The plaintiff would be required to give "express notice" of these circumstances in order to collect special damages. As a matter of good practice, any “special circumstances” should be enumerated *in the contract* entered into by the parties.

6.5. Buyer's Right to Specific Performance or Replevin: Section 2-716

The Code specifies the circumstances where a buyer may seek the remedy of specific performance—in essence, requiring the seller to provide or “turn over” the goods specified in the contract (see Schwartz, 1979). Probasco (2023) outlines the circumstances under which the non-breaching party can seek specific performance as follows:

- The underlying contract is valid and enforceable.
- The plaintiff has performed (or the court believes it will perform) its contractual obligations.
- The defendant could perform its obligations but has failed to do so.
- A monetary remedy is not sufficient.

Code Section 2-716 provides:

> "(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
>
> (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
>
> (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to affect cover for such goods."

The remedy of specific performance is an extraordinary remedy developed in a Court of Equity (also called a Chancery Court) to provide relief when the legal remedy of monetary damages was inadequate in order to put the non-breaching party in as good a position had the contract had been fully performed (Szladits, 1955; Dagan & Heller, 2023). The remedy of specific performance is most appropriate when the non-breaching party, in not seeking monetary damages, asks the court to issue a decree ordering the breaching party affirmatively to carry out contractual duties by turning over the goods which were the subject matter of the contract (see Schwartz, 1979).

In the case of a contract for the sale of goods, monetary damages will normally be deemed adequate, since a "reasonable substitute good" may be readily available in the marketplace through the remedy of cover. However, under the common law, if the goods were considered *unique***,** a Court of Equity may issue a decree of specific performance. Such "unique" items under the common law included antiques, objects of art, racehorses, stock in a closely held or family corporation, and all land.

Courts are reluctant to grant specific performance in personal service contracts because public policy considerations discourage what would amount to involuntary servitude. In addition, courts do not generally desire to monitor a continuing personal service contract to assure that it is carried out.

Tower City Grain v. Richman (1975) provides a discussion of specific performance under the UCC. Although the UCC liberalizes the availability of the remedy of specific performance, such relief remains the extraordinary rather than the ordinary remedy.

TOWER CITY GRAIN CO. V. RICHMAN

232 N.W.2D, 61 N.D. (1975)

Plaintiff sued the defendant for specific performance of an oral contract for the sale of wheat. The lower court ordered specific performance and the defendant appealed. The defendant contended that specific performance was not a proper remedy in this case.

PEDERSON, J.

* * * The Uniform Commercial Code is controlling in the instant case and states in part:

1. Specific performance may be decreed where the goods are unique or in other proper circumstances.

2. The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just. (Emphasis added.)

While the Richmans' contention that fungible goods were not a proper subject for the remedy of specific relief under prior law is correct, the adoption of the Uniform Commercial Code in 1966 liberalized the discretion of the trial court to grant specific performance in a greater number of situations. The Official Comment to § 2-716, UCC, provides in pertinent part:

1. The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.

2. In view of this Article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract.

In addition, (the Code) states that "the remedies provided by this title 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." We cannot presume that an award of damages fails to put an aggrieved party in as good a position as if the other party had fully performed. There was no finding or conclusion to that effect by the trial court in this case.

A complaint which prays for the equitable remedy of specific performance must clearly show that the legal remedy of damages is inadequate. A defendant should not be deprived of a jury trial, to which he would be entitled in an action at law, unless the plaintiff is clearly entitled to the equitable remedy he seeks.

Historically, specific performance, which is an equitable remedy, was applied primarily to contracts relating to goods which were "unique." All real estate was deemed to be unique, and so were goods which had sentimental as distinguished from market value. Another basis for invoking specific performance was the inadequacy of the remedy at law.

A factual basis for a conclusion that the remedy of specific performance is available should be found by the trier of facts in order, that this court, on appeal may know the basis upon which it arrived at such a conclusion.

There is no finding by the trial court in this case that indicates what it believes to be the proper circumstances. Our examination of the record indicates no evidence upon which such finding could be based. The fact that the complaint prayed for specific performance and that the Richmans have in their possession the type and quantity of wheat called for in the contract are not adequate to support such a finding.

The buyer may obtain specific performance of the contract for the sale when the goods are unique or other proper circumstances are shown. Because the purpose of this section is to liberalize the right to specific performance, it would appear that it is not to be of great significance whether a given circumstance is regarded as involving "unique goods" or "proper circumstances"; ordinarily, circumstances which are proper will impart uniqueness to the goods. "Uniqueness in a reasonable commercial setting is the significant point."

> Without holding that specific performance can never be invoked to enforce a contract for grain or other fungible goods, we conclude that it was a manifest abuse of discretion and an error as a matter of law for the trial court to grant such a remedy under the circumstances of this case.
>
> Judgment reversed and remanded with leave to amend.

As can be seen, the writers of the UCC attempted to broaden the scope of circumstances under which a court could order specific performance by adding a section [Section 2-716 (1)] which states that specific performance may be decreed where the goods are "*unique*" or "*in other proper circumstances*." Yet, many courts initially were reluctant to go beyond the conventional categories of unique goods found in the common law. Under the Code, the precondition to filing a suit for specific performance (that is, demonstrating a "proper circumstance") requires a buyer to prove that they were unable to effect cover by procuring a reasonable substitute good.

Replevin is an action originating in common law and now largely codified by which a plaintiff, having a right in personal property which is claimed to be wrongfully taken or detained by the defendant, seeks to recover possession of the property and sometimes to obtain damages for the wrongful detention. The Legal Dictionary (2017) states:

> "The term "replevin" is used to describe the act of recovering someone's personal property that was either taken wrongfully or held improperly. Replevin is also referred to as "claim and delivery." In most cases, when a person is wronged insofar as suffering the loss of property, he will seek money damages as compensation. In the case of replevin, however, the lawsuit is filed for the less common relief of the return of the actual property itself."

6.6. Deduction of Damages from the Price: Section 2-717 (see generally Martin, 2019)

A buyer may act proactively and may choose to deduct any damages from any part of the price which is due under the same contract.

> "The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract."

7. Liquidation or Limitation of Damages under Section 2-718

There may be circumstances under which the parties may *predetermine* the amount of damages that may be awarded in a case of breach of contract. Damages under such an agreement are termed liquidated damages.

Salzman (2020 , p. 241) writes:

> "In most contract disputes, the amount of damages that flow from a breach is a question for a jury (or, sometimes, a judge) to determine based on the presentation of evidence showing the harm caused by the failure to complete the deal. But liquidated damages remove that analysis from the equation: they fix, in advance, as part of the contract themselves, the amount that will be paid in the event of a breach. They can be used in real estate contracts, to fix the amount of damages to be paid in the event of a breach of a long-term lease, or they can be used in commercial contracts between sophisticated entities to quantify the damages that would flow from the breach of a complex transaction."

Section 2-718 states:

> "(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.
>
> (2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds:
>
> (a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or
> (b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller."

While liquidated dames in contracts for the sale of goods are *unusual*, they are quite common in other contexts, for example, in employment agreements (see, e.g., *Vanderbilt University v. Gerry Dinardo*, 1999; Salzman, 2020). Wegener and Caplan (2021) noted: "Liquidated damages provisions are included in many modern private and public construction contracts as a convenient way for owners and contractors to allocate and define their risk in the event of a breach. Construction industry participants would be well served to have a firm grasp on the fundamentals of such provisions to assist them in negotiating, performing or litigating their next contract."

Interestingly, where a seller has received payment in goods (sometimes called a *barter or counter-trade transaction*) their reasonable value or the proceeds of their resale are be treated as payments for the purposes of determining damages.

8. Contractual Modification or Limitation of Remedy: Section 2-219

The Code contains several important provisions relating to the modification or limitations of remedies (see Murtagh, 1988-1989).

> "(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to *return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts*; and
> (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.
>
> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the *person in the case of consumer goods* is *prima facie unconscionable* but limitation of damages where the loss is commercial is not."

Under Section 9-102(23), "Consumer goods means goods that are used or bought for use primarily for personal, family, or household purposes." The theory behind this provision is that if consequential damages for injury to the person arise concerning non-consumer goods (termed "producer goods"), the individual, often an employee, can avail him or herself of a remedy under the provisions of business insurance or workman's compensation insurance (King, 1988).

9. Punitive Damages

Punitive damages are also called *exemplary* damages. Punitive damages are designed to punish a "guilty" party for *intentional, malicious, willful, or wanton wrongdoing* and to make an example of the breaching party. Dodge (1999) strongly argues that punitive damages are indeed proper in contracts cases. Swan (2004) takes the opposite view. The purpose of awarding punitive damages is to deter the wrongdoer from similar conduct in the future, as well as to deter others from engaging in similar conduct. Generally, punitive damages will not be awarded in cases of simple breach of contract, except for a category of cases involving contract fraud due to the presence of "*scienter*" or the intent to deceive, or where a party intentionally caused injury to a plaintiff.

Jiminez (2018, p. 644-645), notes: “Indeed, apart from a few well-recognized exceptions, the general unwillingness of courts to award punitive damages in contracts disputes may be cited as proof of the law's ostensible disdain for punishing promisors who breach their contracts” (citing McCormick (1935, pp. 289-291). However, in cases where an award of punitive damages *is* deemed appropriate, a court may add an additional amount (in some cases, three times the actual damages, called *treble damages*) in order to punish the breaching party for this wrongful conduct.

The United States Supreme Court surprisingly entered the discussion concerning the limitation of punitive damages and held in *BMW of North America, Inc. v. Gore* (1996) (McKee, 1996; Turner, 1998) that under the Due Process Clause of the Fourteenth Amendment the amount of punitive damages awarded by a jury cannot be “grossly excessive” and must bear some “reasonable relationship” to the actual damages sustained. There have also been attempts by several state legislatures to limit or even abolish punitive damages in a wide variety of tort and contract cases. In addition, punitive damage awards are often the subject of a motion for a *remittitur* (Shatz, 2011), asking a trial judge or an appellate court to limit or even exclude punitive damages.

BMW of North America v. Gore

517 U.S. 559 (1996)

Facts

After respondent Gore purchased a new BMW automobile from an authorized Alabama dealer, he discovered that the car had been repainted. He brought this suit for compensatory and punitive damages against petitioner, the American distributor of BMW's, alleging, *inter alia*, that the failure to disclose the repainting constituted fraud under Alabama law. At trial, BMW acknowledged that it followed a nationwide policy of not advising its dealers, and hence their customers, of pre delivery damage to new cars when the cost of repair did not exceed 3 percent of the car's suggested retail price. Gore's vehicle fell into that category. The jury returned a verdict finding BMW liable for compensatory damages of $4,000, and assessing $4 million in punitive damages. The trial judge denied BMW's post-trial motion to set aside the punitive damages award, holding, among other things, that the award was not "grossly excessive" and thus did not violate the Due Process Clause of the Fourteenth Amendment. See, *e. g.*, *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 454. The Alabama Supreme Court agreed, but reduced the award to $2 million on the ground that, in computing the amount, the jury had improperly multiplied Gore's compensatory damages by the number of similar sales in all States, not just those in Alabama.
Held: The $2 million punitive damages award is grossly excessive and therefore exceeds the constitutional limit.
(a) Because such an award violates due process only when it can fairly be categorized as "grossly excessive" in relation to the State's legitimate interests in punishing unlawful conduct and deterring its repetition, cf. *TXO*, 509 U. S., at 456, the federal excessiveness inquiry appropriately begins with an identification of the state interests that such an award is designed to serve. Principles of state sovereignty and comity forbid a State to enact policies for the entire Nation, or to impose its own policy choice on neighboring States. See, *e. g.*, *Healy* v. *Beer Institute*, 491 U. S. 324, 335-336. Accordingly, the economic penalties that a State inflicts on those who transgress its laws, whether the penalties are legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and economy, rather than those of other States or the entire Nation. Gore's award must therefore be analyzed in the light of conduct that occurred solely within Alabama, with consideration being given only to the interests of Alabama consumers.

(b) Elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose, lead to the conclusion that the $2 million award is grossly excessive.
(c) None of the aggravating factors associated with the first (and perhaps most important) indicium of a punitive damages award's excessiveness-the degree of reprehensibility of the defendant's conduct, see, *e. g., Day* v. *Woodworth,* 13 How. 363, 371, is present here. The harm BMW inflicted on Gore was purely economic; the presale repainting had no effect on the car's performance, safety features, or appearance; and BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. Gore's contention that BMW's nondisclosure was particularly reprehensible because it formed part of a nationwide pattern of tortious conduct is rejected, because a corporate executive could reasonably have interpreted the relevant state statutes as establishing safe harbors for nondisclosure of presumptively minor repairs, and because there is no evidence either that BMW acted in bad faith when it sought to establish the appropriate line between minor damage and damage requiring disclosure to purchasers, or that it persisted in its course of conduct after it had been adjudged unlawful. Finally, there is no evidence that BMW engaged in deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive.
(d) The second (and perhaps most commonly cited) indicium of excessiveness-the ratio between the plaintiff's compensatory damages and the amount of the punitive damages, see, *e. g., TXO,* 509 U. S., at 459 also weighs against Gore, because his $2 million award is 500 times the amount of his actual harm as determined by the jury, and there is no suggestion that he or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. Although it is not possible to draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case, see, *e. g.,* id., at 458, the ratio here is clearly outside the acceptable range.
(e) Gore's punitive damages award is not saved by the third relevant indicium of excessiveness-the difference between it and the civil or criminal sanctions that could be imposed for comparable misconduct, see, *e. g., Pacific Mut. Life Ins. Co.* v. *Has lip,* 499 U. S. 1.

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10. The Requirement of Mitigation

In a situation where a breach of contract has occurred, the non-breaching party may be required to lessen or mitigate damages (see Bridge, 1989)**.** A party who has suffered a wrong by a breach of contract may not unreasonably sit by and allow damages to accumulate or even worsen. The law will not permit the aggrieved party to recover from the breaching party those damages that he "should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation" (Restatement, Contracts § 336(1)).

However, while the doctrine of mitigation requires reasonable efforts by the non-breaching party to mitigate or lessen damages, the innocent party is not required to mitigate their damages if the cost of mitigation would involve unreasonable expense. The case of *Parker v. Twentieth Century Fox* (1970) demonstrates the operation of the mitigation principle in a case of an employment contract.

PARKER V. TWENTIETH CENTURY FOX FILM CORP.

474 P.2D 689 (1970)

BURKE, Judge.

Shirley McLain Parker signed a contract to play the female lead in Twentieth Century Fox's projected motion picture Bloomer Girl. Before production began, the corporation decided not to produce the picture and notified the actress of its decision. With the professed purpose of avoiding damage to the

actress, the corporation offered her the leading role in another film entitled Big Country, Big Man. She rejected the alternate role and sued for damages. The corporation claimed the actress had unreasonably refused to mitigate harm to her career by refusing to accept the substitute role. Parker won the case.

The trial court pointed out that although the contract for the substituted role offered identical compensation and terms as the prior contract, Bloomer Girl was to have been a musical, and Big Country was to be a dramatic western movie. Furthermore, the musical was to be filmed in California, the western in Australia. The original contract also specified that the actress could approve the director for the musical, and if that person failed to direct the picture, she was to have the right to approve any substitute director. The actress also had the right to approve of the musical's dance director and the screenplay.

The western offer eliminated or impaired each of those rights. Twentieth Century Fox's sole defense is that the actress unreasonably refused to mitigate damages by rejecting the substitute offer of employment.

In this case, the offer to star in the western was for employment both different from and inferior to that of making the musical, and no factual dispute exists on that issue. The female lead as a dramatic actress in a western style motion picture can by no stretch of the imagination be the equivalent of or substantially similar to the lead in a song-and-dance production. In addition, the western offer proposed to eliminate or impair the approvals the actress had under the original musical contract, and thereby constituted an offer of inferior employment.

There is a split of authority in real estate leasing cases, although a modern view would indicate that the lessor must at least attempt to mitigate damages in case of a breach by a lessee. What kinds of actions by a landlord might qualify? What types of action might a tenant undertake to mitigate damages under circumstances where the tenant is contemplating a possible breach of the lease by ending a tenancy before its contractual termination date?

11. Sellers Opportunity to Cure: Section 2-508

Soble (2016) notes: “In contract law, the seller generally has a limited right to cure, or fix the problem, when the goods or delivery under a contract fails to meet the specified contract terms. If the "goods or the tender of delivery fail in any respect to conform to the contract," the buyer may reject the goods. This is called the "perfect tender rule." Rejection of goods must take place "within a reasonable time after their delivery or tender." The right of the buyer to reject a non-conforming good is subject to the seller's right to cure the non-conforming tender or delivery.

In sum, a seller has the right under the Code to cure a buyer's rejection of non-conforming goods if: (1) "the time for performance has not expired" or (2) there were "reasonable grounds to believe" the imperfect tender "would be acceptable" as a suitable substitution. The seller must also "seasonably notify the buyer of his intention to cure."

"Curing" by the seller entails repairing and/or replacing any non-conforming goods so as to make them conform to the contract, free of defect(s). This ensures that a buyer receives what he bargained for in the contract and allows a seller to "avoid injustice...by reason of a surprise rejection by the buyer" (see Craswell, 1990). As a practical matter, allowing a party to cure may also keep the parties from going to Court!

A special rule may apply in the case of a sale of an automobile which is deemed to be a “lemon” under the provisions of state law where a dealer may be afforded numerous opportunities (again, depending on state law) to “cure” or remedy any defect in an automobile before the buyer can attempt to rescind the contract for sale (see Hunter, Amoroso, & Shannon, 2019).

11. Damages of "Pain and Suffering" as Consequential Damages

The Professional Corporation Lloyd-Winer (2017) noted: "Entering into a contract with someone is an act of trust. The two of you come together and make promises. Promises that the other person relies upon. When someone breaches the contract, there is pain, frustration, and anger. It often feels like a personal attack. Because of this, clients often ask us to make a claim for pain and suffering as part of their breach of contract cause of action."

As noted, because an award of damages for breach of contract is "intended to give the injured party the benefit of his bargain," the goal is to put the injured party in "as good as position as he would have been in had performance been rendered as promised," to add additional compensation for pain and suffering as consequential damages would, according to the case law, fall beyond that goal (see also Niemeyer, 2004). In other areas, for example, in cases of personal injury premised on negligence or strict liability in tort, damages for pain and suffering or emotional distress may be appropriate (Hunter & Amoroso, 2012).

12. Attorney's Fees as Consequential Damages

In the United States (as opposed to Great Britain, which has adopted a modified "*loser pays*" view), an award of damages will not ordinarily include reimbursement for the successful party's attorney's fees. An application for attorney's fees in contracts' cases should be viewed in light of the prior discussion of consequential damages. However, it has become common practice for commercial and residential leases, notes, and contracts for sale of real estate to contain a clause providing for the collection or awarding of "reasonable attorney's fees." A majority of courts uphold such agreements, permitting recovery of a stipulated amount in excess of the damages that would accrue in these cases, provided that the amount demanded is reasonable.

There are other circumstances where an award of attorney's fees are provided for by statute. For example, in cases involving a violation of constitutional rights under 42 U.S.C. Section 1983 (1979) (Gans, 2022; Wright, Carr, & Gasek, 2022; Dryer, 2023), successful litigants may be awarded attorney's fees pursuant to 42 U.S.C. Section 1988, which authorizes a court in its discretion to award the prevailing party reasonable attorney's fee as a part of the costs (see, e.g. *NCAA v. Jerry Tarkanian*, 1988; *City of Rancho Palos Verdes v. Abrams*, 2005Miller, 2022, p. 485, Note 213). Section 1983 reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…."

Section 1988 reads:

> "In any action or proceeding to enforce a provision of sections… of this title, … the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction."

13. Commentary

Assessing the conditions, implications, and circumstances of a possible breach of contract entails a thorough understanding of the common law and the Uniform Commercial Code so that the parties can seek the proper remedy in terms of any monetary damages and other appropriate remedies. Parties must carefully follow the precise requirements of the various statutory materials. Only through a thorough understanding of Article II of the Code can the parties protect their interests to the largest extent possible.

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