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

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seller can resell to mitigate damages instead of resorting to the arbitrary "title" theory. The need of this functional approach lies at the base of the sales section of the UCC. From the framer's viewpoint, a mere re-codification of the present law is not the solution.

GERALD G. GLASER  
WILLIAM C. KELSCH.

REMEDIES OF A SELLER FOR BREACH OF CONTRACT UNDER THE UNIFORM COMMERCIAL CODE. — The treatment of the remedies of a seller of goods for breach of a contract of sale undertaken in the UCC represents in miniature a picture of the Code's overall handling of the law of commercial transactions. A preceding discussion has touched upon one aspect of this matter, outlining the fundamental nature of the UCC's departure from the title theory to more pragmatic and abjectively applicable standards for the settlement of such disputes.<sup>1</sup> No repetition of that discussion will be attempted here. It is merely the purpose of the present discussion to compare the provisions of the UCC with those of the present North Dakota statutes, to illustrate the improvements and changes undertaken by the new Code.

#### I.

In many of its provisions, the Code does not alter the basic principles of North Dakota law at all. A good example is its treatment of insolvency. Section 2-207 (a) of the new Code permits a seller upon discovery of a buyer's insolvency to refuse delivery "except for cash including payment for all goods theretofore delivered under the contract. . . ." A later section states that if the goods are in transit when the buyer's insolvency is discovered the seller may stop their delivery.<sup>2</sup> "Insolvency" exists where a person has ceased to pay his debts in the ordinary course of business; it is not necessary that he be adjudged insolvent within the meaning of the federal statutes on bankruptcy.<sup>3</sup>

North Dakota's law is very similar to the above sections of the proposed Code. An unpaid seller does not have to deliver goods to an insolvent buyer unless they are paid for in cash,<sup>4</sup> and has the

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1. Kelsch and Glaser, *Title Theory and the Uniform Commercial Code*, *supra* page 211.

2. U.C.C. § 2-705 (1952).

3. U.C.C. § 1-201 (1952).

4. N.D. Rev. Code § 51-0155 (1943).

right of stopping the goods while they are in transit upon discovery of the buyer's insolvency<sup>5</sup> even though the property in the goods has passed to the buyer.<sup>6</sup> The definition of insolvency is precisely the same.<sup>7</sup> If there is any change at all it is that the Code is clearer and more exact than the North Dakota statutes on the seller's right to withhold goods or stop delivery regardless of the passage of title.

Section 2-702 (b) provides that a seller who discovers the buyer to be insolvent after the goods have passed into the possession of the buyer on credit may reclaim such goods within ten days after they have been received. If the buyer has made a misrepresentation of solvency to the seller in writing within three months before delivery, however, the ten-day limitation does not apply. In contrast to the preceding sections this is a sharp change from the law as it stands today, and gives the seller a right which is novel to the common law,<sup>8</sup> and represents an extension of the protection given a seller who has sold on credit and has delivered goods to a buyer immediately preceding insolvency.<sup>9</sup> The theory of the proposed change is logical enough: it is felt that any receipt of goods by a buyer within ten days of overt insolvency amounts to a tacit business misrepresentation of solvency at the time of the receipt of the goods and is therefore fraudulent as against the particular seller.<sup>10</sup> The same section also provides that where the seller is successful in reclaiming his goods he is excluded from all other remedies with respect to them. There is obvious justification for this: successful reclamation of such goods constitutes preferential treatment of the seller as against the buyer's other creditors and this provision tends to adjust their situation.<sup>11</sup>

Section 2-703 is an index of the seller's remedies in general. It gathers together all the remedies available to a seller for any breach by the buyer;<sup>12</sup> it rejects any doctrine of election of remedy, and the remedies are made cumulative rather than exclusive.<sup>13</sup> There is no comparable index section in North Dakota law.

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5. N.D. Rev. Code § 51-0158 (1943).

6. N.D. Rev. Code § 51-0154 (1943).

7. N.D. Rev. Code § 51-0101 (1943); *Coleman v. New York, etc. Ry. Co.*, 215 Mass. 45, 102 N.E. 92 (1913).

8. Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 Harv. L.Rev. 561, 584 (1950).

9. U.C.C. § 2-702 (comment) (1952).

10. *Ibid.*

11. *Ibid.*

12. U.C.C. § 2-703 (comments) (1952).

13. Symposium: *The Uniform Commercial Code - The Effect of Its Adoption In Tennessee*, 22 Tenn. 776, 802 (1953).

The next section of the Code provides that where a buyer has wrongfully breached the contract the seller "may identify to the contract conforming goods not already identified at the time he learned of the breach if they are in his possession or control."<sup>14</sup> If the goods are in the process of procurement or manufacture the seller "may complete the process and identify them to the contract unless in reasonable commercial judgment the completion will materially increase the damages."<sup>15</sup> The reason for allowing the seller to identify conforming goods to the contract and to finish the procurement and manufacture of goods is to make the goods available for resale under the resale section which will be discussed later. One writer has commented that this provision could allow the seller to unnecessarily increase damages.<sup>16</sup> However, as the seller has to follow a standard of conduct which is commercially reasonable, any injustice would seem unlikely. This section works an alteration in the law of North Dakota, since the statutes provide that once the buyer repudiates the contract he is liable to the seller "for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract after receiving notice of the buyer's repudiation."<sup>17</sup>

## II.

Section 2-705 extends the seller's right of stoppage of goods in transit. Upon discovery of the buyer's insolvency, or upon failure of the buyer to make a payment due, or if for any other reason the seller has a right to withhold or reclaim goods, the seller may stop delivery of goods in the possession of a carrier or other bailee.<sup>18</sup> This is also the case in North Dakota.<sup>19</sup> However, this section differs from the state's present law in that the seller can stop delivery for almost any breach by the buyer,<sup>20</sup> instead of merely insolvency as under the existing statutes.<sup>21</sup>

The right of the seller to stop delivery under the UCC exists until the buyer receives the goods or until the bailee or the carrier acknowledges to the buyer that the goods are held for him.<sup>22</sup> The seller cannot stop delivery if there has been a negotiation to the

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14. U.C.C. § 2-704 (1952).

15. *Ibid.*

16. Williston, *supra* note 8, at 586.

17. N.D. Rev. Code, § 51-0165(4) (1943).

18. U.C.C. § 2-705 (comment) (1952).

19. *Powell v. Kechnie*, 3 Dak. 13, 19 N.W. 410 (1884).

20. U.C.C. § 2-705 (comments) (1952).

21. N.D. Rev. Code § 51-0158 (1943); *Weyerhauser Timber Co. v. First National Bank*, 105 Ore. 172, 38 P.2d 48 (1934).

22. U.C.C., 2-705 (1952).

buyer of any negotiable document of title covering the goods.<sup>23</sup> These provisions are substantially the same as present North Dakota law.<sup>24</sup> In order to stop delivery the seller must notify the bailee so that by the exercise of reasonable diligence he will be able to avoid delivery;<sup>25</sup> the seller is liable to the bailee for any ensuing charges or damages.<sup>26</sup> This is also similar to existing North Dakota law.<sup>27</sup>

Section 2-706 of the UCC is concerned with the resale of the goods after the buyer's breach. After the buyer rejects or revokes acceptance of goods or fails to make a required payment the seller may resell the goods. The resale must be made in good faith and in a commercially reasonable manner; upon so doing the seller may recover the difference between the resale price and the contract price together with incidental damages. The only condition precedent to a seller's right of resale is a breach by the buyer within the section on the seller's remedies in general.<sup>28</sup> "Other meticulous conditions and restrictions of the prior uniform statutory provision are disapproved of by this Article and are replaced by standards of commercial reasonableness."<sup>29</sup> It is not necessary that the subject of the contract be in existence or that it be identified to the contract before the breach in order to permit a resale.<sup>30</sup> Where the resale is private in character the seller must give the original buyer reasonable notice of his intention to resell,<sup>31</sup> and notice must also be given where there is a public sale unless the goods are perishable or threaten to devalue rapidly.<sup>32</sup> Present law does not require such notice.

Under the same section a purchaser who buys in good faith will take the goods free of any claim on the part of the original buyer even though the seller fails to comply with all the requirements of the section.<sup>33</sup> This represents a broadening of the rights of the bona fide purchaser.<sup>34</sup> Should the resale result in a profit the seller is not accountable to the buyer,<sup>35</sup> a provision which follows the present statute.<sup>36</sup>

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23. *Ibid.*

24. N.D. Rev. Code, § § 8-0442, 60-0848, 51-0158, and 51-0159 (1943).

25. U.C.C., § 2-705 (1952).

26. *Ibid.*

27. N.D. Rev. Code, § 51-0160 (1943).

28. U.C.C., § 2-706 (comments) (1952).

29. *Ibid.*

30. U.C.C., § 2-706 (1952).

31. *Ibid.*

32. *Ibid.*

33. U.C.C., § 2-706(5) (1952).

34. N.D. Rev. Code § 51-0161 (1943).

35. U.C.C., § 2-706(6) (1952).

36. N.D. Rev. Code, § 51-0161 (1943).

Section 2-707 of the Code provides that a buyer's agent or other consignor who has paid and has become responsible for the price "or anyone who otherwise holds as against the buyer or consignee a security interest in goods similar to that of a seller" is a person in the position of a seller and is entitled to the rights of a seller. This changes present North Dakota law very little;<sup>37</sup> it merely expands present law to include financing agencies which honor a letter of credit for the buyer or discount a draft for the seller.<sup>38</sup>

### III.

Section 2-708 of the UCC provides for the seller's damages where resale is impractical. The measure of damages is the difference "between the price current at the time and place for tender and the unpaid contract together with any incidental damages . . ."<sup>39</sup> Any expense saved in consequence of the buyer's breach is deducted.<sup>40</sup> If the measure of damages is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is the profit which the seller would have made from full performance by the buyer.<sup>41</sup> This is practically the same as present North Dakota law.<sup>42</sup>

Section 2-709 states that when the buyer fails to pay the price as it becomes due, the seller may recover the price "of goods accepted or of conforming goods lost or damaged after risk of their loss has passed to the buyer, and of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price . . ." This is approximately the same as present law,<sup>43</sup> except that the UCC requires that the seller first attempt to resell the goods before he can maintain an action for the price.<sup>44</sup> The UCC also substitutes an objective test for the "not readily resalable" standard of present law.<sup>45</sup> The action for the price can be maintained only after a "reasonable effort to resell" the goods has actually been made.<sup>46</sup> The foregoing section also provides that

37. N.D. Rev. Code, § 51-0153 (1943).

38. U.C.C., § 2-707 (comments) (1952).

39. U.C.C., § 2-708 (1952).

40. *Ibid.*

41. *Ibid.*

42. N.D. Rev. Code, § 51-0165 (1943); *Jacobson v. Horner*, 49 N.D. 741, 193 N.W. 327 (1923).

43. N.D. Rev. Code, § 51-0161 (1943). See *Illustrated Postal Card and Novelty Co. v. Holt*, 85 Conn. 140, 81 Atl. 1061 (1912).

44. U.C.C., § 2-709 (comment) (1952).

45. UCC § 2-709 (1952).

46. *Ibid.*

where the seller sues for the price he must hold for the buyer any goods that have been identified to the contract. If resale becomes possible he may resell them at any time prior to the collection of the judgment.<sup>47</sup>

Section 2-710 of the UCC gives the seller the right to collect incidental damages. These incidental damages 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." The purpose of this provision is to authorize reimbursement of the seller for expenses reasonably incurred by him as a result of the buyer's breach.<sup>48</sup> It sets forth the principal elements of damage flowing from the breach but intends to allow all commercially reasonable expenditures made by the seller.<sup>49</sup> It broadens, from the standpoint of present law, the seller's rights to recover damages. Under North Dakota law the seller is now entitled only to those damages that directly and naturally result in the ordinary course of events from the buyer's breach of contract,<sup>50</sup> including interest and special damages,<sup>51</sup> but not, apparently, such items as seller's commissions.

#### IV.

In summarizing the remedies for a breach of contract available to a seller under the UCC as compared with present law, three distinct improvements can be noted. First, the UCC substitutes "commercially reasonable" for "reasonable" as a standard of conduct and measure of damages. Thus a seller whose contract has been breached may complete the procurement and manufacture of the goods even after the breach unless in "reasonable commercial judgment" the completion will materially increase the damages.<sup>52</sup> Where the seller resells the goods after a breach he must do so in a "commercially reasonable manner" if he is to be able to collect the difference between the resale price and the contract price.<sup>53</sup> The method, manner, time, place and terms of the resale must be "commercially reasonable" charges, expense, commissions or terms.<sup>54</sup>

Second, the rights of the seller have been increased. The seller

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47. *Ibid.*

48. U.C.C., § 2-710 (comments) (1952).

49. *Ibid.*

50. N.D. Rev. Code, § 51-0165 (1943).

51. N.D. Rev. Code, § 51-0171 (1943).

52. U.C.C., § 2-704 (1952).

53. *Id.* § 2-706.

54. *Ibid.*

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

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

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

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55. U.C.C., § 2-702 (1952).

56. *Ibid.*

57. U.C.C., § 2-705 (1952).

58. *Id.* § 2-710.

59. *Id.* § 2-705.

60. *Id.* § 2-704.

61. *Ibid.*

62. U.C.C., § 2-706 (1952).

63. *Id.* § 2-708.

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

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