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Effect of the Uniform Commercial Code on Virginia Commercial Law: Buyer's Remedies and Article 2

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same remedies for the seller whose buyer breaches as did Virginia case law. However, the technical concept of passage of title has been eliminated, thus broadening the application of these remedies and providing for Virginia a body of law that is more in line with modern commercial practices.

CHARLES B. ROWE

BUYER'S REMEDIES AND ARTICLE 2

Article 2 of the Uniform Commercial Code,¹ which deals with the sales of goods, broadens the remedies available to the buyer. A buyer no longer has to worry about the uniqueness of chattels in regard to obtaining specific performance of the goods involved, and also, he may accept tender of the goods without precluding himself from recovering damages.

The buyer's remedies under the UCC can be conveniently grouped into three categories: (1) the buyer's right to reject nonconforming goods, (2) the buyer's right to recover damages, and (3) the buyer's remedies which "reach" the goods. One or more of these remedies will arise if the seller repudiates the contract, breaches the contract by failing to deliver, by making a delivery that is improper, or becomes insolvent.²

RIGHT OF REJECTION OF NONCONFORMING GOODS

Section 2-601 of the Uniform Commercial Code gives the buyer a right to reject nonconforming goods. The buyer, upon receipt of an improper delivery in any respect, may: (a) reject the whole, (b) accept the whole, or (c) accept any commercial unit or units and reject the rest.³ A buyer accepting a nonconforming tender is not penalized by the loss of any remedy otherwise open to him.

Allowing the buyer to accept any commercial unit, even though the tender is nonconforming, changes Virginia law as expressed in *Charles Syer & Co. v. Lester*.⁵ In this case, the Supreme Court of Ap-

¹Hereinafter referred to as UCC.

²Phalan, *Uniform Commercial Code—Sales—Summary of Buyer's Remedies*, 16 U. Pitt. L. Rev. 209 (1955).

³UCC § 2-601. This section must be read in conjunction with UCC § 2-718 and UCC § 2-719 in regard to the contractual limitations of remedies.

⁴UCC § 2-601, Comment, Point 1.

⁵116 Va. 541, 82 S.E. 122 (1914). See also *Lamborn Co. v. Bristol Grocery Co.*, 140 Va. 77, 124 S.E. 184 (1924).

peals required the buyer either to reject the whole or to accept the whole under protest and sue to recover the damages sustained by the breach. The Virginia rule has not been applied where the seller has agreed to take back the nonconforming goods.⁶ Virginia also has applied the rule where the buyer accepts a portion of the goods delivered for a reason that is not inconsistent with his subsequent refusal to accept the balance of the goods.⁷

The UCC⁸ imposes two affirmative duties upon the buyer who would seek to reject the goods as nonconforming: (1) he must reject within a reasonable time after tender of the goods, and (2) he must seasonably notify the seller of his rejection. In addition, the UCC requires the buyer to use reasonable care to preserve the goods for a reasonable time to permit the seller to remove them.⁹ A merchant buyer must follow any reasonable instructions received from the seller in regard to the goods, and, in the absence of such instructions, make a reasonable effort to sell the goods if they are perishable.¹⁰ Virginia law has not been extended so as to impose these additional duties on the rejecting buyer.

The UCC modifies the stringent Virginia rule referred to in *Fielding v. Robertson*¹¹ that a buyer who objects to goods on one stated ground cannot later object on other grounds. This Virginia rule imposes undue hardship on buyers, if they give quick and informal notices that fail to state all the defects. UCC section 2-605 ends this inequity by permitting the buyer to give an informal notice of the defects, without imposing penalties on him for omissions, while at the same time protecting the seller who is misled by the buyer's failure to particularize.¹²

Virginia has permitted a buyer to rescind a sales transaction even after he has accepted the goods. This was the situation in *Universal Motor Co. v. Snow*.¹³ The UCC changes this rule. Section 2-607(2)

⁶Lamborn & Co. v. Bristol Grocery Co., 140 Va. 77, 124 S.E. 184 (1924).

⁷Rennolds v. Avery, 132 Va. 335, 111 S.E. 123 (1922); Gibney & Co. v. Arlington Brewery Co., 112 Va. 117, 70 S.E. 485 (1911).

⁸UCC § 2-602(1). See also Honnold, Buyer's Right of Rejection, 97 U. Pa. L. Rev. 457 (1949).

⁹UCC § 2-602(2)(b).

¹⁰UCC § 2-603(1).

¹¹141 Va. 123, 126 S.E. 231 (1925). Where the buyer declined to receive meal because of the delay in delivery, there was no waiver of his right to refuse delivery because of a deficiency in quantity, where he did not know of the deficiency at the time of repudiation.

¹²UCC § 2-605, Comment, Point o.

¹³149 Va. 690, 140 S.E. 653 (1927).

provides that an acceptance of the goods precludes any subsequent rejection, and a buyer who had knowledge or should have had knowledge of the nonconformity cannot revoke an acceptance of nonconforming goods. Under the UCC, the buyer accepts the goods when he: (a) signifies his acceptance to the seller, or (b) fails to make an effective rejection, but such acceptance does not occur until there has been a reasonable opportunity to inspect the goods¹⁴ or (c) does any act inconsistent with the seller's ownership.¹⁵ Where the buyer has accepted the goods, the seller acquires a right to the price, or in the case of a partial acceptance, a right to part of the price apportioned on the basis of the contract price.¹⁶

DAMAGES

Under UCC section 2-711(1), a buyer who rightfully rejects the goods has a choice of remedies. He may: (a) cancel the sales contract; (b) recover the purchase price advanced to the seller; (c) "cover" and obtain damages as to all the goods affected whether or not they have been identified to the contract, or (d) recover damages for nondelivery. Thus, the UCC continues the right under Virginia law of the buyer to "cancel," recover the purchase price advanced, and in addition to obtain damages.¹⁷

After a breach, the UCC allows the buyer to "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."¹⁸ This section does little more than provide a handy label, "cover," for a remedy existing in Virginia law. Several Virginia cases have made it clear that a buyer may obtain substitute goods upon learning of the seller's default, and that the buyer's measure of damages in such a case is the difference between the con-

¹⁴UCC § 2-606(1)(a). Accord, *Rosenbaum Hardware Co. v. Paxton Lumber Co.*, 124 Va. 346, 97 S.E. 784 (1919). A purchaser of lumber in carload lots is entitled to a reasonable time in which to unload the car and to make an inspection or examination before he is required to accept.

¹⁵UCC § 2-606(1)(b).

¹⁶UCC § 2-607(1), Comment, Point 1.

¹⁷See *Richmond Leather Mfg. Co. v. Fawcett*, 130 Va. 484, 107 S.E. 800 (1921), for discussion as to the legal alternatives presented to a buyer entitled to rescind for a breach of contract by the seller.

There are two limitations on the remedies of the buyer: (1) UCC § 2-718 allows the parties to liquidate their damages by agreement, provided the damages are reasonable; and (2) UCC § 2-719 generally allows such agreements to contain additions to and alterations of the remedies provided by the UCC.

¹⁸UCC § 2-712. Comment, Point 2 says, the definition of "cover" envisages a series of contracts or sales as well as a single contract of sale.

tract price and the price of the replacement goods.¹⁹ Absent a showing that the buyer acted unreasonably or in bad faith in covering, the UCC uses the same test for damages as Virginia has used. As long as the buyer acts reasonably and in good faith, proof that his method of "cover" was not the cheapest or most effective possible will not defeat a recovery of damages.²⁰

The UCC uses cover considerations as a base line for determining the buyer's damages for nondelivery. Therefore, the buyer's damages are computed as of the time the buyer learns of the breach. This is done by subtracting the contract price from the current price prevailing at the place where the buyer would have covered had he elected to do so.²¹

Under Virginia law, which is in accord with the UCC, the proper measure of damages for the breach of an executory contract to deliver goods is the difference between the contract price and the market price at the time and place of delivery, with interest thereon until paid.²² However, if both the purchaser and seller are located in the same area, and the goods were bought for shipment elsewhere, the Supreme Court of Appeals in *Hopkins v. Le Cato*²³ measured the damages at the place where delivery was to be made to the carrier. Where no market exists at the place of delivery, the rule is well established in Virginia that other markets must necessarily be resorted to in determining the market value of the products.²⁴ Where the seller breaks his contract to furnish goods and sells to another buyer, and

¹⁹*Goldstein v. Old Dominion Peanut Corp.*, 177 Va. 716, 15 S.E.2d 103 (1941); *C. G. Blake Co., Inc. v. W. R. Smith and Son, Ltd.*, 147 Va. 960 133 S.E. 685 (1926). *Hopkins v. LeCato*, 142 Va. 769, 123 S.E. 347 (1924); *Triplett v. Nichols*, 139 Va. 321, 123 S.E. 339 (1924); *Manor v. Hindman*, 123 Va. 767, 97 S.E. 332 (1918); *Richardson Construction Co. v. Whiting Lumber Co.*, 116 Va. 490, 82 S.E. 87 (1914); *Long Pole Lumber Co. v. Saxon Lime and Lumber Co.*, 108 Va. 497, 62 S.E. 349 (1908); *O. H. Perry Tie & Lumber Co. v. Rennolds & Bro.*, 100 Va. 264, 40 S.E. 919 (1902).

²⁰UCC § 2-712, Comment, Point 2. Accord: *Triplett v. Nichols*, 139 Va. 321, 123 S.E. 339 (1924).

²¹UCC § 2-713. "The buyer on notifying the seller of his intention to do so may, under UCC § 2-717, deduct all or part of damages resulting from any breach of contract from any part of the price still due under the same contract."

²²*Sun Co. v. Burrus*, 139 Va. 279, 123 S.E. 347 (1924); *Richmond Leather Manufacturing Co. v. Fawcett*, 130 Va. 484, 107 S.E. 800 (1921); *Nottingham Coal & Ice Co. v. Preas*, 102 Va. 820, 47 S.E. 823 (1904); *Trigg v. Clay*, 88 Va. 330, 13 S.E. 434 (1891). If there is no market at the place of delivery, the basis for estimating the damages of the vendee is the value of the articles in the nearest available market to which the buyer may resort to supply himself, with the additional costs of transportation, if any.

²³142 Va. 769, 128 S.E. 55 (1925).

²⁴*Nottingham Coal & Ice Co. v. Preas*, Va. 820, 47 S.E. 823 (1904).

there is no available market for the buyer to purchase similar goods, *Trigg v. Clay*²⁵ held the damages to be the difference between the contract price and the price at which the buyer had contracted to resell them. The UCC effects no significant changes in these Virginia decisions.

UCC section 2-714 deals with the remedies of the buyer after the goods have been accepted and revocation of acceptance is not possible. The measure of damages for delivery of the nonconforming goods 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 conformed to the contract.²⁶ Incidental and consequential damages may also be recovered.²⁷ Virginia law seems to be in accord.²⁸

The UCC²⁹ and Virginia law³⁰ both allow incidental and consequential damages arising from the seller's breach. The UCC allows the buyer to recover any consequential damages resulting from general or particular requirements which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. The UCC also allows consequential damages to the buyer in the case of a loss of a profitable resale because of the seller's breach, if the defaulting seller at the time of the bargain had reason to know that a resale was contemplated. But the UCC does not seem to permit speculative damages, and consequently, expected profits are not allowed by the UCC unless the profit clearly would have been earned.³¹

REMEDIES THAT REACH THE GOODS

When the seller fails to make delivery or repudiates the contract, UCC section 2-716 greatly expands the buyer's remedy of specific per-

²⁵88 Va. 330, 13 S.E. 434 (1891).

²⁶UCC § 2-714(2).

²⁷UCC § 2-714(3).

²⁸*Smith v. Hensley*, 202 Va. 700, 119 S.E.2d 332 (1961); *E. I. DuPont de Nemours & Co. v. Universal Moulded Products Corp.*, 191 Va. 525, 62 S.E.2d 233 (1950); *Greenland Dev. Corp. v. Allied Heating Products Co.*, 184 Va. 588, 35 S.E.2d 801 (1954); *Newbern v. Joseph Baker & Co.*, 147 Va. 996, 133 S.E. 500 (1926); *Reese v. Bates*, 94 Va. 321, 26 S.E. 865 (1897).

²⁹UCC § 2-715.

³⁰*Bristol Belt Line Ry. v. Bullock Electric Mfg. Co.*, 101 Va. 652, 44 S.E. 892 (1930); *O. H. Perry Tie & Lumber Co. v. Rennolds*, 100 Va. 264, 40 S.E. 919 (1902). *Consumer's Ice Co. v. Jennings*, 100 Va. 719, 42 S.E. 879 (1902). For recovery of profits see *Shenandoah Milling Co. v. Phosphate Products Corp.*, 161 Va. 642, 171 S.E. 681 (1933); *Arkla Lumber & Mfg. Co. v. West Virginia Timber Co.*, 146 Va. 641, 132 S.E. 840 (1926). *Mount Rodgers Furniture Co. v. Virginia Mirror Co.*, 155 Va. 201, 154 S.E. 600 (1930), said that profits may not be speculative.

³¹UCC § 2-715(2). Accord, *Washington & O.D. Ry. v. Westinghouse Elec. & Mfg. Co.*, 120 Va. 620, 89 S.E. 131 (1916); *Trigg v. Clay*, 88 Va. 330, 13 S.E. 434, 435 (1891).