

Fall 9-1-1963

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

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### Recommended Citation

*Effect of the Uniform Commercial Code on Virginia Commercial Law: Seller's Remedies and Article 2*, 20 Wash. & Lee L. Rev. 267 (1963), <https://scholarlycommons.law.wlu.edu/wlulr/vol20/iss2/6>

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## NOTES

EFFECT OF THE UNIFORM COMMERCIAL CODE  
ON VIRGINIA LAW

## SELLER'S REMEDIES AND ARTICLE 2

The Uniform Commercial Code sets forth in detail the remedies available to the seller when the buyer breaches a sales contract. In general these are the same as those previously available in Virginia, but the UCC gives the seller a somewhat wider range of remedies.

Under Virginia case law, the location of title to the goods at the time of the breach determined the remedy.<sup>1</sup> Title, as a significant concept, has been almost eliminated in the UCC,<sup>2</sup> so that while the same remedies are given, the results are reached by different routes.

A buyer may breach a sales contract at different points in the transaction. The remedies will vary, depending upon when the buyer breached the contract. (1) When the buyer breaches a sales contract after having accepted the goods, the seller may: (a) bring an action for the price; or (b) in certain situations reclaim the goods. (2) When the buyer breaches the contract after the seller has delivered the goods to a carrier, the seller may stop the goods in transit. (3) When the buyer refuses to accept goods when tendered, the seller may: (a) rescind the contract; (b) resell the goods and bring an action for any damages sustained; (c) retain the goods and collect damages; or (d) bring an action for the price in special situations. (4) When the buyer

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<sup>1</sup>*Birdsong & Co. v. American Peanut Co.*, 149 Va. 755, 141 S.E. 759 (1928); *J. B. Colt Co. v. Elam*, 138 Va. 124, 120 S.E. 857 (1924).

<sup>2</sup>The elimination of the concept of passage of title is emphasized in the comment to UCC § 2-101, which reads:

"The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character."

Section 2-401 provides, "Each provision of this Article with regard to the rights, obligations and remedies . . . applies irrespective of title to the goods except where the provision refers to such title."

makes an anticipatory repudiation of the contract, the seller may: (a) await the time for performance, tender the goods, and then proceed as in any other case of nonacceptance; or (b) bring any action immediately that would be appropriate, treating the breach as having occurred at the scheduled time of performance.

#### REMEDIES WHEN BUYER HAS ACCEPTED THE GOODS

The UCC provides two remedies for a seller when a buyer with possession of the goods refuses to pay for them. Section 2-709(1)(a) provides that the seller may bring an action for the price of the goods. Under Virginia case law in order to bring such an action, title must have passed to the buyer.<sup>3</sup> The UCC also provides for the recovery of incidental damages, a point not covered by Virginia cases.

Under section 2-702(2) the seller who has delivered goods to an insolvent buyer may reclaim the goods if he acts within ten days. This provision changes Virginia law, as stated in *James v. Bird's Adm'r*,<sup>4</sup> in which it is said that the vendor of personal property has no implied or equitable lien on the goods for the purchase money and that he must look solely to the personal responsibility of the vendee.

If the buyer has misrepresented his solvency to the seller, in writing and within ten days prior to the delivery of the goods, under this section of the UCC the ten-day limitation does not apply. Virginia in *Oberdorfer v. Meyer*<sup>5</sup> recognized a similar right on the part of a seller, whose buyer has fraudulently misrepresented his solvency, to reclaim the goods, although in the case relief was denied because the goods had passed into the hands of parties who had taken without notice.

This right of reclamation given by the UCC gives the seller such a preference over other creditors that such a reclamation bars all other remedies.<sup>6</sup>

The UCC also recognizes the seller's right to reclaim the goods where delivery has been made to the buyer conditional upon pay-

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<sup>3</sup>*Birdsong & Co. v. American Peanut Co.*, supra note 1; *Geoghegan & Sons v. Arbuckle Bros.*, 139 Va. 92, 123 S.E. 387 (1924); *Pleasants v. Pendleton*, 27 Va. (6 Rand.) 473 (1828).

<sup>4</sup>35 Va. (8 Leigh) 510 (1837). See also *Trigg v. Bucyrus Co.*, 104 Va. 79, 51 S.E. 174 (1905).

<sup>5</sup>88 Va. 384, 13 S.E. 756 (1891).

<sup>6</sup>UCC § 2-702(3) and Comment, Point 3.

ment of the price, which is not received,<sup>7</sup> or where a check, which is subsequently dishonored, is taken in payment.<sup>8</sup>

#### REMEDIES WHERE BUYER BREACHES WHILE GOODS ARE IN TRANSIT

The UCC provides that the seller may under certain conditions stop goods in transit although the goods are in the possession of a carrier and no longer under the control of the seller, so that under traditional doctrines title would have passed to the buyer. If at such a time the buyer becomes insolvent,<sup>9</sup> if the method of payment fails, as because of government regulation,<sup>10</sup> or if the buyer refuses to make a payment then due,<sup>11</sup> the seller may stop goods in transit. This right to stop delivery is always limited so that the carrier will not be harmed.<sup>12</sup> There is the further limitation that, except in the case of the insolvent buyer, such stoppage of delivery is available only as to carload, planeload or similar large quantities.<sup>13</sup>

The Virginia Supreme Court of Appeals has only considered the insolvency situation, allowing the seller to stop the goods in transit where the buyer became insolvent.<sup>14</sup>

#### REMEDIES WHERE BUYER REJECTS THE GOODS

The UCC provides four remedies for the seller when the buyer wrongfully rejects the goods tendered:

(1) The seller may cancel the contract,<sup>15</sup> a remedy which, although never actually given in any case, is said to be available under Virginia law.<sup>16</sup>

(2) The seller may resell the goods and collect damages.<sup>17</sup> Although the same remedy has been available under case law,<sup>18</sup> the UCC con-

<sup>7</sup>UCC § 2-507(2) and Comment, Point 3. This comment indicates that the right is waived if not exercised within ten days. However, the text of the UCC does not contain such a limitation and there is no cross-reference to UCC § 2-702, dealing with reclamation from an insolvent buyer, where the limitation is specifically spelled out.

<sup>8</sup>UCC § 2-511(3).

<sup>9</sup>UCC §§ 2-702(1), 2-705(1).

<sup>10</sup>UCC § 2-614(2).

<sup>11</sup>UCC § 2-705(1).

<sup>12</sup>UCC § 2-705(2).

<sup>13</sup>UCC § 2-705(1).

<sup>14</sup>Howatt & Co. v. Chalmers, 19 Va. (5 Munf.) 34 (1816).

<sup>15</sup>UCC § 2-703(f).

<sup>16</sup>Rosenbaums v. Weedon, Johnson & Co., 59 Va. (18 Gratt.) 785, 790 (1868) (dictum).

<sup>17</sup>UCC §§ 2-703(d), 2-706.

<sup>18</sup>Rosenbaums v. Weedon, Johnson & Co., supra, note 16.

tains explicit provisions in section 2-706 regarding the requirements to be followed in making such a sale, and in section 2-708 regarding the damages recoverable.

While the sale must be made in a "commercially reasonable" manner it may be either public or private. Where the resale is to be private, the buyer must be given reasonable notice of the seller's intent to resell and hold the buyer for damages. A public sale must be held in the usual place for such sales and unless the goods are perishable or such as may speedily decline in value, notice must be given the buyer. Unless the goods are in view of those attending a public sale, adequate provision must be made for inspection by prospective buyers. The seller is free to buy at a public sale. A seller does not have to account to the buyer for any profit made on a resale, and if there is a deficiency he may maintain an action for damages. In order to facilitate resale, the UCC provides that the purchaser at either a public or private resale takes free of the claims of the original buyer, even though the seller has failed to comply with the statutory provisions for resale.

Virginia case law similarly requires the seller to use "reasonable diligence" in making a resale,<sup>19</sup> and it has been said that, unless good faith requires otherwise, the sale should be at public auction.<sup>20</sup> The seller is required to give notice of his intention to resell and to hold the buyer for damages, but he does not have to give notice of the sale itself<sup>21</sup> and so he does not have to give notice of the time and place of resale.<sup>22</sup> Under Virginia case law the seller is said to act as agent of the buyer in carrying out resale<sup>23</sup>—a doctrine not recognized in the UCC. The damages recoverable under section 2-708 are comparable to those recoverable under Virginia case law.<sup>24</sup>

(3) The seller may retain the goods and under section 2-708 bring an action for damages measured by the difference between the contract and market prices at the time and place of tender, plus incidental damages incurred, and less any expenses the seller is saved by the breach. Virginia cases have recognized this same remedy with the

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<sup>19</sup>Mayflower Mills v. Hardy, 138 Va. 138, 120 S.E. 861 (1924).

<sup>20</sup>Rosenbaums v. Weedon, Johnson & Co., supra, note 16.

<sup>21</sup>American Hide & Leather Co. v. Chalkley, 101 Va. 458, 44 S.E. 705 (1903).

<sup>22</sup>Walker v. Gateway Milling Co. 121 Va. 217, 92 S.E. 826 (1917); Rosenbaums v. Weedon, Johnson & Co., supra, note 16.

<sup>23</sup>Baker-Matthews Lumber Co. v. Lincoln Furniture Mfg. Co. 148 Va. 413, 139 S.E. 254 (1927).

<sup>24</sup>Mayflower Mills v. Hardy, supra, note 19; Rosenbaums v. Weedon, Johnson & Co., note 16.

same measure of damages,<sup>25</sup> except that Virginia has never specifically made an award to cover incidental damages.

If this measure of damages, i.e., contract price less market price and costs saved the seller, is inadequate; then the UCC provides that the measure of damages shall be the profit lost.<sup>26</sup> Virginia cases recognize that where the goods have not yet been manufactured, the measure of damages is the contract price less cost of manufacturing and delivery,<sup>27</sup> or profit loss because of the buyer's breach;<sup>28</sup> these are situations in which any measure of damages other than profit lost would also seem to be inadequate under the UCC. Virginia has not allowed this measure of damages in other circumstances contemplated in the UCC.

(4) The seller may maintain an action for the purchase price if the goods were identified to the contract prior to the buyer's breach and with reasonable effort the goods cannot be sold at a reasonable price.<sup>29</sup> If the seller resorts to this remedy, he must hold the goods for the buyer, unless resale subsequently becomes possible, and upon payment of the judgment, the buyer is entitled to the goods. Since under Virginia law the position of title is determinative of the remedy available, an action for price could not be maintained unless title had passed to the buyer while possession remained in the seller.<sup>30</sup>

#### REMEDIES AVAILABLE BEFORE TIME FOR PERFORMANCE

Section 2-609 of the UCC provides that when the seller, prior to the time for his performance, has reasonable grounds for insecurity as to the buyer's performance, the seller may require "reasonable assurance" from such buyer, and suspend performance until it is received. A failure by the buyer to give the assurance within thirty days constitutes a repudiation of the contract.

<sup>25</sup>*Yellow Poplar Lumber Co. v. Chapman*, 74 Fed. 444 (4th Cir. 1896); *Sanitary Grocery Co. v. Wright*, 158 Va. 312, 163 S.E. 86 (1932); *Wessel, Duval & Co. v. Crozet Cooperage Co.*, 143 Va. 469, 130 S.E. 393 (1925); *James River Lumber Co. v. Smith Bros.*, 135 Va. 406, 116 S.E. 241 (1923).

<sup>26</sup>UCC § 2-708(2).

<sup>27</sup>*Tidewater Plumbing Supply Co. v. Emory Foundry Co.*, 141 Va. 363, 127 S.E. 87 (1923); *Norfolk Hosiery & Underwear Mills Co. v. Aetna Hosiery Co.*, 124 Va. 221, 98 S.E. 43 (1919); *Duke v. Norfolk & W. Ry.*, 106 Va. 152, 55 S.E. 548 (1906); *Worrell & Williams v. Kinnear Mfg. Co.*, 103 Va. 719, 49 S.E. 988 (1905); *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S.E. 525 (1898).

<sup>28</sup>*A.I.M. Percolating Corp. v. Ferrodine Chemical Corp.*, 139 Va. 366, 124 S.E. 442 (1924).

<sup>29</sup>UCC § 2-709.

<sup>30</sup>*Montauk Ice Cream Co. v. Daigger Co.*, 141 Va. 686, 126 S.E. 681 (1925). A dictum in *Rosenbaums v. Weedon, Johnson & Co.*, supra, note 16, which indicates that an action for price will lie although title is still in the seller, was explained on another basis in this case. 141 Va. at 701-02.

In *Smokeless Fuel Co. v. W. E. Seaton & Sons*<sup>31</sup> assurance in the form of an indemnity bond was sought by a seller who questioned the ability of his buyer to perform. However the court did not grant such relief because it found that it was not warranted by the circumstances. *Howatt & Co. v. Davis & Chalmers*<sup>32</sup> contains the statement that where prior to delivery to the actual buyer, the seller discovers that the buyer is likely to become insolvent, the seller may stop goods in transit.

If the buyer actually becomes insolvent before the seller performs, the seller may refuse delivery except for cash and payment of past deliveries, and may stop goods in transit<sup>33</sup> unless the carrier has acted in such a way that stoppage would work an injustice upon him.<sup>34</sup>

Virginia case law allows the seller whose buyer becomes insolvent to stop goods in transit,<sup>35</sup> and it seems self-evident that he could suspend performance without fear of legal sanction.

Section 2-610 of the UCC governs the remedies available when the buyer actually makes an anticipatory repudiation. The seller may (1) await performance for a "commercially reasonable" time, or (2) bring any action which he would be entitled to bring<sup>36</sup> if the seller had breached at the scheduled time for performance. In either case he may suspend his own performance, or proceed under section 2-704, which permits the seller faced with anticipatory breach to identify to the contract: (a) conforming goods in his possession or control at the time he learned of the breach, or (b) to complete goods not then completed but demonstrably intended for the particular contract, or (c) to cease manufacture and salvage uncompleted goods.

Virginia has recognized the doctrine of anticipatory breach in only one sales case. In *Virginia Hardwood Lumber Co. v. Hughes*,<sup>37</sup> the court said that upon learning of the breach the seller was under a duty to recognize the situation, terminate relations, and sue for damages.

The adoption of the Uniform Commercial Code provides the

<sup>31</sup>105 Va. 170, 52 S.E. 829 (1906).

<sup>32</sup>Supra, note 14.

<sup>33</sup>UCC § 2-702(1).

<sup>34</sup>UCC § 2-705.

<sup>35</sup>*Howatt & Co. v. Davis & Chalmers*, supra, note 14.

<sup>36</sup>UCC § 2-610(b) provides that such actions may be brought even though the seller has previously asked the buyer to reconsider his repudiation.

<sup>37</sup>140 Va. 249, 124 S.E. 283 (1924). For non-sales cases on anticipatory repudiation see: *Mutual Reserve Fund Life Ass'n v. Taylor*, 99 Va. 208, 37 S.E. 854 (1901); *Lee v. Mutual Reserve Fund Life Ass'n*, 97 Va. 160, 33 S.E. 556 (1899); *James v. Kibler's Adm'r*, 94 Va. 165, 26 S.E. 417 (1896).