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Chapter 25. General Remedies Principles

25.1. Basic Common Law Remedy Concepts. To the extent not displaced by the UCC, common law principles governing remedies continue to apply to both buyers and sellers. Let us review some of those principles. At common law, you must first establish that one of the parties has breached the agreement. If a breach exists, the non-breaching party is entitled to be compensated for the losses suffered by the non-breaching party as a result of the breach. See § 1-305. However, the following **common law principles** may limit the non-breaching party’s ability to recover damages: **causation, foreseeability, certainty, and mitigation.**

25.1.1. Causation. The non-breaching party must establish that the breach **caused** the damage (*i.e.*, causation).

25.1.2. Foreseeability The damages must have been **reasonably foreseeable** at the time of contracting. This limitation often makes it difficult to obtain consequential damages. As stated in Restatement (Second) of Contracts § 351, damages “are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.”

25.1.2.1. Section 2-715(2) adopts the principle of foreseeability by limiting buyer’s consequential damages to “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know....”

☑ **Purple Problem 25-1.** Missoula Music Shop agreed to sell a violin to Brenda, which Brenda intended to use in an upcoming audition for a scholarship to be awarded by the University of Montana. The Music Shop had to special order the violin, and promised to deliver it on February 1. The audition was scheduled for February 10. On January 31, the Music Shop informed Brenda that it would not be able to deliver the violin until February 15, after the audition. Brenda used her old violin at the audition, and did not receive the scholarship. Brenda sues Missoula Music Shop for the \$10,000 scholarship she would have been awarded if she had won the competition. Is the Music Shop liable for these damages?

☑ **Purple Problem 25-2.** On February 1, Farmer Bob ordered a new tractor from the local implement dealer, which he intended to use to plant his spring wheat crop in May. The implement dealer promised to deliver the tractor by May 1. However, the implement dealer did not deliver the tractor until May 15. As a result of the delay, Farmer Bob was unable to plant 500 of his 2000 acres. He seeks damages from the implement dealer for his lost profits on the 500 acres. Will Bob be able to establish that the damages were foreseeable?

25.1.3. Certainty. The non-breaching party must be able to prove the amount of the damages *with reasonable certainty*.

25.1.3.1. Damages need not be calculated with mathematical accuracy. See Comment 1 to § 1-305, which “rejects any doctrine that damages must be calculable with mathematical accuracy.” You can estimate or approximate damages, as long as there is some certainty involved.

☑ **Purple Problem 25-3.** Let’s go back to Farmer Bob. What sort of evidence would you submit to establish Bob’s lost profits on the 500 acres?

25.1.4. Mitigation The breaching party may raise the affirmative defense of *mitigation*, pursuant to which the non-breaching party has an obligation to reasonably *mitigate* his/her damages.

25.1.4.1. The only explicit reference to mitigation in Article 2 appears in § 2-715(2), which adopts the principle of mitigation by limiting buyer’s consequential damages to those “which could not reasonably be prevented by cover or otherwise.” Nevertheless, the common law principle must always be applied.

☑ **Purple Problem 25-4.** Let's go back to Farmer Bob. If you represented the implement dealer, what arguments would you make regarding mitigation?

25.1.5. Changing Available Remedies By Agreement. Under the principle of *freedom of contract*, the parties, *by agreement*, may to some extent expand or limit otherwise available remedies or the measure of damages. However, because many of the principles are so strong, we will say that such provisions are not always enforceable.

☑ **Purple Problem 25-5.** What if the purchase agreement between the implement dealer and Farmer Bob contained a clause specifically stating that seller was not responsible for any consequential damages resulting from a breach, including lost profits? See § 2-719.

25.2. Purpose of Remedies. The primary purpose of a contract remedy is to put the non-breaching party in as good a position as that party would have been in had the contract been performed. This is often referred to as the non-breaching party's *expectation interest*, or the rule of the *expectancy*. See Restatement (Second) of Contracts § 347. We will see that even though the Code contains a lot of formulas for calculating damages, these are just ways of computing the expectancy.

25.2.1. Section 1-305 incorporates the concept of fulfilling a party's expectation interest by stating that the "remedies provided by [the UCC] must 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...."

25.2.2. Sometimes a plaintiff may not be able to prove the value of the expectation interest with certainty or may conclude that another measure would be more favorable. In those situations, a party may seek two other measures of damages:

25.2.2.1. **Reliance Interest.** The purpose of this interest is to reimburse the non-breaching party for losses incurred by reliance on the contract, such as expenses incurred in preparing to perform. The rationale is to put the non-breaching party in the same position as if the contract had not been made rather than as if the contract had been performed.

25.2.2.2. **Restitution Interest.** The purpose of this interest is to restore to the non-breaching party any benefit conferred by her on the other party.

25.3. Material versus Immaterial Breach and Effect on Remedies. At common law, it is important to classify a breach as **material** or **immaterial**, because the remedies available depend upon the materiality of the breach. In both cases, damages are available as a remedy. However, it is only when a breach is material that the non-breaching party may be fully excused from further performance of his or her obligations, and may terminate the contract. Except for certain situations, such as **installment contracts**, the concept of materiality is not determinative of remedies under the UCC. For example, recall from § 12.2 that the perfect tender rule of § 2-601 allows the buyer to reject goods for **any non-conformity** (subject to the seller's right to cure and certain other limitations); and § 2-607(1) requires the buyer to pay at the contract price for any goods accepted rather than claim that its obligation to pay under the contract was discharged on grounds that the breach was material.

25.4. Terminology. Different terms are used to describe different types of damages.

25.4.1. **Direct damages:** Damages that flow directly and immediately from a breach. In the context of the sale of goods, a seller's direct damages include the lost profit that a seller would have made upon the sale of the goods. A buyer's direct damages would include any increase in price the buyer would have to pay to replace goods that seller fails to deliver.

25.4.2. **Incidental damages:** Damages reasonably associated with or related to actual damages.

25.4.2.1. A seller's incidental damages include costs reasonably incurred in stopping delivery, in transporting or storing the goods after the buyer's breach, or costs incurred in connection with the return or resale of the goods. Section 2-710.

25.4.2.2. A buyer's incidental damages include costs reasonably incurred in inspection, receipt, transportation and storage of goods rightfully rejected; and reasonable expenses incurred in connection with effecting cover. Section 2-715(1).

25.4.3. **Consequential damages:** Consequential damages include losses that do not flow directly and immediately from a breach, but that result indirectly from the breach.

25.4.3.1. Section 2-715(2) defines a **buyer's** consequential damages to include:

- i. any loss resulting from general or particular requirements and needs of which the seller knew (or had reason to know) at the time of contracting,

and which could not have been reasonably prevented by cover or otherwise; and

ii. injury to person or property proximately resulting from any breach of warranty.

25.4.3.2. The UCC **does not include a provision allowing consequential damages for sellers**. See, for example, § 2-708(1), which allows incidental but not consequential damages to a seller. Section 1-305 states that consequential damages are not allowed unless as specifically provided elsewhere in the UCC. Based on § 1-305, several courts have held that the lack of a provision specifically allowing consequential damages to seller does, in fact, prevent the seller from recovering any consequential damages. See, for example, *Firewood Mfg. Co. v. General Tire, Inc.*, 96 F.3d 163 (6th Cir. 1996) (court disallowed interest as a consequential damage for seller). Amended § 2-708 would have allowed consequential damages for sellers.

25.4.3.3. In most jurisdictions, attorney's fees are not allowed as part of incidental or consequential damages. Exception: if a party has to defend a foreseeable claim by a third party because of the breach, the breaching party may be held responsible for attorney's fees incurred.

For example, Seller agreed to sell widgets to Buyer, knowing that Buyer planned to resell them to Third Party. Seller repudiated and Buyer was not able to provide widgets to Third Party, which sued Buyer. In its claim against Seller, Buyer cannot recover attorney's fees expended in pursuing that claim. However, Buyer can recover from Seller attorney's fees it expended defending the claim of Third Party.

25.4.4. The terms “**general damages**” and “**special damages**” are the terms used in pleading for direct and consequential damages. A plaintiff does not have to notify the defendant of general damages because they are, as defined in Black's Law Dictionary, “damages that the law presumes follow from the type of wrong complained of.” In other words, one would generally be aware that such damages would naturally arise from a breach; they could have been fairly and reasonably contemplated by both parties at the time the contract was made. But because special damages do not naturally arise from a breach, the plaintiff must plead them with particularity so the defendant has notice of them.

☑ **Purple Problem 25-6.** Wilbur Reed operates a small greenhouse in Missoula known as Reed's Greenhouse. In May, Reed's Greenhouse received orders from various Missoula retail outlets, such as K-Mart, for Christmas poinsettias. On June 2, Reed then ordered 5,000 poinsettia cuttings from McCalif, a large

California grower of poinsettias, for \$1.00 each. The shipment of poinsettia cuttings were received by Reed on August 11. When the boxes were opened, it was clear that all but 500 of the cuttings were ruined because they had not been packed properly. Because it was so late in the season, McCalif could not provide replacement plants to Reed. Classify the following damages incurred by Reed as direct, incidental or consequential:

1. the purchase by Reed from a Seattle grower of 3,000 poinsettia cuttings at \$1.75/each (which was the most he could find at this point in time, and the lowest price he could find)
2. the lost profit of \$5.00 per plant on the sale of 2,000 poinsettias which Reed was unable to replace
3. the cost of transporting the 3,000 replacement poinsettias to Missoula?

☑ **Purple Problem 25-7.** Now let's classify damages when the seller is the non-breaching party. John is an appliance salesman. At noon on March 15, a customer comes into the store and agrees to purchase a washing machine for \$500. John is very excited, because if he delivers 125 major appliances to buyers between January 1 and March 15, he qualifies for a free trip to the NCAA basketball championships (valued at \$2,500), sponsored by the appliance manufacturer. This sale would be his 125th, and John enthusiastically explains these facts to the customer as they are signing the purchase agreement. After the contract is signed, John closes early and goes out to celebrate with a few beers. That afternoon, when the appliance is delivered, the customer refuses delivery, telling the carrier that he has changed his mind, and he is not going to buy the washing machine. John learns of these facts the next day. Classify each of the following damages as direct, incidental or consequential:

1. the cost of delivering the washing machine back to the store
2. the lost profit on the sale of the appliance
3. the lost trip to the NCAA?

25.5. Non-compensatory Damages. Tort law is often solicitous of injured feelings, but contract law is not. Except in unusual cases, contract law does not compensate for non-economic injuries, nor does contract law allow punitive damages.

25.5.1. One of the principles of contract law is that of **efficient breach**. This principle prevents a party from having to perform an inefficient contract. The party may deliberately breach a contract, as long as the breaching party pays compensatory (versus punitive) damages arising from its breach. In other words, the breaching party is allowed to breach a contract, if it decides that it is cheaper to breach than to continue performing under the contract. Punitive damages discourage parties to a contract from committing efficient breaches. Section 1-305 provides that punitive (“penal”) damages may not be had unless specifically provided by the UCC.

25.5.2. With regard to non-economic injuries, such as emotional distress, such damages are excluded “unless the breach also caused bodily harm or the contract ... is of such a kind that serious emotional disturbance was a particularly likely result.” Restatement (Second) of Contracts § 353. A contract for the sale of a casket is one of those rare contracts which could give rise to a cause of action for liability based on mental suffering. See, e.g., *Hirst v. Elgin Metal Casket Co.*, 438 F. Supp. 906 (D. Mont. 1977).

25.6. Burden of Proof. The party seeking damages has the burden of proof to establish damages caused by a breach.

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