Note: This version contains a correction to page 260, made Nov. 7, 2017.

Chapter 26. Seller's Remedies

26.1. Summary of Seller Remedies. Section 2-703 sets forth seller's remedies in general. The remedies are ***cumulative***; for example, the seller can withhold delivery of the goods, cancel the contract, *and* sue for damages. See Comment 1 to § 2-703. Note, however, that the seller is not entitled to be over-compensated. See § 1-305. The remedies available to an aggrieved seller include:

- the right to withhold or stop delivery of goods;
- the right to resell the goods and recover damages as provided at § 2-706;
- the right to recover damages for nonacceptance as provided at § 2-708, using the market price as the measure of damages or, in appropriate cases, the lost profit on the sale;
- in certain circumstances, the right to recover the purchase price of the goods as provided at § 2-709; or
- the right to cancel the contract.

26.2. Recovery of Purchase Price. See § 2-709.

26.2.1. There are only three situations which allow a seller to recover the purchase price from the buyer:

- Where the buyer ***has accepted*** the goods (§ 2-709(1)(a))(and most courts interpret this provision to mean that the buyer is in possession of the goods);
- Where the goods have been destroyed *after* the risk of loss has passed to the buyer (§ 2-709(1)(a)); and
- Where the seller is ***unable to re-sell goods*** identified to the contract at a reasonable price (§ 2-709(1)(b)).

26.2.2. If the seller has the goods and successfully sues for the price, he must hold any goods which have been identified to the contract and which are still in his control for the buyer. Section 2-709(2).

26.2.3. For situations giving rise to the right to sue for the purchase price, see the cases noted in John S. Herbrand, Annotation, *Seller's Recovery of Price of Goods from Buyer Under UCC § 2-709*, 90 A.L.R. 3d 1141 (1979).

☑ **Purple Problem 26-1.** Susan owns and operates a jewelry store. Betty comes into the store and agrees to purchase a large emerald ring for $12,000. Betty agrees to pick up the ring the next day, and deliver a check for the purchase price at that time. The next day, Betty calls and cancels the contract. Can Susan sue for the purchase price under § 2-709? Why or why not?

☑ **Purple Problem 26-2.** A Montana farmer agrees to sell a carload of grain to a specialty bakery located in Spokane, Washington. The contract is F.O.B. Collins, Montana elevator. After the grain is delivered to the Collins elevator with notice to buyer and it has been loaded onto the train, there is a derailment on its way to Spokane that renders the grain worthless. Can the farmer sue for the purchase price? Why or why not? (Hint: review the seller's obligations under this contract and when the risk of loss passes in §§ 10.1.4 and 10.1.5.)

☑ **Purple Problem 26-3.**

1. The sponsors of the annual Conrad Whoop-up Rodeo enter into a contract with Sam's Silver Designs to design and manufacture 10 custom-made silver-plated belt buckles to award to the winner of each rodeo event, at the price of $200 each. Before Sam has begun work on the belt buckles, the rodeo sponsors call and repudiate the contract. Can Sam sue for the $2,000 purchase price of the buckles under § 2-709?

2. Suppose that Sam orders the metal and starts work. After pouring and molding all of the belt buckles, but before stamping them with the words "Whoop-up Champion," the rodeo sponsors cancel the contract due to low ticket sales for the rodeo. Can Sam sue the rodeo sponsors for the $2,000 purchase price of the buckles under § 2-709?

3. Assume that Sam has completed the belt buckles with the words "Whoop-up Champion" stamped on them and then the rodeo sponsors repudiate the contract. Sam successfully sues for the purchase price under § 2-709. What must Sam do with the belt buckles in his possession?

26.3. Remedy of Resale. Under § 2-706, a seller ***may resell goods*** identified to the contract in ***good faith*** and in a ***commercially reasonable manner*** at either a ***private sale*** or a ***public sale*** (auction) and recover damages under the following formula:

contract price

– resale price

+ incidental damages

– expenses saved by seller

= resale damages

Put more succinctly:

resale damages = KP – RP + ID – ES

26.3.1. In addition, § 2-706 requires that the seller give the buyer ***notice*** of his intent to resell. Since the remedy gives the seller the difference between the contract price and the resale price, the buyer has an interest in seeing that the seller gets as a high a resale price as possible.

26.3.1.1. Under § 2-709(3), for a ***private sale***, the seller must give the buyer reasonable notification of his intention to resell. Although some sellers have argued that the buyer should have reasonably known that the seller would resell, most courts have required strict compliance with the notice provision.

26.3.1.2. Under § 2-709(4), for a ***public sale***, the seller must give the buyer reasonable notice of the time and place of the auction, ***unless*** the goods are perishable or threaten to decline quickly in value.

26.3.2. Needless to say, there is lots of litigation over whether the method, manner, time, place and terms of re-sale were commercially reasonable. These issues are very similar to the issues that arise in secured transactions (Article 9) when the creditor sells the repossessed goods. See Carolyn Kelly MacWilliam, Annotation, *Resale of Goods Under UCC § 2-706*, 101 A.L.R.5th 563 (2002).

☑ **Purple Problem 26-4.** Dollar Store decides to go out of business, and enters into an agreement to sell all of the inventory and shelving to Bargain Buyers for $48,000. Dollar will have to pay $2,000 to ship the goods to Bargain. A few days prior to the closing, Bargain Buyers repudiates the contract.

1. Dollar pays a broker who found the buyer a commission of $2,500 to find a private buyer who will pay $44,000 for the goods. The buyer is closer to Dollar and it will have to pay only $1,000 in shipping. Dollar notifies Bargain of its intention to resell. How much can Dollar recover from Bargain under § 2-706?

2. Assume instead Dollar sells the inventory and shelving at a public auction, but fails to give any notice of the auction to Bargain Buyers. The auction generates $35,000 in sales proceeds, and Dollar Store sues Bargain Buyers for the $15,000 difference, plus costs of the auction. Will Dollar prevail under § 2-706? Why or why not? If it does not prevail, are any other remedies available to it?

What if the remedy provisions of the purchase agreement allowed the sellers to re-sell the goods at private or public auction, *without notice* to buyers? In other words, is the notice requirement a default rule that the parties are free to change. In this situation, can Dollar Store collect $15,000 (plus the cost of the auction) from Bargain Buyers?

26.4. Market Price Remedy. Under § 2-708(1), instead of re-selling the goods and seeking damages under § 2-706, a seller may seek damages from a breaching buyer based upon the market price of the goods, applying the following formula:

contract price

– market price at the time and place for tender

+ incidental damages

– expenses saved by seller

= market price damages

Put more succinctly:

market price damages = KP – MP + ID – ES

☑ **Purple Problem 26-5.** Salmons of Seattle has on hand a quantity of processed frozen salmon fillets. On August 1 it contracts to sell a large quantity of these fillets to Better Foods of Boise, Idaho for a price of "$2/pound F.O.B. Boise." Delivery is to be made by rail on August 21. On August 4, before the shipment has been delivered by Salmons of Seattle to the railroad, Better Foods cancels the contract. Review § 10.1.4 if you are not clear on the meaning of the shipping terms. Additional facts that you may (or may not) need to answer the questions follow (prices per pound):

Market price of fillets at Boise on August 1	$2.04
Market price of fillets at Seattle on August 1	$1.54
Market price at Boise on August 4	$1.92
Market price at Seattle on August 4	$1.40
Market price at Boise on August 21	$1.14
Market price at Seattle on August 21	$1.00
Cost of shipping from Seattle to Boise (per pound)	$ .05

1. If Salmons sues Better Foods under § 2-708(1), what amount should it receive?

2. What if instead the contract price had been agreed to as "$1.95 F.O.B. Seattle?"

3. What if Better Foods could demonstrate that upon hearing of the cancelation, Salmons had very quickly been able to arrange sale of the shipment to another buyer at $1.50/lb?

26.4.1. How do you establish market price if there is no readily available market price at the time and place of tender? Go to § 2-723, which provides that where market prices are 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."

26.5. Lost Profits. If the measure of damages under § 2-708(1) is ***inadequate***, then the seller can seek recovery under § 2-708(2), which allows as damages the seller's lost profit on the sale, *including reasonable overhead*, plus incidental damages.

A court explained overhead this way:

> Overhead is defined as costs which "cannot be avoided" even if events at issue in a suit did not take place.~ Overhead in this sense refers to fixed costs required to be incurred independently of the particular matters at issue.
>
> The antithesis of overhead in this sense is marginal variable cost incurred or avoided when an event occurs.

Four Points Ship. and Trading, Inc. v. Poloron Israel, L.P., 853 F. Supp. 95, 96–97 (S.D.N.Y. 1994)

Ordinarily, a calculation of profits involves subtracting allocable overhead. But § 2-708(2), in a sense, adds it back in by specifying "including reasonable overhead." Because of this, we'll simplify "lost profit" to the contract price less the direct cost of the good to the seller. Thus:

contract price

– cost of good

+ incidental damages

= lost-profits damages

Or put more succinctly:

lost-profits damages = KP – CG + ID

The lost-profits remedy under § 2-708(2) is broadly appropriate for "lost volume" sellers.

☑ **Purple Problem 26-6.** Sonic Sales sells a wide-screen television set to Barbara for $1,500, to be delivered the next day. It has several of this model in stock, and can always order more from the manufacturer. This model is going for the same price at other appliance dealers around town. Before the television is delivered, Barbara calls and repudiates the contract. Sonic Sales re-sells the television for $1,500 within a few days to another buyer.

1. What would the measure of damages be under § 2-706, assuming notice of re-sale had been given to Barbara (and no other costs or savings are involved)?

2. What would the measure of damages be under § 2-708(1), assuming that the market price is $1,500, and there are no other costs or savings involved?

3. Is the measure of damages under §§ 2-706 and 2-708(1) inadequate? Why or why not?

26.5A.0. Case: *Kenco Homes, Inc. v. Williams*

This case explores the appropriateness of lost-profits damages.

Kenco Homes, Inc. v. Williams

Court of Appeals of Washington
February 26, 1999

972 P.2d 125. KENCO HOMES, INC., a Washington corporation, Appellant, v. Dale E. WILLIAMS and Debi A. Williams, husband and wife, Respondents. No. 20907-1-II.

MORGAN, J.

Kenco Homes, Inc., sued Dale E. Williams and Debi A. Williams, husband and wife, for breaching a contract to purchase a mobile home. After a bench trial, the trial court ruled primarily for Williams. Kenco appealed, claiming the trial court used an incorrect measure of damages. We reverse.

Kenco buys mobile homes from the factory and sells them to the public. Sometimes, it contracts to sell a home that the factory has not yet built. It has "a virtually unlimited supply of product," according to the trial court's finding of fact.

On September 27, 1994, Kenco and Williams signed a written contract whereby Kenco agreed to sell, and Williams agreed to buy, a mobile home that Kenco had not yet ordered from the factory. The contract called for a price of $39,400, with $500 down. [Before a necessary appraisal of the site had taken place, Williams stopped payment and repudiated the contract. He told the trial court he did so because he "found a better deal elsewhere."]

When Williams repudiated, Kenco had not yet ordered the mobile home from the factory. After Williams repudiated, Kenco simply did not place the order. As a result, Kenco's only out-of-pocket expense was a minor amount of office overhead.

On November 1, 1994, Kenco sued Williams for lost profits. After a bench trial, the superior court found that Williams had breached the contract; that Kenco was entitled to damages; and that Kenco had lost profits in the amount of $11,133 ($6,720 on the mobile home, and $4,413 on the site improvements). The court further found, however, that Kenco would be adequately compensated by retaining Williams' $500 down payment....

Under the Uniform Commercial Code (UCC), a nonbreaching seller may recover "damages for non-acceptance" from a breaching buyer. The measure of such damages [in § 2-708] is as follows:

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (RCW 62A.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 (RCW 62A.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 (RCW 62A.2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

As the italicized words demonstrate, the statute's purpose is to put the nonbreaching seller in the position that he or she would have occupied if the breaching buyer had fully performed (or, in alternative terms, to give the nonbreaching seller the benefit of his or her bargain). A party claiming damages under subsection (2) bears the burden of showing that an award of damages under subsection (1) would be inadequate. [cites omitted]

In general, the adequacy of damages under subsection (1) depends on whether the nonbreaching seller has a readily available market on which he or she can resell the goods that the breaching buyer should have taken. When a buyer breaches before either side has begun to perform, the amount needed to give the seller the benefit of his or her bargain is the difference between the contract price and the seller's expected cost of performance. Using market price, this difference can, in turn, be subdivided into two smaller differences: (a) the difference between the contract price and the market price, and (b) the difference between the market price and the seller's expected cost of performance. So long as a nonbreaching seller can reasonably resell the breached goods on the open market, he or she can recover the difference between contract price and market price by invoking subsection (1), and the difference between market price and his or her expected cost of performance by reselling the breached goods on the open market. Thus, he or she is made whole by subsection (1), and subsection (1) damages should be deemed "adequate." But if a nonbreaching seller cannot reasonably resell the breached goods on the open market, he or she cannot recover, merely by invoking subsection (1), the difference between market price and his or her expected cost of performance. Hence, he or she is not made whole by subsection (1); subsection (1) damages are "inadequate to put the seller in as

good a position as performance would have done;" and subsection (2) comes into play.

The cases illustrate at least three specific situations in which a nonbreaching seller cannot reasonably resell on the open market. In the first, the seller never comes into possession of the breached goods; although he or she plans to acquire such goods before the buyer's breach, he or she rightfully elects not to acquire them after the buyer's breach. In the second, the seller possesses some or all of the breached goods, but they are of such an odd or peculiar nature that the seller lacks a post- breach market on which to sell them; they are, for example, unfinished, obsolete, or highly specialized. In the third situation, the seller again possesses some or all of the breached goods, but because the market is already oversupplied with such goods (*i.e.*, the available supply exceeds demand), he or she cannot resell the breached goods without displacing another sale. Frequently, these sellers are labeled "jobber," "components seller," and "lost volume seller," respectively; in our view, however, such labels confuse more than clarify.

To illustrate the first situation, we examine *Copymate Marketing v. Modern Merchandising*, 660 P.2d 332 (Wash. App. 1983), a case cited and discussed by both parties. In that case, Copymate had an option to purchase three thousand copiers from Dowling for $ 51,750. Before Copymate had exercised its option, it contracted to sell the copiers to Modern for $ 165,000. It also promised Modern that it would spend $ 47,350 for advertising that would benefit Modern. It told Dowling it was exercising its option, but before it could finish its purchase from Dowling, Modern repudiated. Acting with commercial reasonableness, Copymate responded by canceling its deal with Dowling and never acquiring the copiers. It then sued Modern for its lost profits and prevailed in the trial court. Modern appealed, but this court affirmed. Because Copymate had rightfully elected not to acquire the copiers, it had no way to resell them on the open market; subsection (1) was inadequate; and subsection (2) applied.

To illustrate the second situation, we again examine Copymate. Based on substantial evidence, the Copymate trial court found that after Modern's repudiation, Copymate had "no active or reasonably available market for the resale of the . . . copiers." One reason was that the copiers had been in storage in Canada for nine years; thus, they seem to have been obsolete. Again, then, Copymate could not resell the copiers on the open market; subsection (1) was inadequate; and subsection (2) provided for an award of "lost profits."

To illustrate the third situation, we examine *R.E. Davis Chemical Corp. v. Diasonics*, 826 F.2d 678 (7th Cir. 1987). In that case, Davis breached his contract to buy medical equipment from Diasonics. Diasonics was in

possession of the equipment, which it soon resold on the open market. Diasonics then sued Davis for "lost profits" under subsection (2), arguing that "it was a 'lost volume seller,' and, as such, it lost the profit from one sale when Davis breached its contract." The trial court granted summary judgment to Davis, but the appellate court reversed and remanded for trial. Other courts, the appellate court noted, "have defined a lost volume seller as one that has a predictable and finite number of customers and that has the capacity either to sell to all new buyers or to make the one additional sale represented by the resale after the breach." This definition, the appellate court ruled, lacks an essential element: whether the seller would have sold an additional unit but for the buyer's breach. On remand, then, Diasonics would have to prove (a) that it could have produced and sold the breached unit in addition to its actual volume, and (b) that it would have produced and sold the breached unit in addition to its actual volume.

In this case, Kenco did not order the breached goods before Williams repudiated. After Williams repudiated, Kenco was not required to order the breached goods from the factory; it rightfully elected not to do so; and it could not resell the breached goods on the open market. Here, then, "the measure of damages provided in subsection (1) is inadequate to put [Kenco] in as good a position as [Williams'] performance would have done;" subsection (2) states the applicable measure of damages; and Kenco is entitled to its lost profit of $11,133….

26.6. Unfinished Goods. Under § 2-704(2), the seller may complete the manufacture of unfinished goods if the seller reasonably believes that will mitigate the damages caused by the buyer's breach. It is instructive to compare this section with the common law rule exemplified in the case of *Rockingham Co. v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929). In that case, after the County contracted for the building of a bridge, it breached the contract by telling the contractor it did not want the bridge. The contractor nevertheless completed the bridge and claimed the contract price. The court held that after repudiation, a party may not continue to perform and thereby increase the damages. What is the difference between a contractor being told to stop construction on a bridge and a seller being told to stop construction on a good?

☑ **Purple Problem 26-7.** Buyer asked Seller to build a custom machine for it. The price was $100,000, of which $90,000 is cost and $10,000 is anticipated profit. Seller ordered $50,000 worth of parts and began assembly of the machine. At that point Buyer repudiated the contract.

1. Assuming Seller can sell what it has built for scrap worth $5,000, what can Seller recover as damages?

2. At the time of repudiation, Seller reasonably believes it can complete the machine and find a buyer for it. It does, and sells the completed machine for $90,000. What can Seller recover as damages?

3. Same facts as #2 except Seller can't find a buyer for the completed machine and has to sell it for scrap worth $10,000. What can Seller recover as damages?