Chapter 27. Buyer's Remedies

27.1. Summary of Buyer Remedies. Under §§ 2-711 through 2-716, different remedies are available to a buyer, depending upon whether (1) the buyer accepts the goods, or (2) the buyer does not have the goods because either (i) the buyer rightfully rejects or revokes acceptance of goods, or (ii) the seller fails to deliver or otherwise repudiates the contract.

27.1.1. If a buyer ***accepts*** and keeps ***non-conforming goods***, a buyer may:

- Recover damages for the non-conformity, including damages for any breach of warranty (§ 2-714); and
- Upon notice, deduct his damages from any part of the purchase price still due (§ 2-717).

27.1.2. If the seller ***fails to make delivery*** or otherwise ***repudiates*** (*i.e.*, buyer never gets the goods), or if the buyer ***rightfully rejects*** goods or ***rightfully revokes acceptance*** of goods, (*i.e.* gets the goods but returns them to the seller), the buyer may ***cancel*** the contract, ***recover any portion of the price paid,*** and either:

- "cover" and pursue damages under § 2-712;
- recover damages for nondelivery based on market price as provided in § 2-713; or
- in certain circumstances, seek ***specific performance*** or ***recovery*** of the goods, as allowed under §§ 2-502 or 2-716.

In addition, a buyer has a ***security interest*** in goods in his possession to the extent of (i) any payments made on their price and (ii) any expenses reasonably incurred in their inspection, receipt, transportation, care and custody. This

means that the buyer may hold such goods and resell them to satisfy the amounts secured, remitting any balance to the seller.

27.2. Remedies Where Buyer Accepts Non-conforming Goods. Recall that the buyer may have a right to reject nonconforming goods. However, if the buyer accepts them, the buyer still has a remedy. Section 2-714 is the starting point to determine the measure of damages when a buyer accepts and keeps non-conforming goods.

27.2.1. The measure of damages is different, depending upon the basis of the claim.

27.2.1.1. Under § 2-714(1), if the damages result from a claim ***other than breach of warranty*** (a common example is a failure to deliver on time) the measure of damages is "the loss resulting in the ordinary course of events from the seller's breach as determined ***in any manner which is reasonable."*** In addition, the buyer may pursue "any incidental and consequential damages" as allowed in § 2-715.

☑ **Purple Problem 27-1.** Darla ordered eight bridesmaid dresses, to be delivered one day prior to her wedding, at a cost of $100 per dress. The seller did not deliver the dresses until two hours after the scheduled hour of the wedding, causing a three-hour delay of the wedding. The delay adversely affected other contracted services, including the limousine rental, the video and photography service contract, and the rental of the church and of an adjacent area for the wedding reception. Needless to say, all this caused the bride emotional distress. As Darla's attorney, what damages would you seek?

27.2.1.2. In earlier chapters, we identified the warranties that a buyer may get under the Code. Under § 2-714(2), if the damages arise from a breach of one of these warranties, the measure of damages 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 been as warranted***, unless special circumstances show proximate damages of a different amount. In addition, the buyer may recover incidental and consequential damages under § 2-715.

As we will see, we are accustomed to sellers using their freedom of contract to provide for a different remedy for breach of warranty, such as repairing or replacing the defective part. Nevertheless, it is important to keep in mind that the default rule gives the buyer money damages for a breach of warranty.

☑ **Purple Problem 27-2.** Buyer orders a solar panel for $25,000 and pays for it. As part of the contract, Seller promises that the solar panel has characteristics that are found only in solar panels that sell for $75,000. In fact, the panel as delivered does not perform as promised, and is worth only $20,000. Buyer decides to keep the solar panel and sue for damages. How much can Buyer recover?

A. $55,000.

B. $50,000.

C. $20,000

D. $5,000.

27.2A.0. Case: *Schroeder v. Barth, Inc.*

This case explores the appropriate measure of buyer's damages for breach of an express warranty.

Schroeder v. Barth, Inc.

United States Court of Appeals for the Seventh Circuit
1992

969 F.2d 421 (7th Cir. 1992).

BAUER, Chief Judge

Lester and Viola Schroeder, an elderly couple, wanted nothing more than a reliable, comfortable motor home to provide them with transportation and housing on their leisurely travels around the country. With that in mind, on March 13, 1981, they bought a 1981 Barth MCC Model 35 motor home from Motor Vacations Unlimited, of Elgin, Illinois, for $146,705.00. The Schroeders took delivery of the vehicle in July 1981. It came with a manufacturer's one year limited warranty. Barely 2,600 miles and five months later, on December 3, 1981, Lester Schroeder wrote a letter to Charles Dolan of Motor Vacations Unlimited cataloguing sixty-one separate problems he had experienced with the motor home since taking delivery. Dolan sent a copy of the letter and list to Richard Bibler, Assistant to the President of Barth, Incorporated ("Barth"), the manufacturer ....

On March 7, 1985, the Schroeders, citizens of Florida, filed a complaint against Barth, an Indiana corporation, in the United States District Court for

the Northern District of Indiana. [The Schroeders sought damages of $146,705.] On March 15, 1991, nearly ten years after the Schroeders purchased the motor home, the court granted Barth's motion for summary judgment on damages, and entered judgment for the Schroeders in the amount of $2,113 plus costs.

Because there is no dispute that a breach of Barth's express warranty occurred, and that the Schroeders sustained damages as a result of that breach, the only issue is the amount of those damages. Indiana's Uniform Commercial Code provides that the appropriate measure of damages for breach of an express warranty "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 been as warranted, unless special circumstances show proximate damages of a different amount." IND. CODE § 26-1-2-714(2). The alternative methods to calculate those damages, set out in *Michiana Mack, Inc. v. Allendale Rural Fire Protection District*, 428 N.E.2d 1367 (Ind. App. 1981), are (1) the cost to repair, (2) the fair market value of the goods as warranted less the salvage value of the goods, or (3) the fair market value of the goods as warranted at the time of acceptance less the fair market value of the goods as received at the time of acceptance. *Id.* at 1370. It is the Schroeders' burden to prove the amount of their damages, and theirs alone. "It is not the function of the trial court to fashion equitable remedies to relieve [them] of that burden." *Id.* at 1371.

Nowhere in the two-inch thick record of the seven years of proceedings below do the Schroeders indicate under which of *Michiana Mack's* alternative methods they calculate their damages. They simply, adamantly, insist their damages are $ 146,705, which coincidentally is the price of the motor home. Unfortunately for the Schroeders, however, recapture of the purchase price is not an available remedy under § 26-1-2-714(2). It is appropriate only when the buyer has rejected the goods or revoked acceptance. *Michiana Mack*, 428 N.E.2d at 1372. And despite repeated opportunities to offer more, the only evidence of damages they proffered was Lester Schroeder's subjective opinion that the motor home was worthless.

In its memorandum in support of its motion for summary judgment, Barth argued that although the cost to repair is not the only method to calculate breach of express warranty damages, it is the preferred method. More importantly, as Barth pointed out, it was the only method for which there was supporting evidence. That evidence, provided in the affidavit of Barth's Assistant to the President, Richard Bibler, was an itemized list of the Barth-warranted components of the motor home the Schroeders claimed were defective. Bibler gave a dollar figure, based on personal knowledge, for each

item, "with a generous time allowance for each repair, at a retail labor rate of $ 35.00 per hour and, where applicable, a part or parts at retail price." Bibler Affidavit, Exhibit A to Defendant's Memorandum in Support of its Motion for Summary Judgment, Rec. Doc. No. 48, at 2 & 3. Contrary to the Schroeders' contention, Barth met its burden to identify for the court the absence of any genuine issue of material fact: it admitted liability, it admitted the Schroeders sustained damages, and using the preferred method, it provided the court with sufficient evidence to calculate those damages.

So the burden shifted to the Schroeders. "When a moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 586 (1986). But once again, in their response to Barth's motion, the Schroeders offered only Lester's affidavit and argued that the owner of a motor home is competent to testify as to its value. In their statement of genuine issues of fact, the Schroeders offered that "Mr. Bibler may be entitled to his opinion that the Schroeders' damages are limited to the cost of repair, which he claims to be $ 2,211.25. Mr. and Mrs. Schroeder have their own opinion. The motor home was worthless." Plaintiffs' Statement of Genuine Issues, Rec. Doc. No. 51, at 2. The problem with this response is that it offers only subjective opinion, not the kind of documentary evidence that [the nonmovant must produce to support his contentions].

Although Lester's opinion may be competent evidence of the value of the motor home to the Schroeders, it is not sufficient to meet their burden of proving damages under any of *Michiana Mack's* alternative methods....

Moreover, fixing damages at the cost to repair also was appropriate. The Schroeders wholly failed to meet their burden to establish their damages, under any one of *Michiana Mack's* alternative methods, and as we noted above, a trial court will not relieve them of that burden. As odd as it may be, Barth provided the only evidence of damages in the record, and that is the cost to repair.

The Schroeders also argue that the district court erred in failing to award them incidental and consequential damages. Ever since *Hadley v. Baxendale*[5] [[5]The case, 9 Ex. 341, 156 Eng. Rep. 145 (1854), not the screen actor, whose credits include *Behind the Green Door.*] courts have allowed recovery in breach of contract actions for all damages that were reasonably foreseeable to the parties at the time of contract formation. Indiana's courts are among them. *See, e.g., Indiana Ins. Co. v. Plummer Power Mower,* 590 N.E.2d 1085 (Ind. App. 1992). In their complaint, in addition to the $146,705 damages, the Schroeders asked for "expenses reasonably incurred." But as with their breach

of warranty damages, they fail to prove exactly what expenses they reasonably incurred in connection with the defective Barth-warranted components of the motor home. The only evidence they offer is contained in a letter from Lester to Charles Dolan of Motor Vacations Unlimited. In it, Lester says:

> We signed the contract in March, took delivery in July and still can't use it. My insurance costs me $150.00 a month, telephone calls mount up and I am doing a lot of this work myself, and communications are not getting the job done.
>
> Have already made one trip to Globe, 250 miles. Next trip they want me to leave the vehicle for a week, that's another 250 miles. To stay in a motel gets to [sic] expensive, will have to drive a car up and back, that's another 250 miles. Then the return trip to pick up the motor home will be another 250 miles and then will the work be done that time. It is 1200 miles to the factory, these trips to Globe come to 1000 miles. Why don't [sic] the factory pay for fuel and let this vehicle get the repairs it needs at the factory. And yet it had been at the factory for about 3 weeks the last time and the work still was not finished and had to wait.

These statements are wholly insufficient for the Schroeders to carry their burden of establishing their damages as a consequence of, and incidental to, defects of the Barth-warranted components.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

27.2A.1. Question regarding *Schroeder v. Barth, Inc.*

The Schroeders wanted as damages the amount they paid for the vehicle. What are the alternatives for obtaining that remedy?

27.3. Notice. Before a buyer can seek damages under § 2-714, the buyer must give notification of the non-conformity to the seller as required under § 2-607(3).

27.3.1. Turn to § 2-607(3). The notice must be ***within a reasonable time*** after the buyer discovers or should have discovered the breach.

27.3.2. Comment 4 to § 2-607(3) states that the purpose of the notification requirement is "to defeat commercial bad faith, ***not to deprive a good faith consumer of his remedy***." (Emphasis supplied.) Comment 4 also notes that

"a reasonable time" for notification from a retail consumer is to be judged by different standards than the time period applicable to a merchant.

27.3.3. Comment 4 also explains that the content of the notification need not include a "clear statement of all the objections," but "need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched." However, several courts have required much more than some notice that a transaction is "troublesome." In fact, one court has said that Comment 4 is flat wrong in stating that mere notice that a transaction is "troublesome" is sufficient. That court required a clear statement informing the seller that the "trouble" experienced by a buyer constitutes a breach. *K&M Joint Venture v. Smith Int'l, Inc.*, 669 F.2d 1106 (6th Cir. 1981).

27.3.4. To whom must the notice be sent? If a buyer purchases a defective product, and intends to bring a claim against both the seller and the manufacturer, must the buyer notify both of the breach?

27.3A.0. Case: *Cooley v. Big Horn Harvestore Systems, Inc.*

This case explores the issue of notice in buyer's damages.

Cooley v. Big Horn Harvestore Systems, Inc.

Supreme Court of Colorado
June 24, 1991

813 P.2d 736. Robert COOLEY and Rita Cooley, d/b/a Cooley Dairy; Donald Weed; Ben Konishi, D.V.M.; Pamela Ann Konishi; Mark Konishi; and Jeffrey Konishi, Petitioners and Cross-Respondents, v. BIG HORN HARVESTORE SYSTEMS, INC., a Colorado corporation, and A.O. Smith Harvestore Products, Inc., a Delaware corporation, Respondents and Cross-Petitioners. No. 88SC420. En Banc. Rehearing Denied July 15, 1991.

Justice KIRSHBAUM delivered the Opinion of the Court.

In July 1980, plaintiffs Robert Cooley and Rita Cooley executed two agreements with defendant Big Horn Harvestore Systems, Inc. (hereinafter Big Horn), in connection with their purchase of a Harvestore automated grain storage and distribution system for use in their dairy operation. Big Horn is an independent distributor of Harvestore systems pursuant to agreements with defendant A.O. Smith Harvestore Products, Inc. (hereinafter AOSHPI), the manufacturer of the Harvestore system. The Cooleys purchased the Harvestore system to improve the efficiency and productivity of their dairy....

In early 1981, the Cooleys began to feed their herd with grain stored in the Harvestore system. Shortly thereafter, the health of the herd began to deteriorate and milk production substantially declined. The Cooleys informed

Big Horn of these developments, and over the succeeding eighteen months Big Horn representatives made repairs to the structure, gave advice to the Cooleys concerning feed ratios, and assured the Cooleys that the system was functioning properly.

The health of the cows continued to deteriorate. Some died, and the Cooleys ultimately sold the remainder of the herd in 1983. The plaintiffs then filed this action against Big Horn and AOSHPI seeking damages based on claims of breach of implied warranties of merchantability and fitness for a particular purpose, breach of express warranties, breach of contract because of the failure of essential purpose of a limited remedy of suit for breach of warranty to repair or replace any defective part thereof (hereinafter referred to as the "failure of essential purpose" claim) [see § 2-719(2)], negligence, deceit, and revocation of acceptance ….

The Court of Appeals held that a commercial buyer seeking recovery from a manufacturer for a breach of contract claim resulting in property damage alone must, pursuant to the provisions of § 4-2-607(3)(a), 2 C.R.S. (1973), give the manufacturer timely notice of the claimed breach as a condition precedent to any recovery. The plaintiffs contend that they complied with the notice provisions of the statute by giving timely notice of their failure of essential purpose claim to Big Horn. We agree with the plaintiffs' contention.

Section 4-2-607(3)(a), 2 C.R.S. (1973), provides that "where a tender has been accepted: (a) the buyer must within a reasonable time after he discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy …." This provision serves as a condition precedent to a buyer's right to recover for breach of contract under the statute. *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 206 (Colo. 1984). The question of what constitutes a reasonable time is dependent on the circumstances of each case. *White v. Mississippi Order Buyers, Inc.*, 648 P.2d 682 (Colo. App. 1982). The parties agree that the plaintiffs gave timely notice to Big Horn of their claim but did not directly notify AOSHPI of such claim.

The notice provision of § 4-2-607(3)(a) serves three primary purposes. It provides the seller with an opportunity to correct defects, gives the seller time to undertake negotiations and prepare for litigation, and protects the seller from the difficulties of attempting to defend stale claims. *Palmer v. A.H. Robins Co.; Prutch v. Ford Motor Co.*, 618 P.2d 657 (Colo. 1980). See generally White and Summers, Uniform Commercial Code § 11-10 at 481 (3d ed. 1980). The Code defines 'seller' as "a person who sells or contracts to sell goods." § 4-2-103(1)(d), 2 C.R.S. (1973). The official comment to the Code states in pertinent part that "the rule of requiring notification is designed to defeat

commercial bad faith, not to deprive a good faith consumer of his remedy." § 4-2-607, 2 C.R.S. comment 4 (1973).

In *Palmer v. A.H. Robins Co.,* 684 P.2d 187, this court construed the statute's notice provision in the context of a product liability action. In *Palmer*, a consumer injured through use of a defective intrauterine device sought recovery for damages against the manufacturer of the product, A.H. Robins Co. Although the plaintiff, prior to initiating litigation, notified the immediate seller, her doctor, of the fact that she allegedly sustained injuries as a result of defects in the product, she did not so notify Robins. Robins argued that the plaintiff's claims against it should be dismissed for failure to comply with § 4-2-607(3)(a).

We rejected that argument. We construed the term "seller" as used in § 4-2-607(3)(a) to "refer only to the immediate seller who tendered the goods to the buyer." *Palmer* at 206. We explained that "under this construction, as long as the buyer has given notice of the defect to his or her immediate seller, no further notification to those distributors beyond the immediate seller is required." *Id.* We also observed that a relaxed notification requirement was especially appropriate in *Palmer* because the plaintiff was a lay consumer who "would not ordinarily know of the notice requirement." *Id.* at 207 n.3.

The Court of Appeals concluded that the plaintiffs here were commercial purchasers who suffered only economic loss, as distinguished from the lay consumer who sought relief in *Palmer*. Assuming, arguendo, that the plaintiffs here were commercial purchasers, it must be observed that our decision in *Palmer* required construction of a statute adopted by the General Assembly for application in all commercial contexts. The language of § 4-2-607(3)(a) is unambiguous: it requires a buyer to give notice of a defective product only to the "seller." See 2 Anderson, Uniform Commercial Code § 2.607:24. The General Assembly has not elected to require advance notice to a manufacturer of litigation for breach of the manufacturer's warranty of a product, and we find no compelling reason to create such a condition precedent judicially in the context of commercial litigation. The filing of a lawsuit is sufficient notice to encourage settlement of claims, and applicable statutes of limitation protect manufacturers from the difficulties of defending against stale claims. [Citations omitted.]

Several courts considering whether a purchaser seeking recovery under a manufacturer's warranty must give notice to the manufacturer as well as to the seller of the product under statutory provisions similar to § 4-2-607(3)(a) have reached a similar result. See, e.g., *Firestone Tire and Rubber Co. v. Cannon*, 53 Md. App. 106, 452 A.2d 192 (1982), aff'd, 295 Md. 528, 456 A.2d 930 (1983). Some courts have reached contrary results. See *Morrow v. New Moon*

Homes, Inc., 548 P.2d 279 (Alaska 1976); *Branden v. Gerbie*, 62 Ill. App. 3d 138, 379 N.E.2d 7, 19 Ill. Dec. 492 (1978); *Western Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806 (Wyo. 1980). Many such courts have recognized that in most nationwide product distribution systems, the seller/representative dealer may be presumed to actually inform the manufacturer of any major product defects. *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 347-48, 378 N.E.2d 1083, 1086-87, 19 Ill. Dec. 208 (1978); see also Prince, Overprotecting the Consumer? § 2-607(3)(a). Notice of Breach in Non-Privity Contexts, 66 N.C.L. Rev. 107, 151 (1987). Furthermore, as one commentator has noted, "it is perhaps more reasonable to treat notice to an immediate seller as sufficient against a remote seller than vice versa, in view of the immediacy of relation that exists in the one instance but not in the other." Phillips, Notice of Breach in Sales and Strict Tort Liability Law: Should There be a Difference?, 47 Ind. L.J. 457, 473 (1971); see also *Snell v. G.D. Searle & Co.*, 595 F. Supp. 654, 656 (N.D. Ala. 1984) (applying Alabama law); *Firestone Tire and Rubber Co. v. Cannon*, 53 Md. App. 106, 452 A.2d 192 (1982), aff'd, 295 Md. 528, 456 A.2d 930 (1983). This presumption forms the basis of the principle that a remote manufacturer may raise as its own defense the buyer's failure to give timely notice to the immediate seller. See, e.g., *Snell v. G.D. Searle & Co.*, 595 F. Supp. 654, 656 (N.D. Ala. 1984) (applying Alabama law); *Owens v. Glendale Optical Co.*, 590 F. Supp. 32, 36 (S.D. Ill. 1984) (applying Illinois law); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 347-48, 378 N.E.2d 1083, 1086-87, 19 Ill. Dec. 208 (1978). In view of the unambiguous language of § 4-2-607(3)(a), we conclude that a purchaser injured by a product is not required to give notice of such injury to a remote manufacturer prior to initiating litigation against such manufacturer.

AOSHPI urges us to adopt the rationale expressed in *Carson v. Chevron Chemical Co.*, 6 Kan. App. 2d 776, 635 P.2d 1248 (1981). In that case three farmers brought suit against a herbicide manufacturer and dealer to recover damages for breach of warranties. Observing that in ordinary buyer-seller relationships the Kansas Commercial Code equivalent of § 4-2-607(3)(a) requires that notice of an alleged breach need only be given to the buyer's immediate seller, *Carson* at 1256, the Kansas Court of Appeals concluded that the plaintiffs were required to notify the manufacturer under the particular circumstances of that case. The court explained its holding as follows:

> In those instances, however, where the buyer and the other parties to the manufacture, distribution and sale of the product are closely related, or where the other parties actively participate in the consummation of the actual sale of the product, the reasons for the exclusion of such other parties from the K.S.A. 84-2-607(3)(a) notice provision cease to exist.

Id.

In our view, the rationale of *Carson* supports the result we reach. The Kansas Court of Appeals emphasized that under the circumstances disclosed by the evidence the defendant was in effect a direct seller to the plaintiffs. Here, AOSHPI, the manufacturer, was isolated and insulated from the plaintiffs. The contract specified that Big Horn was the seller. AOSHPI, if a seller, was a seller to Big Horn, not to the plaintiffs. As far as the plaintiffs were concerned, the only direct relationship established by the contract and by the conduct of the parties was their relationship with Big Horn. Under these circumstances, to require the plaintiffs to give statutory notice to AOSHPI when not specifically required to do so by statute would unreasonably promote commercial bad faith and inequitably deprive good faith consumers of a remedy, contrary to the purpose of the statute. We reject such a construction.

27.3A.1. Questions and notes regarding *Cooley v. Big Horn Harvestore Systems*

1. What about a plaintiff who is not a purchaser, but a third party beneficiary of a warranty claim under § 2-318, such as a member of the purchaser's family? Must the third party beneficiary give notice under § 2-607(3) before she can bring a claim against either the seller or the manufacturer? Several courts have not required a third party beneficiary bringing a horizontal claim under § 2-318 to provide notice, even to the seller. See *Taylor v. American Honda Motor Co., Inc.*, 555 F. Supp. 59 (D. Fl. 1982).

2. Some courts have found that notice upon a seller constituted notice against the manufacturer, on the rationale that the seller was ***the agent*** of the manufacturer. See, for example, *Church of Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1 (Minn. 1992).

27.4. Buyer's Remedy of "Cover." Section 2-712 provides the buyer's remedy of "cover," or procuring substitute goods. Where the buyer has rightfully rejected or revoked acceptance, or if the seller has failed to deliver or otherwise repudiates the contract, the buyer may ***cancel the contract*** and ***recover any portion of the purchase price paid***. In addition, the buyer may ***reasonably*** purchase substitute goods, but in doing so the buyer must act in ***good faith*** and ***without unreasonable delay***. After covering, the buyer may recover damages from seller under the following formula:

cost of cover

– contract price

+ incidental and consequential damages

– expenses saved by buyer

= cover damages

Put more succinctly:

cover damages = cover – KP + ID + CD – ES

27.4.1. The substitute goods ***do not have to be identical*** with those called for under the contract. Comment 2 to § 2-712 specifies that the goods must be "commercially usable as reasonable substitutes under the circumstances of the particular case."

27.4.2. The buyer is not obligated to cover; the buyer may choose another remedy. However, if buyer fails to cover, buyer will not be able to recover those consequential damages ***which could have been mitigated by cover***. See Comment 3 to § 2-712.

☑ **Purple Problem 27-3.** Brianna has agreed to purchase a temperature-regulated wine storage unit, the Vintner's Deluxe, for $1,000 plus a $50 delivery fee from Serena's Cellars, payable on delivery. The unit has a glass door, black framing, and a burgundy interior, to match Brianna's redecorated kitchen. The temperature is 68 at the top (for red wine), and 48 at the bottom (for white wine). The delivery crew arrives the next day with a large box marked "Vintner's Deluxe," but when the unit is removed, it turns out to have a burnt orange interior instead of a burgundy interior, which clashes terribly with Brianna's decor. Brianna rejects the cooler. Serena calls later in the day and tells Brianna that she can't find any units with a burgundy interior; the manufacturer has stopped making that color line. Desperate to have the wine storage unit installed by the time of her scheduled "kitchen warming" party next weekend, Brianna starts looking on E-bay. After hours of searching, she finally finds a Vintner's Deluxe with a burgundy interior. She purchases it for $1,200, plus $25 in shipping and insurance costs.

1. What is the measure of Brianna's damages against Serena's Cellars under § 2-712(2)?

2. What if the cooling unit which Brianna eventually bought for $1,200 was not the exact same model as she had originally contracted for with Serena's Cellars; instead, it has capacity for 15 bottles of wine instead of 12 bottles of wine, but it was the only model she could find in the right colors?

27.5. Buyer's Remedy of Market Price Damages. As an alternative to the remedy of cover, § 2-713 allows buyer to recover damages for seller's failure to deliver or repudiation. The measure of damages is calculated using the following formula:

market price at the time buyer learned of breach

– contract price

+ incidental and consequential damages

– expenses saved by buyer

= market-price damages

Or put more succinctly:

market-price damages = MP – KP + ID + CD – ES

27.5.1. Comment 1 states that the appropriate market to refer to in determining the market price is the place where the buyer would have obtained cover had she pursued that remedy. Comment 1 proceeds to state that this would be the place of tender, unless the goods are rejected or acceptance is revoked after delivery, in which event the market would be the place of arrival.

27.5.2. If the market price is difficult to prove, § 2-723 provides that you can refer to the price prevailing within any reasonable time or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute. However, notice must be given to the seller if buyer intends to use a time or place other than those described in § 2-713.

☑ **Purple Problem 27-4.** Let's go back to Brianna and the wine storage unit which she had agreed to purchase for $1,000, plus $50 delivery. What if the average retail price for the exact same unit was $1,200 (plus $50 delivery), but Brianna was able to find the same unit on clearance at a store going out of business for $900 (which did not offer delivery, so she borrowed a friend's pick-up and brought it home herself). Calculate her damages under § 2-712 (cover) and § 2-713 (market price). Which choice of remedies would you recommend she pursue?

27.5A.0. Case: *Tongish v. Thomas*

This case explores the appropriateness of lost-profits damages or contract-price/market-price-differential damages in a context where the two would provide for starkly different results.

Tongish v. Thomas

Kansas Supreme Court
1992

840 P.2d 471. DENIS V. TONGISH, Appellee, v. DANNY THOMAS, d/b/a NORTHWEST SEED, Defendant, and DECATUR COOP ASSOCIATION, Third-Party Intervenor/Appellant. No. 66,771.

Background:

Tongish agreed to deliver to Decator Co-op Association [Co-op] an agreed upon amount of sunflower seeds at a specified price of $8 to $13 per hundredweight, depending upon the size of the seeds. Co-op, in turn, had agreed to deliver these seeds to Bambino Bean & Seed, Inc., for the price it paid to Tongish plus $.55 per hundredweight handling fee. Its total profit on

the re-sale of the sunflower seeds would have been $ 455.51. Due to a short crop, bad weather, and other factors, the market price of sunflower seeds quickly doubled from the prices set forth in the Tongish/Co-op contract. After partially fulfilling the contract, Tongish notified Co-op he would not deliver any more sunflower seeds to Co-op and instead sold the seeds to Thomas. Tongish initially sued Thomas, but Thomas was dismissed as a defendant. Co-op intervened as a third-party defendant and claimed breach of contract by Tongish. Computation of Co-op's damages under § 2-713 (market price of $16 to $26 per hundredweight) would have amounted to approximately $8,000 in damages, versus the Co-op's actual lost profit of $455.51.

Opinion of the court delivered by McFARLAND, J.:

This case presents the narrow issue of whether damages arising from the nondelivery of contracted-for sunflower seeds should be computed on the basis of K.S.A. 84-1-106 [now § 1-305] or K.S.A. 84-2-713. That is, whether the buyer is entitled to its actual loss of profit or the difference between the market price and the contract price. The trial court awarded damages on the basis of the buyer's actual loss of profit. The Court of Appeals reversed the judgment, holding that the difference between the market price and the contract price was the proper measure of damages (*Tongish v. Thomas*, 16 Kan. App. 2d 809, 829 P.2d 916 [1992]). The matter is before us on petition for review….

Following a bench trial, the district court held that Tongish had breached the contract with no basis therefor. Damages were allowed in the amount of $ 455.51, which was the computed loss of handling charges. Co-op appealed from said damage award. The Court of Appeals reversed the district court and remanded the case to the district court to determine and award damages pursuant to K.S.A. 84-2-713 (the difference between the market price and the contract price).

The analyses and rationale of the Court of Appeals utilized in resolving the issue are sound and we adopt the following portion thereof:

"The trial court decided the damages to Co-op should be the loss of expected profits. Co-op argues that K.S.A. 84-2-713 entitles it to collect as damages the difference between the market price and the contract price. Tongish argues that the trial court was correct and cites K.S.A. 84-1-106 as support for the contention that a party should be placed in as good a position as it would be in had the other party performed. Therefore, the only disagreement is how the damages should be calculated.

"The measure of damages in this action involves two sections of the Uniform Commercial Code: K.S.A. 84-1-106 and K.S.A. 84-2-713. The issue to be determined is which statute governs the measure of damages. Stated in another way, if the statutes are in conflict, which statute should prevail? The answer involves an ongoing academic discussion of two contending positions. The issues in this case disclose the problem.

"If Tongish had not breached the contract, he may have received under the contract terms with Coop about $5,153.13 less than he received from Danny Thomas. Coop in turn had an oral contract with Bambino to sell whatever seeds it received from Tongish to Bambino for the same price Coop paid for them. Therefore, if the contract had been performed, Coop would not have actually received the extra $5,153.13.

"We first turn our attention to the conflicting statutes and the applicable rules of statutory construction. K.S.A. 84-1-106(1) [now § 1-305] states:

> 'The remedies provided by this act shall 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 but neither consequential or special nor penal damages may be had except as specifically provided in this act or by other rule of law.'

"If a seller breaches a contract and the buyer does not 'cover,' the buyer is free to pursue other available remedies. K.S.A. 84-2-711 and 84-2-712. One remedy, which is a complete alternative to 'cover' (K.S.A. 84-2-713, Official comment, para. 5), is K.S.A. 84-2-713(1), which provides:

> 'Subject to the provisions of this article with respect to proof of market price (§ 84-2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (§ 84-2-715), but less expenses saved in consequence of the seller's breach.'

"Neither party argues that the Uniform Commercial Code is inapplicable. Both agree that the issue to be determined is which provision of the UCC should be applied. As stated by the appellee: 'This is really the essence of this appeal, *i.e.*, whether this general rule of damages [K.S.A. 84-1-106] controls the measure of damages set forth in K.S.A. 84-2-713.' However, Tongish then offers no support that K.S.A. 84-1-106 controls over K.S.A. 84-2-713. The authority he does cite (*M & W Development, Inc. v. El Paso Water Co.*, 6 Kan. App. 2d 735, 634 P.2d 166 [1981]) is not a UCC case and K.S.A. 84-2-713 was not applicable.

"The statutes do contain conflicting provisions. On the one hand, K.S.A. 84-1-106 offers a general guide of how remedies of the UCC should be applied, whereas K.S.A. 84-2-713 specifically describes a damage remedy that gives the buyer certain damages when the seller breaches a contract for the sale of goods.

"The cardinal rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature govern. [cites omitted] When there is a conflict between a statute dealing generally with a subject and another statute dealing specifically with a certain phase of it, the specific statute controls unless it appears that the legislature intended to make the general act controlling.... The Kansas Supreme Court stated in *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 353, 770 P.2d 423 (1989): 'General and special statutes should be read together and harmonized whenever possible, but to the extent a conflict between them exists, the special statute will prevail unless it appears the legislature intended to make the general statute controlling.'

"K.S.A. 84-2-713 allows the buyer to collect the difference in market price and contract price for damages in a breached contract. For that reason, it seems impossible to reconcile the decision of the district court that limits damages to lost profits with this statute.

"Therefore, because it appears impractical to make K.S.A. 84-1-106 and K.S.A. 84-2-713 harmonize in this factual situation, K.S.A. 84-2-713 should prevail as the more specific statute according to statutory rules of construction.

"As stated, however, Co-op protected itself against market price fluctuations through its contract with Bambino. Other than the minimal handling charge, Co-op suffered no lost profits from the breach. Should the protection require an exception to the general rule under K.S.A. 84-2-713?~

"There is authority for appellee's position that K.S.A. 84-2-713 should not be applied in certain circumstances. In *Allied Canners & Packers, Inc. v. Victor Packing Co.*, 162 Cal. App. 3d 905, 209 Cal. Rptr. 60 (1984), Allied contracted to purchase 375,000 pounds of raisins from Victor for 29.75 cents per pound with a 4% discount. Allied then contracted to sell the raisins for 29.75 cents per pound expecting a profit of $ 4,462.50 from the 4% discount it received from Victor. 162 Cal. App. 3d at 907-08.

"Heavy rains damaged the raisin crop and Victor breached its contract, being unable to fulfill the requirement. The market price of raisins had risen to about 80 cents per pound. Allied's buyers agreed to rescind their contracts so Allied was not bound to supply them with raisins at a severe loss. Therefore,

the actual loss to Allied was the $ 4,462.50 profit it expected, while the difference between the market price and the contract price was about $ 150,000. 162 Cal. App. 3d at 909.

"The California appellate court, in writing an exception, stated: 'It has been recognized that the use of the market-price contract-price formula under § 2-713 does not, absent pure accident, result in a damage award reflecting the buyer's actual loss. [Citations omitted.]' 162 Cal. App. 3d at 912. The court indicated that § 2-713 may be more of a statutory liquidated damages clause and, therefore, conflicts with the goal of § 1-106. The court discussed that in situations where the buyer has made a resale contract for the goods, which the seller knows about, it may be appropriate to limit 2-713 damages to actual loss. However, the court cited a concern that a seller not be rewarded for a bad faith breach of contract. 162 Cal. App. 3d at 912-14.

"In *Allied*, the court determined that if the seller knew the buyer had a resale contract for the goods, and the seller did not breach the contract in bad faith, the buyer was limited to actual loss of damages under § 1-106. 162 Cal. App. 3d at 915.

"The similarities between the present case and *Allied* are that the buyer made a resale contract which the seller knew about. (Tongish knew the seeds eventually went to Bambino, although he may not have known the details of the deal.) However, in examining the breach itself, Victor could not deliver the raisins because its crop had been destroyed. Tongish testified that he breached the contract because he was dissatisfied with dockage tests of Co-op and/or Bambino. Victor had no raisins to sell to any buyer, while Tongish took advantage of the doubling price of sunflower seeds and sold to Danny Thomas. Although the trial court had no need to find whether Tongish breached the contract in bad faith, it did find there was no valid reason for the breach. Therefore, the nature of Tongish's breach was much different than Victor's in *Allied*.

"Section 2-713 and the theories behind it have a lengthy and somewhat controversial history. In 1963, it was suggested that 2-713 was a statutory liquidated damages clause and not really an effort to try [to] accurately predict what actual damages would be. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 259 (1963).

"In 1978, Robert Childres called for the repeal of § 2-713. Childres, *Buyer's Remedies: The Danger of Section 2-713*, 72 Nw. U. L. Rev. 837 (1978). Childres reflected that because the market price/contract price remedy 'has been the cornerstone of Anglo-American damages' that it has been so hard to see that

this remedy 'makes no sense whatever when applied to real life situations.' 72 NW. U. L. REV. at 841-42.

"In 1979, David Simon and Gerald A. Novack wrote a fairly objective analysis of the two arguments about § 2-713 and stated:

> 'For over sixty years our courts have divided on the question of which measure of damages is appropriate for the supplier's breach of his delivery obligations. The majority view, reinforced by applicable codes, would award market damages even though in excess of plaintiff's loss. A persistent minority would reduce market damages to the plaintiff's loss, without regard to whether this creates a windfall for the defendant. Strangely enough, each view has generally tended to disregard the arguments, and even the existence, of the opposing view.' Simon and Novack, *Limiting the Buyer's Market Damages to Lost Profits: A Challenge to the Enforceability of Market Contracts*, 92 HARV. L. REV. 1395, 1397 (1979).

"Although the article discussed both sides of the issue, the authors came down on the side of market price/contract price as the preferred damages theory. The authors admit that market damages fly in the face 'of the familiar maxim that the purpose of contract damages is to make the injured party whole, not penalize the breaching party.' 92 Harv. L. Rev. at 1437. However, they argue that the market damages rule discourages the breach of contracts and encourages a more efficient market. 92 HARV. L. REV. at 1437.

"The *Allied* decision in 1984, which relied on the articles cited above for its analysis to reject market price/contract price damages, has been sharply criticized. In Schneider, *UCC § 2-713: A Defense of Buyers' Expectancy Damages*, 22 CAL. W. L. REV. 233, 266 (1986), the author stated that *Allied* 'adopted the most restrictive [position] on buyer's damages. This Article is intended to reverse that trend.' Schneider argued that by following § 1-106, 'the court ignored the clear language of § 2-713's compensation scheme to award expectation damages in accordance with the parties' allocation of risk as measured by the difference between contract price and market price on the date set for performance.' 22 Cal. W. L. Rev. at 264.

"Recently in Scott, *The Case for Market Damages: Revisiting the Lost Profits Puzzle*, 57 U. CHI. L. REV. 1155, 1200 (1990), the *Allied* result was called 'unfortunate.' Scott argues that § 1-106 is 'entirely consistent' with the market damages remedy of 2-713. 57 U. CHI. L. REV. at 1201. According to Scott, it is possible to harmonize §§ 1-106 and 2-713. Scott states, 'Market damages measure the expectancy ex ante, and thus reflect the value of the option; lost profits, on the other hand, measure losses ex post, and thus only reflect the value of the completed exchange.' 57 U. CHI. L. REV. at 1174. The author

argues that if the nonbreaching party has laid off part of the market risk (like Co-op did) the lost profits rule creates instability because the other party is now encouraged to breach the contract if the market fluctuates to its advantage. 57 U. CHI. L. REV. at 1178.

"We are not persuaded that the lost profits view under *Allied* should be embraced. It is a minority rule that has received only nominal support. We believe the majority rule or the market damages remedy as contained in K.S.A. 84-2-713 is more reasoned and should be followed as the preferred measure of damages. While application of the rule may not reflect the actual loss to a buyer, it encourages a more efficient market and discourages the breach of contracts." *Tongish v. Thomas*, 16 Kan. App. 2d at 811-17.

At first blush, the result reached herein appears unfair. However, closer scrutiny dissipates this impression. By the terms of the contract Co-op was obligated to buy Tongish's large sunflower seeds at $ 13 per hundredweight whether or not it had a market for them. Had the price of sunflower seeds plummeted by delivery time, Co-op's obligation to purchase at the agreed price was fixed. If loss of actual profit pursuant to K.S.A. 84-1-106(1) would be the measure of damages to be applied herein, it would enable Tongish to consider the Co-op contract price of $ 13 per hundredweight plus 55 cents per hundredweight handling fee as the "floor" price for his seeds, take advantage of rapidly escalating prices, ignore his contractual obligation, and profitably sell to the highest bidder. Damages computed under K.S.A. 84-2-713 encourage the honoring of contracts and market stability.

As an additional argument, Tongish contends that the application of K.S.A. 84-2-713 would result in the unjust enrichment of Co-op. This argument was not presented to the trial court.

Even if properly before us, the argument lacks merit. We discussed the doctrine of unjust enrichment in *J. W. Thompson Co. v. Welles Products Corp.*, 243 Kan. 503, 758 P.2d 738 (1988), stating:

> "The basic elements on a claim based on a theory of unjust enrichment are threefold: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value." 243 Kan. at 512.

Before us is which statutory measure of damages applies. This is not a matter of one party conferring a benefit upon another.

The judgment of the Court of Appeals reversing the district court and remanding the case for the determination and award of damages pursuant to the provisions of K.S.A. 84-2-713 is affirmed. The judgment of the district court is reversed.

27.6. Specific Performance. Specific performance is an ***equitable remedy***, exercisable within the ***discretion of the court***, if ***damages are inadequate***. Since the remedy requires the court to order the seller to perform the contract, courts are reluctant to order it since it may require court supervision. Also note that when a court awards money damages, it does not order the defendant to pay the damages. If the defendant does not pay, the plaintiff must attempt to collect the judgment. But if a court orders specific performance, then the non-complying defendant may be in contempt of court. Specific performance is often granted with respect to enforcement of a contract to buy or sell real property since each parcel of real property is unique and the court can transfer the property if the defendant refuses. The UCC employs a slightly more liberal attitude for granting specific performance. Section 2-716 provides that specific performance may be decreed "where the goods are unique" or "in other proper circumstances."

27.6.1. If specific performance is a remedy which your client will want to pursue, you may increase your client's chances of obtaining specific performance if you include a provision in the contract allowing a non-breaching party to seek specific performance. However, the parties' agreement is not binding on the court.

☑ **Purple Problem 27-5.** In early February Bill agrees to purchase an original painting from Russell Chatham for $15,000. The agreement provides that Bill will pick up the painting on February 28, and will pay the purchase price at that time. On February 15, the artist writes to Bill and advises Bill that he has decided to donate the painting to a charitable auction. For this reason, he will not be delivering the painting. Would you advise Bill to file a lawsuit seeking specific performance? Why or why not?