

# Contract Law for Paralegals: Chapter 16

## Chapter 16

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Chapter 16

CHAPTER 16

**Plaintiff's Remedies under Article 2 of the UCC**

Chapter 16 explores the plaintiff's remedies for breach of a contract for the sale of goods. These remedies are codified in Part 7 of Article 2 of the UCC.

Chapter 16 has three parts: (1) the seller's remedies for the buyer's breach; (2) the buyer's remedies for the seller's breach; and (3) whether both the seller's remedies and the buyer's remedies under Article 2 are, in fact, statutory liquidated damages rather than actual damages.

Part 7 of Article 2 of the UCC is designed around a hub and spoke concept. The hub for the seller's remedies for the buyer's breach is UCC § 2-703. This section lists the seller's remedies regardless of whether the buyer has accepted the goods. Each remedy is developed in its own section, a section

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#### CHAPTER 16

#### **Plaintiff's Remedies under Article 2 of the UCC**

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goods. Each remedy is developed in its own section, a section subsequent to UCC § 2-703 (e.g., UCC §§ 2-706, 2-708(1), 2-708(2), and 2-709).

The buyer's remedies for the seller's breach has two hubs-UCC § 2-711(1) for when the breach occurs and the buyer has not accepted the goods and § 2-714 for when the breach is discovered after the buyer has accepted the goods. The buyer's remedies listed in the UCC § 2-711(1) hub are developed in UCC §§ 2-712 and 2-713.

While Article 2 has the hubs and spokes for the plaintiff's remedies, the overarching intent of the Code remedies is found in Article 1-UCC § 1-106(1), quoted on text page 489. This overarching intent stresses expectation damages: "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 . . . ." Therefore, unlike the common law where the plaintiff's remedies for breach of contract may be expectation, reliance, or restitution, the breach of a contract for the sale of goods remedies (Article 2 remedies) are expectation remedies for breach of contract and not reliance or restitution remedies for breach of contract.

Exhibit 16-1 (490) diagrams the expectation remedy formula.

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## Seller's Remedies

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### Seller's Remedies

**SELLER'S REMEDIES FOR BUYER'S BREACH (UCC §§ 1-106(1) & 2-703) (490)**

Exhibit 16-3 (492) diagrams the seller's remedies for the buyer's breach.

**Before the Buyer Accepts the Goods (UCC §§ 2-706, 2-708(1), & 2-708(2)) (491)**

This section discusses three remedies the seller has if the goods are still with the seller.

- The seller may resell the goods and recover damages for any loss incurred (UCC § 2-706)
- Even if the seller has resold the goods, the seller may recover damages for nonacceptance of the goods or repudiation (UCC § 2-708).

**Damages after Resale (UCC § 2-706) (492)**

PARALEGAL EXERCISE 16.1 (494) asks students to apply UCC § 2-706, the formula for damages after resale, to a set of

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**Damages after Resale (UCC § 2-706) (492)**

PARALEGAL EXERCISE 16.1 (494) asks students to apply UCC § 2-706, the formula for damages after resale, to a set of facts. Applying the facts to the formula, the damages becomes-

[What the seller expected to receive  
(contract price)  
(\$95,000)  
less  
What the seller did receive  
(resale price)  
(\$100,000)]  
less  
[What the seller expected to give  
(the goods)  
(the yacht)  
less  
What the seller did give  
(the goods + incidental damages)  
(the yacht + \$1,000)]

The result is [-\$5,000 + \$1,000]. Therefore, Sail & Sea's damages under UCC § 2-706 were a negative \$4,000. Sail & Sea had no damages for the breach of contract but gained by the breach and resale.

**Damages for Nonacceptance or Repudiation (UCC §§ 2-708(1) & (2)) (494)**

PARALEGAL EXERCISE 16.2 (495) asks students to apply UCC § 2-708(1), a formula

for damages for nonacceptance, to a set of facts. Applying the facts to the formula, the damages become-

[What the seller expected to receive  
(the contract price)  
(\$95,000)  
less  
What the seller did receive  
(any prepayment by the buyer)  
(\$20,000)]  
less  
[What the seller expected to give  
(the goods as measured by the market price)  
(\$100,000)  
less  
What the seller did give  
(any goods accepted by the buyer plus incidental damages)  
(\$0 + \$1,000)]

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This equals [\$75,000 - \$101,000]. Therefore, Sail & Sea's damages under UCC § 2-708(1) were a negative \$26,000. Sail & Sea was not entitled to any damages for the breach under this formula but rather received a gain from the breach.

PARALEGAL EXERCISE 16.3 (497) asks students to apply UCC § 2-708(2), a damage calculation for the lost volume seller, to a set of facts. Applying the facts to the formula, the damages become-

$$\begin{array}{r} \text{[What the seller expected to receive} \\ \text{(the contract price)} \\ \text{(\$95,000)} \\ \text{less} \\ \text{What the seller did receive} \\ \text{(any prepayment by the buyer)} \\ \text{(\$20,000)]} \\ \text{less} \\ \text{[What the seller expected to give} \\ \text{(the goods as measured by their cost)} \\ \text{(costs)} \\ \text{less} \\ \text{What the seller did give} \\ \text{(nothing plus incidental damages)} \\ \text{(\$0 + \$1,000)]} \end{array}$$

Therefore, Sail and Sea's damages under UCC § 2-708(2) (lost volume seller) were \$76,000 less seller's costs to acquire the goods. By assigning \$65,000 as the cost of the yacht (see Example 16-3 (496)), the seller's damages under UCC § 2-708(2) were \$11,000.

### **After the Buyer Accepts the Goods-Action for the Price (UCC § 2-709) (497)**

Calculating damages when the remedy is for the price is diagrammed in Exhibit 16-7 (497) and is straightforward. Example 16-4 (498) applies the formula to a set of facts.

### **Liquidated Damages (UCC § 2-718(1)) (498)**

The section authorizing liquidated damages is quoted on text page 498. Liquidated damages are those damage amounts that the parties agree upon at the time of contract formation as the fair computation in the event of a subsequent breach. A damage provision stipulated by the parties at the time of contract formation is enforceable unless the court determined that the stipulated damages does not qualify as liquidated damages but rather are a penalty.

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## Buyer's Remedies

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### Buyer's Remedies

BUYER'S REMEDIES FOR SELLER'S BREACH (UCC §§ 1-106(1), 2-711(1), 2-714, & 2-717) (498)

As previously noted, Part 7 of Article 2 is divided between seller's remedies for buyer's breach (2-703 through 2-710) and buyer's remedies for seller's breach (2-711 through 2-714). UCC § 1-106(1), a section that states the expectation remedy formula, applies to the buyer's remedies as well as the seller's remedies. As was true with the seller's remedies, the buyer's remedies are applications of the expectation formula with no reference to reliance or restitution (with the exception of UCC § 2-718).

UCC § 2-717 (499) is interesting since it authorizes the buyer to deduct from the price damages resulting from the seller's breach. The buyer, however, must give the seller notice of his or her intention to do so. The buyer must be careful when assessing whether the seller has in fact breached and when calculating the damages resulting from the breach.

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BUYER'S REMEDIES FOR SELLER'S BREACH (UCC §§ 1-106(1), 2-711(1), 2-714, & 2-717) (498)

As previously noted, Part 7 of Article 2 is divided between seller's remedies for buyer's breach (2-703 through 2-710) and buyer's remedies for seller's breach (2-711 through 2-714). UCC § 1-106(1), a section that states the expectation remedy formula, applies to the buyer's remedies as well as the seller's remedies. As was true with the seller's remedies, the buyer's remedies are applications of the expectation formula with no reference to reliance or restitution (with the exception of UCC § 2-718).

UCC § 2-717 (499) is interesting since it authorizes the buyer to deduct from the price damages resulting from the seller's breach. The buyer, however, must give the seller notice of his or her intention to do so. The buyer must be careful when assessing whether the seller has in fact breached and when calculating the damages resulting from the breach.

Exhibit 16-9 (text p 500) is a schematic of the buyer's remedies for the seller's breach.

**Before the Buyer Accepts the Goods (UCC § 2-711(1)) (499)**

If the buyer has not accepted the goods, then UCC § 2-711(1) forms the hub and 2-712 and 2-713 the spokes (along with UCC § 2-715(1) for incidental damages). Both UCC §§ 2-712 and 2-713 authorize the buyer to recover consequential damages as provided in UCC § 2-715(2).

PARALEGAL EXERCISE 16.4 (501) raises the question of why the buyer is entitled to consequential damages for the seller's breach but the seller is not entitled to consequential damages for the buyer's breach. UCC § 2-301 states the general obligations of the parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

The seller's right is a right to payment. The buyer's right is a right to receive the goods. The seller may need the money, but money is fungible. The buyer needs the goods, and they may or may not be fungible. The buyer has a right to cover (i.e., to buy substitute goods) and thus address its need for the goods. The seller has no right to cover (although the seller has a right to resell the goods). (If the buyer covers or the seller resells, damages may be reduced.)

**Cover (UCC § 2-712) (501)**

The buyer may cover by buying substitute goods but cover is not mandated by UCC § 2-712. Exhibit 16-10 (502) diagrams the buyer's remedy under UCC § 2-712. Example 16-5 (502) applies the damage remedy for cover to a set of facts.

PARALEGAL EXERCISE 16.5 (503) asks students to calculate damages under UCC § 2-712.

$$\begin{aligned} & \text{[What the buyer expected to receive} \\ & \quad \text{(the goods from the seller)} \\ & \quad \text{less} \\ & \quad \text{what the buyer did receive} \\ & \quad \text{(the goods from another seller)]} \\ & \quad \text{less} \\ & \text{[what the buyer expected to give} \\ & \quad \text{(the contract price)} \\ & \quad \text{(\$17,500)} \\ & \quad \text{less} \\ & \quad \text{what the buyer did give} \\ & \text{(the cover price plus incidental damages)} \\ & \quad \text{(\$17,500 + \$1,000)]} \\ & \quad = \$1,000 \text{ damages} \end{aligned}$$

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### **Damages for Nondelivery or Repudiation (UCC § 2-713)**

Whether the buyer buys substitute goods and thus covers or does not cover, the buyer is still entitled to measure its damages for the seller's nondelivery or repudiation by using UCC § 2-713. UCC § 2-713 is diagrammed in Exhibit 16-11 (503). The formula is:

$$\begin{array}{r} \text{[What the buyer expected to receive} \\ \text{(the goods)} \\ \text{less} \\ \text{What the buyer did receive} \\ \text{(some or none of the goods)]} \\ \text{less} \\ \text{[What the buyer expected to give} \\ \text{(the contract price)} \\ \text{less} \\ \text{What the buyer did give} \\ \text{(prepaid price, if any, plus incidental damages)]} \end{array}$$

Example 16-6 (503) illustrates the application of UCC § 2-713 to a set of facts.

PARALEGAL EXERCISE 16.6 (504) asks student to apply UCC § 2-713 to a set of facts.

$$\begin{array}{r} \text{[What the buyer expected to receive} \\ \text{(the goods)} \\ \text{(one carload of Mason green jars} \\ \text{as measured by the market price-\$21,000)} \\ \text{less} \\ \text{What the buyer did receive} \\ \text{(some or none of the goods)} \\ \text{(no Mason green jars-\$0)]} \\ \text{less} \\ \text{[What the buyer expected to give} \\ \text{(the contract price)} \\ \text{(\$17,500)} \\ \text{less} \\ \text{What the buyer did give} \\ \text{(prepaid price, if any, plus incidental damages)} \\ \text{(no prepayment + \$1,000 incidental damages)]} \end{array}$$

### **Specific Performance (UCC §§ 2-716(1) & (2)) (504)**

In special circumstances, "the goods are unique or in other proper circumstances."

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Goods are unique if the buyer cannot cover. Goods are in the “other proper circumstances” if it is excessively expensive to cover. Example 16-7 (505) illustrates the difficulty of demonstrating “other proper circumstance.”

PARALEGAL EXERCISE 16.7 (505) asks students to apply UCC § 2-716(1) to a set of facts. Is the only remaining original gold-plated DMC-12 unique (one of two produced)? Should the two later DMC-12s be considered so the original DMC-12 would not be unique but possibly other proper circumstances? Note that the later two were not as highly regarded as the original two.

After the Buyer Accepts the Goods-Damages for Breach with Regard to

### **Accepted Goods (UCC § 2-714) (503)**

The index for the seller’s remedies for the buyer’s breach, regardless of whether the buyer has or has not accepted the goods, are all found in one code section, UCC § 2-703. The index for the buyer’s remedies for the seller’s breach, however, is not in one code section but rather in two. As has been discussed, UCC § 2-711(1) indexes the buyer’s remedies if the buyer has not accepted the goods.

UCC § 2-714 deals with the buyer’s remedies after the buyer has accepted the goods. Since the buyer has accepted the goods, the buyer may not reject the goods under UCC § 2-601 (entire delivery) or UCC § 2-612(2) (installment delivery). The buyer may, in the appropriate case, revoke acceptance of the goods under UCC § 2-608. In that case, the buyer may pursue the UCC § 2-711(1) remedies as if the goods were not accepted.

After the goods have been accepted, the seller’s breach will involve a nonconforming tender, such as a breach of warranty. Exhibit 16-12 (506) diagrams the buyer’s remedy for a breach of warranty.

$$\begin{array}{r} \text{[What the buyer expected to received} \\ \text{(the goods as warranted)} \\ \text{(value of the goods if they had been as warranted)} \\ \text{less} \\ \text{What the buyer did receive} \\ \text{(the goods in breach of warranty condition)} \\ \text{(value of the goods accepted)]} \\ \text{less} \\ \text{[What the buyer expected to give} \\ \text{(the contract price)} \\ \text{less} \\ \text{What the buyer did give} \\ \text{(prepaid price, if any, plus incidental damages)]} \end{array}$$

### **Liquidated Damages (UCC § 2-718(1)) (506)**

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At the time of contracting, the parties may fix a reasonable amount as damages if, at the time of breach, the proof of loss will be difficult to prove and obtaining an adequate remedy will be inconvenient or nonfeasible.



# Statutory Liquidated Damages

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## Statutory Liquidated Damages

### STATUTORY LIQUIDATED DAMAGES (507)

UCC § 1-106(1) begins the damage discussion with the expectation formula-putting the nonbreaching party forward to the position that he or she would have been in had the contract been fully performed. The Article 2 remedies, however, do not necessarily calculate actual damages. For example, if the buyer breaches and the seller still has the goods, the seller may resell and calculate damages using UCC § 2-706 or may resell and calculate damages using UCC § 2-708(1). If UCC § 2-708(1) proves to be inadequate, the seller may assert "lost volume seller" status and use UCC § 2-708(2).

Therefore, even if the seller resells so actual damages could be calculated under UCC § 2-706, the seller may ignore the resale and seek damages above and beyond actual damages by using UCC §§ 2-708(1) or (2), if applicable.

Thus, if the parties set reasonable damages at the time of contract formation, they will be enforced as liquidated damages

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### STATUTORY LIQUIDATED DAMAGES (507)

UCC § 1-106(1) begins the damage discussion with the expectation formula-putting the nonbreaching party forward to the position that he or she would have been in had the contract been fully performed. The Article 2 remedies, however, do not necessarily calculate actual damages. For example, if the buyer breaches and the seller still has the goods, the seller may resell and calculate damages using UCC § 2-706 or may resell and calculate damages using UCC § 2-708(1). If UCC § 2-708(1) proves to be inadequate, the seller may assert "lost volume seller" status and use UCC § 2-708(2).

Therefore, even if the seller resells so actual damages could be calculated under UCC § 2-706, the seller may ignore the resale and seek damages above and beyond actual damages by using UCC §§ 2-708(1) or (2), if applicable.

Thus, if the parties set reasonable damages at the time of contract formation, they will be enforced as liquidated damages unless the court declares the damages a penalty. If the parties did not create a liquidated damage provision at

the time of contracting, and if the contract is for the sale of goods, the remedy formulas in Article 2 will provide the calculation. These calculations do not necessarily reflect actual damages and therefore they are statutory liquidated damages. Statutory because they are provided in the Code and not by the parties.

*Tongish v. Thomas* (507) makes this point. Tongish, a grower, contracted to grow 160 acres of sunflower seeds and to sell them to the Decatur Coop Association for \$13 per hundredweight for large seeds and \$8 per hundredweight for small seeds. The crop was to be delivered in three installments: December 31, March 31, and May 31.

The contract was subsequently modified to reduce the acreage to 116.8 acres.

Tongish knew that the Coop would resell his seed and the Coop did contract to sell the Tongish seed to Bambino Bean & Seed for the same price the Coop contracted to pay Tongish plus a \$.55 per hundredweight handling fee. The handling fee was to be the Coop's only profit.

Tongish delivered the first shipment and then notified the Coop that it would not deliver the remaining two shipments since the market price for sunflower seeds had increased in January to twice the contract price.

Tongish then sold the remainder of his crop to Thomas for \$20 per hundredweight.

Thomas paid for half of the seed and Tongish sued Thomas for the balance due. The Coop intervened seeking damages for breach of contract. Thomas paid the balance it owed Tongish to the court and was dismissed from the case. What remained was the Coop's breach of contract action against Tongish.

The issue between Tongish and the Coop was whether the buyer's damages for the seller's nondelivery should be computed using UCC § 1-106, the general expectation formula, or UCC § 2-713, the market price/contract price differential. The buyer's damages under the general expectation formula would be the handling fee \$.55 per hundredweight (i.e., \$455.51). The buyer's damages under the market price/contract price differential would be substantially more.

The trial court used UCC § 1-106 and awarded the buyer damages based on its actual loss. The Kansas Court of Appeals reversed holding that, UCC § 2-713, the market price/contract price differential applied. The Kansas Supreme Court affirmed the judgment of the Court of Appeals.

The court used the rule of statutory construction that where a general statute and a specific statute conflict, the specific takes precedence over the general. Therefore, UCC § 2-713, the specific section of the UCC, should take

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precedence over UCC § 1-106, the general section of the UCC. The court noted that this issue has been discussed by others and some conclude that the intent of the drafters was not to require the Article 2 damage formulas to represent actual damages. Therefore, they could be considered statutory liquidated damages because they are not trying to accurately predict what actual damages would be. The court also noted that the Article 2 remedies were a two-edged sword-the market could go up and favor one party or the market could go down and favor the other.

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#### TRUE/FALSE QUESTIONS

1. F
2. T
3. T
4. F
5. T
6. T
7. F
8. F
9. F
10. T
11. F
12. F
13. F
14. T
15. F
16. F
17. F

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#### TRUE/FALSE QUESTIONS

1. F
  2. T
  3. T
  4. F
  5. T
  6. T
  7. F
  8. F
  9. F
  10. T
  11. F
  12. F
  13. F
  14. T
  15. F
-

16. F
17. F
18. F
19. F
20. T
21. F
22. T

### **FILL-IN-THE-BLANK QUESTIONS**

1. Expectation
2. 1-106(1)
3. 2-703
4. 2-711
5. 2-706
6. 2-713
7. 2-709
8. 2-714
9. 2-712
10. 2-715
11. 2-710
12. Cover

### **MULTIPLE CHOICE QUESTION**

1. b
2. d
3. d
4. e
5. a
6. e
7. e

### **SHORT ANSWER QUESTIONS**

1. Actual damages compensate the aggrieved party for his or her loss. Section 1-106(1) of the UCC provides for expectation damages. These are damages that put the aggrieved party in the position he or she would have been in had the contract been fully performed. For example, if the seller breaches and does not send the goods to the buyer and the buyer buys substitute goods at a

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higher price, the difference between the higher price and the contract price plus any incidental damages incurred by the aggrieved party compensate the aggrieved party as actual damages.

Liquidated damages are an estimate of what future loss might be in the event of breach. If at

the time of contract the parties state that the buyer's loss in the event of late delivery will be \$

and this amount would be difficult to determine with any precision and that the amount agreed

upon would be a reasonable forecast of buyer's loss, then the designated amount would constitute liquidated damages.

Statutory liquidated damages are the computation of damage computations found in Article

2 of the UCC. They may or may not compensate the aggrieved party for his or her loss but provide

a simple method for calculating damages so a dispute can be resolved. For example, if the

seller resells the goods, the seller is not limited to the difference between the contract price and

the resale price but may seek the difference between the contract price and the market price.

Thus, if the market price is higher than the resale price, the aggrieved seller may still seek the

market price/contract price differential rather than what the seller already has procured, i.e., the

resale price/contract price differential.

2. The aggrieved seller may resell the goods and, whether or not he or she has done so, may recover

the resale price/contract price differential or the market price/contract price differential. In the

event the latter is inadequate (lost volume seller), the aggrieved seller may recover lost profits

(contract price/costs differential).

3. The aggrieved buyer may purchase a substitute (cover) and, whether or not he or she has done so,

recover the cover price/contract price differential or the market price/contract price differential.

In rare cases (goods are unique or in other special circumstance), the aggrieved buyer may seek

specific performance.

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