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A Practical Resource for Managing UCC-based Litigation[†]

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Steven K. Stawski

I.

INTRODUCTION

This article offers a practical resource for managing Uniform Commercial Code (UCC) litigation in light of the greatest wholesale revision to Article 2 since its inception. Specifically, this article identifies the threshold issues in UCC litigation, offers strategies for early motion practice, and explains how the Code eases the rules of contract formation, imposing obligations on sellers and buyers alike. In further reminding practitioners that rights and remedies under the UCC depend upon a client's conduct before, during, and after delivery and acceptance of goods, this article also identifies the operative facts that ultimately control damages.

II.

A SUMMATIVE BACKGROUND: APPLICABILITY ACROSS STATE JURISDICTIONS

The UCC's stated purpose is to: (a) simplify, clarify and modernize the law governing commercial transactions; (b) permit the continued expansion of commercial practices through the custom, usage and agreement of the parties; and (c) make uniform the law among the various jurisdictions.¹ The National Conference of Commissioners on Uniform State Laws

^{*} Submitted by the authors on behalf of the FDCC Commercial Litigation Section.

¹ Uniform Commercial Code [hereinafter U.C.C.] § 1-102(1) (2003).



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(NCCUSL) and the American Law Institute (ALI) originally approved Article 2 in the early 1950's, and state adoption began to follow in the mid-1950's and 1960's. While periodic updates and clarifications have occurred since that time, the first wholesale update and revision to Article 2 occurred in 2003.²

III. HANDLING UCC-BASED LITIGATION

A. *The Predominant Factor Test*

The threshold issue in UCC litigation concerns whether an agreement arises out of a "transaction in goods" The term "goods" is defined to mean "all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than money in which the price is to be paid, investment securities (Article 8) and things in action" Article 2 controls actions arising out of the sale of all things movable, including the unborn young of animals, growing crops, and goods to be severed from realty, such as minerals and timber.³

² While the NCCUSL and the ALI have approved the 2003 Amendments to Article 2, this article recognizes the pre-amended form as the common denominator to most state-based jurisdictions.

³ U.C.C. § 1-102.

⁴ *Id.* § 2-105(1).

⁵ *Id.* § 2-107. The definition of "goods" in the 2003 Amendments excludes information not associated with goods to clarify that electronic transfers of information are not included. For example, an architect's provision or architectural plans on a computer disk would not constitute a transaction in goods.



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When a contract involves a mix of goods and services, the majority of jurisdictions employ a "predominant factor" test.⁶ As explained by one court:

Most courts follow the "predominant factor" test to determine whether such hybrid contracts are transactions in goods, and therefore covered by the UCC, or transactions in services, and therefore excluded. Under this test, the court determines "whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)."⁷

While no single factor is determinative in finding that a hybrid contract is one for goods or services, courts have looked to contractual language, the manner of billing, and the mobility of goods at the time of contract.⁸ For example, contracts that refer to the transaction as a "purchase agreement," identify parties as "buyers" and "sellers," or show that the price for goods exceeds the price for services are more likely to be controlled by Article 2.⁹

⁶ Sonja A. Soehnel, Annotation, *Applicability of UCC Article 2 to Mixed Contracts for Sale of Goods and Services*, 5 A.L.R. 4th 501 at § 2 (1981).

⁷ *BMC Indus., Inc. v Barth Indus., Inc.*, 160 F.3d 1322, 1329-30 (11th Cir. 1998) (internal citations omitted).

⁸ *Id.* at 1330.

⁹ *Id.*

The facts and determination in *D.N. Garner Co. v. Georgia Palm Beach Aluminum Window Co.*¹⁰ are illustrative. The plaintiff-buyer, a general contractor who was renovating an apartment building, sued for breach of a contract for the sale and installation of windows when defendant-seller's windows did not meet the architect's specifications at the price stated in the original offer. Finding that defendant-seller's bid did not segregate the cost of the windows from the cost of the services, the court held that the predominant character of the transaction was the sale of goods as controlled by the UCC, despite the fact that a substantial measure of service was involved with installing the goods.¹¹ Distinguishing contract formation under common law, the Georgia Court of Appeals looked to the UCC's expanded concept of contract formation in reversing the trial court upon findings of material fact.¹²

- **Practice pointer:** For mixed contracts for goods and services, question whether the contract primarily covered the rendition of services with goods incidentally involved, or involved a transaction of sale with labor incidentally involved.
- Does the contact language speak to a "purchase order" between a "buyer" and a "seller?"
 - Does the contract billing separate labor from materials, and if so, what is the proportion of charges?
 - Does the contract call for identified goods that are movable at the time of contracting?

Motion practice using the predominant factor test may hold great practical importance: the UCC provides a four-year period of limitations which may serve to dismiss a plaintiff's action altogether.¹³

- **Practice pointer:** If defending a claim, ask:
- Has four years passed since plaintiff's action accrued? (Recall that a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of a breach.)¹⁴

¹⁰ 504 S.E.2d 70 (Ga. Ct. App. 1998).

¹¹ *Id.* at 73-4.

¹² *Id.* at 74.

¹³ See U.C.C. § 2-725(1).

¹⁴ *Id.* § 2-725(2). The 2003 revisions expand the general period of limitation to the later of four years after accrual of the right of action, or one year after the breach should have been discovered, but no later than five years after the accrual. They also preclude reduction of the limitation period in consumer contracts.

B. Using the Economic Loss Doctrine to Dismiss Tort Claims

If a matter satisfies the predominant factor test or otherwise falls within the UCC, litigation counsel can employ the economic loss doctrine in motion practice to eliminate tort claims.¹⁵ While courts in every state have wrestled with tort actions that arise from contractual relationships, one state's decision to join the majority and adopt the economic loss doctrine is particularly instructive with regard to the UCC and its stated purpose:

[The economic loss doctrine] hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts.¹⁶

In contemplating the economic loss doctrine in conjunction with the UCC, the Michigan court in *Neibarger*, cited above, focused in part on the UCC's goal of national uniformity:

Adoption of the economic loss doctrine is consistent with the stated purposes of the UCC. The availability of a tort action for economic loss would "only add more confusion in an area already plagued with overlapping and conflicting theories of recovery," while preclusion of such actions will lead to the simplification, clarification, and modernization of commercial law called for by § 1-102(2)(a). Moreover, because a majority of other jurisdictions have adopted the economic loss doctrine, our decision here will promote the uniformity called for in § 1-102(2)(c).¹⁷

Ultimately, the *Neibarger* court found that "the UCC and the economic loss doctrine reflect the proper approach for resolution of defective product claims in the commercial arena" and precluded plaintiff's claims in tort under a product liability theory.¹⁸

As such, the economic loss doctrine serves as a basis to eliminate tort claims that are otherwise pled in conjunction with, or as an alternative to, remedies that fall within the UCC. For example, in *Citizens Insurance Co. v. Osmose Wood Preserving, Inc.*,¹⁹ plaintiff filed a

¹⁵ In evaluating a potential motion on the pleadings, counsel should be aware that the UCC recognizes that supplementary general principles of law remain applicable. Unless displaced by the particular provisions of the UCC, the principles of law and equity, including merchant law and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions. See U.C.C. § 1-103.

¹⁶ *Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612, 615 (Mich. 1992) (citations omitted).

¹⁷ *Id.* at 619.

¹⁸ *Id.*

¹⁹ 585 N.W.2d 314 (Mich. Ct. App. 1988).

lawsuit against Osmose Wood Preserving, Inc. (Osmose), the manufacturer of a chemical fire retardant that was sprayed on wood trusses and wood roof decking during construction of plaintiff's subrogor's restaurant. After the roof and decking collapsed, plaintiff alleged negligence, breach of warranty, and fraud. The *Osmose* court found that defendant, who was sued in its capacity as a manufacturer, merely provided the chemicals and accompanying instructions used by another company to treat the wood installed in the restaurant – and it concluded that the plaintiff's action was governed by the UCC.²⁰ As to the claim for fraud, the court found that misrepresentations alleged by plaintiff related solely to the quality and characteristics of the flame-retardant chemicals; it held, in essence, that the plaintiff's fraud claim was merely a restatement of its breach of warranty claims.²¹

IV. LITIGATING THE UCC COUNT

A. *Contract Formation: UCC Versus the Common Law*

Article 2 expands the common law concept of contracts by easing the rules of contract formation and reducing formalities. It also imposes a broader range of obligations emanating from Code statutes and from course of dealing, usage of trade, or course of performance.

Unlike the common law, which requires an exchange of communications, a contract covered by the UCC may be made *in any manner sufficient to show agreement*, including conduct by both parties that recognizes the existence of such a contract.²² Under the Code's statute of frauds, any contract for the sale of goods priced at \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought, or by his authorized agent or broker.²³ A writing is not insufficient because it omits or incorrectly states a term, but the contract is not enforceable beyond the quantity of goods shown. Between merchants, the statute of frauds is satisfied if, within a reasonable time, a writing in confirmation of the contract is received, the party receiving it has reason to know its contents, and no notice of objection is made within ten days after receipt.²⁴

²⁰ *Id.* at 317.

²¹ *Id.* The 2003 Amendments create direct obligations between sellers and remote purchasers, such that potential plaintiffs will no longer need to rely on tort actions to maintain claims against product manufacturers. As such, the economic loss doctrine will be unavailable to product manufacturers as grounds for dismissing these types of actions with the result that product manufacturers could see an increase in litigation. See U.C.C. §§ 2-313A and 2-313B.

²² U.C.C. § 2-204 (emphasis added).

²³ *Id.* § 2-201. The 2003 Amendments increased the threshold price from \$500 to \$5,000.

²⁴ *Id.* § 2-201. Among other changes, the 2003 Amendments replace the term "writing" with "record" to include electronic information.

Specifically, a contract under Article 2 of the UCC is defined to mean "the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law."²⁵ An "Agreement" is defined as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act . . ."²⁶ As such, enforcement of UCC contracts requires an understanding of the parties' written agreement, the Code's gap-filling provisions, the previous conduct between the parties, and the practices or methods of dealing in a place, vocation, or trade.

➤ **Practice pointer:** If verifying or challenging contract formation under the UCC,

- ask clients for all acknowledgments, confirmations, e-mails or other documents that confirm the sale or delivery of goods.

Even in the absence of a signed agreement, such documents can serve as a "writing in confirmation of the contract" to satisfy the statute of frauds as between merchants.

B. *Relating Breach to Remedy under the Code*

Rights and remedies under the Code depend, in part, on the seller's and the buyer's performance as well as actions before, during and after the delivery and acceptance of goods. The Code recognizes industry processes and contemplates whether goods are custom, whether delivered goods conform to the contract, and whether deliveries of non-conforming goods have been rejected. In contrast to common law, the Code allows for a certain flexibility to cure non-conforming tender and delivery; it also allows various remedies and options upon breach by the seller or by the buyer.

Even before performance is due, sellers and buyers can breach through anticipatory repudiation.²⁷ Anticipatory repudiation "centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance."²⁸

Unlike contracts under common law, a seller may tender goods or deliver goods that do not conform to the contract. In this circumstance, the buyer may: (a) reject the whole; (b) accept the whole; or (c) accept any commercial unit and reject the rest.²⁹ The rejection of goods must be made within a reasonable time after delivery or tender.³⁰

²⁵ *Id.* § 1-201(11).

²⁶ *Id.* § 1-201(3).

²⁷ *Id.* § 2-610.

²⁸ *Id.* cmt. 1.

²⁹ *Id.* § 2-601.

³⁰ *Id.* § 2-602.

➤ **Practice pointer:** To identify an actionable breach and advise a seller of its remedies and options, ask:

- Did the buyer fail to make payment when due?
- Did the buyer wrongfully reject or revoke acceptance?
- Did the buyer repudiate with respect to a part or the whole?
- Are all goods under the contract finished?
- If unfinished, is it commercially reasonable to complete the goods? Should seller cease manufacturing and sell materials for scrap or salvage value? Is there another commercially reasonable way to proceed?
 - Does the seller have additional deliveries available to withhold?
 - Can the finished goods be sold at a commercially reasonable price?
 - What are the expenses or commissions incurred: in stopping delivery; in the transportation, care and custody of goods after the buyer's breach; in connection with return or resale of the goods; or otherwise resulting from the breach?

In some circumstances, a seller's right to recovery for goods accepted can be diminished by the buyer's actions to correct non-conforming goods. For example, in *Flick Lumber Co. v. Breton Industries, Inc.*,³¹ the plaintiff-seller entered into a contract requiring it to supply boards cut to certain specifications. Plaintiff-seller sued buyer and buyer counterclaimed with allegations that the boards failed to meet the specifications, making it necessary for the buyer to sort through every board and to re-cut over twenty-five percent of them to bring them within specifications. The court found the issue regarding nonconformity of the goods to be significant. If established, it could significantly diminish or negate plaintiff's recovery.³²

➤ **Practice pointer:** To identify an actionable breach and advise a buyer of its remedies and options, ask:

- Has the seller failed to make delivery?
- Has the seller repudiated?
- Did the buyer rightfully reject or justifiably revoke acceptance?
- Did the buyer accept the seller's non-conforming tender of delivery?

³¹ 636 N.Y.S.2d 169 (App. Div. 1996).

³² *Id.* at 170.

- If so, did the buyer provide notice of breach to the seller within a reasonable time after discovery?
- Did the buyer purchase substitute goods?
- If so, were the substitute goods purchased in good faith and without unreasonable delay?
- Did the buyer incur expenses in inspection, receipt, transportation, and care and custody of goods rightfully rejected?
- What are the buyer's general or particular requirements and needs of which the seller, at the time of contract, had reason to know?

C. Remedies

Remedies under the Code "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 . . .*"³³ If and when adopted by the states, the 2003 Amendments also will mark a substantial increase in remedies available to sellers since they will be entitled to consequential damages – a measure previously unavailable to them.³⁴

1. Identifying Seller's Remedies upon Buyer's Breach

In general, aggrieved sellers have the right to withhold or stop delivery, identify goods to the contract, resell the goods and recover damages for any loss, sue for damages, sue for the price, or cancel the contract. The 2003 Amendments also allow sellers to claim consequential damages, as noted earlier. As concerns all of these remedies, UCC section 2-703 particularly notes that aggrieved sellers may:

- (a) withhold delivery of such goods;
- (b) stop delivery by a bailee (under section 2-705);
- (c) identify to the contract conforming goods not already identified, or where goods are unfinished, complete goods when commercially reasonable, cease manufacture and resell for scrap or salvage value, or proceed in any other reasonable manner (see section 2-704);

³³ U.C.C. § 1-106 (emphasis added).

³⁴ *See id.* § 2-710. In contrast to direct or general damages, which are based on the value of goods and measured by the market, the price of substitute cover purchases, or the worth warranted by the seller, special damages include incidental and consequential damages which arise naturally, but not necessarily, as a result of the breach and because of the aggrieved party's particular circumstances.

- (d) resell goods or the undelivered balance thereof in good faith and in a commercially reasonable manner and recover the difference between the resale price and the contract price, together with the "Seller's Incidental Damages" under section 2-710;
- (e) recover damages for non-acceptance or for the price, including seller's incidental damages;
- (f) cancel.

To calculate a seller's direct damages, the Code provides that a "buyer must pay at the contract rate for any goods accepted."³⁵ Acceptance of goods by the buyer precludes rejection of the goods accepted.³⁶ Importantly for the seller, the burden is on the buyer to establish any breach with respect to the goods accepted.³⁷

In general, a seller's direct damages for undelivered goods are calculated using a resale, market rate, or profit formula under sections 2-706 and 2-708. A seller who resells the goods or undelivered balance in good faith and in a commercially reasonable manner may recover the difference between the resale price and the contract price, together with incidental damages.³⁸ Under the Code, a seller's incidental damages "include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach."³⁹

➤ **Practice pointer:** to identify seller's incidental damages, ask:

- Did seller incur costs of replacing material in stock for resale?
- Did seller incur costs for storage and relocation of goods wrongfully rejected?
- Were commissions paid upon resale?
- Did seller incur charges for storage and handling of goods after the breach?

³⁵ *Id.* § 2-607(1).

³⁶ *Id.* § 2-607(2).

³⁷ *Id.* § 2-607(4).

³⁸ *Id.* § 2-706(1).

³⁹ *Id.* § 2-710.

Methods for calculating a seller's damages are illustrated in *Nobs Chemical, U.S.A., Inc. v Koppers Co.*⁴⁰ In that case, Nobs Chemical had contracted to sell 1,000 metric tons of a chemical to Koppers Co. (Koppers) for \$540,000. Nobs Chemical arranged to purchase 1,000 metric tons from its Brazilian supplier at \$400 per ton and expected transportation costs of \$45 per ton. After Koppers breached, Nobs Chemical lowered the quantity it had on order with its supplier from 4,000 metric tons to 3,000 metric tons, but lost a supplier discount of \$25 per ton. At the time of the breach, the market value of the chemical dropped to somewhere between \$220.40 and \$264.48 per metric ton.

Nobs Chemical argued for the market rate formula recovery under the contract, claiming it was entitled to the difference between the contract price (\$540,000) and the market price (between \$220,400 and \$264,480). It also claimed consequential damages owing to the loss of its \$25 per ton discount for the remaining 3,000 tons on order. On appeal, the Fifth Circuit rejected Nobs Chemical's argument, however, reasoning that since Nobs Chemical had never acquired the goods from its Brazilian supplier, an action for the purchase price on resale was unavailable.⁴¹

As to the claim for \$75,000 in consequential damages for the loss of \$25 per ton in discount on its remaining 3,000 tons on order, the Fifth Circuit ruled that "[t]he code does not provide for the recovery of consequential damages by a seller." It reiterated that section 2-710 "was intended to cover only those expenses contracted by the seller after breach and occasioned by such things as the seller's need to care for, and if necessary, dispose of, the goods in a commercially reasonable manner."⁴²

Ultimately, the Fifth Circuit cited to the Code's underlying philosophy "that the aggrieved party may be put in as good a position as if the other party had fully performed,"⁴³ and affirmed the application of the profit formula. Applying that formula, Nobs Chemical would be awarded a total of \$95,000 — the difference between the contract price (\$540,000) and Nobs Chemical's costs (\$445,000).⁴³

⁴⁰ 616 F.2d 212 (5th Cir. 1980).

⁴¹ *Id.* at 215.

⁴² *Id.* at 216.

⁴³ *Id.* at 215 (internal citation omitted). This result in *Nobs Chemical* will change with the adoption of the 2003 Amendments, which entitle sellers to claim consequential damages, except in cases where the buyer is a consumer. As amended, section 2-710(2) provides: "Consequential damages resulting from the buyer's breach include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting had reason to know and which could not reasonably be prevented by resale or otherwise." Under the revised Code, if Koppers had reason to know upon contracting that its order of 1,000 metric tons would enable Nobs Chemical to obtain a \$25 per ton supplier discount, it could then claim entitlement to such damages as a matter of law.

2. Identifying Buyer's Remedies upon Seller's Breach

When a seller fails to make delivery or repudiates, or the buyer rightfully rejects or justifiably revokes acceptance, the buyer may cancel the contract. In addition, the buyer may "cover" by purchasing substitute goods, seeking to recover the difference in price or damages for non-delivery.⁴⁴ Cover damages are available when a buyer, in good faith and without unreasonable delay, makes a reasonable purchase of, or enters a contract to purchase goods in substitution for those due from the seller.⁴⁵

In *Louis Dreyfus Corp. v. J.B. Brown*,⁴⁶ the plaintiff-buyer entered into two contracts with defendant-seller to purchase 30,000 bushels of soybeans: the first called for the delivery of 20,000 bushels at \$7.15 per bushel; the second called for the delivery of 10,000 bushels at \$7.54 per bushel. After the plaintiff-buyer learned in a telephone conversation that defendant-seller had harvested all the soybeans and was over 20,000 bushels short, he immediately purchased 20,000 bushels of soybeans at \$8.34 per bushel and the remainder at \$7.84 per bushel. The Fifth Circuit concluded that the telephone call constituted an anticipatory repudiation by the seller and upheld entry of judgment for the plaintiff in the amount of \$23,821.60. This recovery included the sum of \$21,656, which measured the difference between the cost of cover and the contract price, plus interest.⁴⁷

The measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time the buyer learned of the breach and the contract price. It also includes incidental and consequential damages, less the expenses saved in consequence of the seller's breach.⁴⁸

➤ Practice pointer. If seller failed to deliver, then:

- Establish the market price at the time the buyer learned of the breach.
- If evidence of the price is not readily available at the time of the breach, then identify available market prices within a reasonable time before or after the breach or at any other place which, in commercial judgment or under usage of trade, would serve as a reasonable substitute, making any proper allowance for the cost of transporting goods to or from such other place.⁴⁹

⁴⁴ U.C.C. § 2-711.

⁴⁵ *Id.* § 2-712.

⁴⁶ 709 F.2d 898 (5th Cir. 1983).

⁴⁷ *Id.* at 901.

⁴⁸ U.C.C. § 2-713.

⁴⁹ See *id.* § 2-723(2). Evidence of a relevant price, prevailing at a time or place other than the one described in Article 2 and offered by one party, is not admissible unless and until the other party is given such notice as the court finds sufficient to prevent unfair surprise. *Id.* § 2-723(3).

With regard to accepted non-conforming goods, if the buyer provides notification of the breach to the seller within a reasonable time after discovery, the buyer may recover damages resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable, including incidental and consequential damages in proper cases.⁵⁰ Buyers that cover also are entitled to incidental or consequential damages, less the expenses saved in consequence of the seller's breach.⁵¹ With notification to the seller, the buyer may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.⁵²

Special damages available to the buyer are defined in UCC section 2-715. Incidental damages "include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach."⁵³ Consequential damages include: "(a) [a]ny loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) [i]njury to person or property proximately resulting from any breach of warranty."⁵⁴

In *S.M. Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc.*,⁵⁵ the court addressed acceptance of non-conforming goods, cover, and incidental damages. Plaintiff-buyer, a general contractor who was building an addition on the St. Elizabeth's Hospital in Granite City, Illinois, contracted with defendant-seller for mixed concrete that tested to a compressive strength of 3,000 pounds per square inch. Upon visual inspection, the plaintiff-buyer's superintendent refused to accept the first delivery of concrete. That concrete was returned to defendant-seller's plant, where it was remixed. The concrete from the next truck was tested and approved, but the remixed delivery from the first truck was not. Several months later, when the cement on the hospital's sixth floor began abrading or peeling, plaintiff-buyer performed core sampling tests and found that nine of ten samples averaged a compressive strength of only 2,400 pounds per square inch. Plaintiff-buyer then performed two load tests. While the first test failed, the second proved that the slab strength was in fact sufficient for use in the project. Plaintiff-buyer notified defendant-seller of the situation and claimed \$14,588.10 in set-offs for the costs of testing. As a consequence, the defendant-seller ceased further shipments of concrete. The plaintiff-buyer was then required to buy concrete from another source at an added expense of \$1,278.96.

⁵⁰ *Id.* § 2-714(1).

⁵¹ *Id.* § 2-712(2).

⁵² *Id.* § 2-717.

⁵³ *Id.* § 2-715(1).

⁵⁴ *Id.* § 2-715(2).

⁵⁵ 350 N.E.2d 321 (Ill. App. Ct. 1976).

Finding that plaintiff-buyer decided to leave the concrete in place instead of removing it, the *Reeves* court held that the "plaintiff neither rejected the concrete nor revoked its acceptance under the Code."⁵⁶ Applying section 2-714 in particular, the court ultimately determined that the notice of defect during the time of compression testing was timely and upheld the trial court's award of \$14,588.10 as incidental damages for the costs of testing. The court also found that the cost of obtaining additional concrete following defendant's refusal to deliver the amount as specified by contract was a reasonable cost of "cover" since it exceeded the contract price.

With regard to breach of warranty, the measure of damages typically is the difference at the time and place of acceptance between the value of the goods accepted and the value of the goods as warranted, unless special circumstances show proximate damages of a different amount.⁵⁷ For example, in *General Supply & Equipment Co. v Phillips*,⁵⁸ Phillips sued General Supply and Equipment Company on a contract for PVC paneling used to cover greenhouses, alleging that the product was warranted to last from five to seven years. Within three years, however, the panels had darkened and reduced the sunlight entering the greenhouses, resulting in the loss of plants and greenhouse business. The *Phillips* court found that since no damage had been done to the greenhouse structures, the correct measure of damage for breach of warranty was the cost of replacing the defective paneling with paneling of a quality equal to that represented by the seller, less any salvage value.⁵⁹

V. CONCLUSION

While the 2003 Amendments to Article 2 are yet to be adopted in most state jurisdictions, counsel should be aware that these amendments portend substantial changes that could lead to increased litigation and higher damage claims. Although the fundamentals of UCC-based litigation will remain the same, early identification of the threshold questions and operative facts called into issue by these amendments will assist counsel with strategies for early motion practice, better containment of damages, and more effective case management.

⁵⁶ *Id.* at 325.

⁵⁷ U.C.C. § 2-714(2).

⁵⁸ 490 S.W.2d 913 (Tex. App. 1972).

⁵⁹ *Id.* at 920.

The Federation of Insurance Counsel was organized in 1936 for the purpose of bringing together insurance attorneys and company representatives in order to assist in establishing a standard efficiency and competency in rendering legal service to insurance companies, and to disseminate information on insurance legal topics to its membership. In 1985, the name was changed to Federation of Insurance and Corporate Counsel, thereby reflecting the changing character of the law practice of its members and the increased role of corporate counsel in the defense of claims. In 2001, the name was again changed to Federation of Defense & Corporate Counsel to further reflect changes in the character of the law practice of its members.

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