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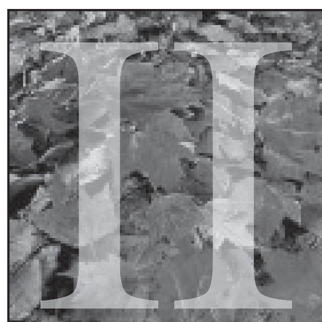

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Michigan Defense Trial Counsel, Inc.

THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

MANAGING UCC-BASED LITIGATION: A PRACTITIONER'S GUIDE

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Smith, Haughey, Rice & Roegge

Executive Summary

In this article, the authors provide a practical resource for managing Uniform Commercial Code litigation in light of the greatest wholesale revision to Article 2 since its inception. A threshold issue in litigation involving the Code is the predominant factor test, which determines whether a transaction is within the scope of the Code. Because of the breadth of the Code, the "economic loss doctrine" can often be used to limit or eliminate tort remedies, and may be the basis for early success through motion practice. The Code eases the rules of contract formation in comparison to common law rules, and imposes specific obligations on sellers and buyers. The rights and remedies created by Code that are available to the client depend on the client's conduct before, during, and after delivery and acceptance of goods, which give rise to the operative facts that ultimately control damages. Amendments proposed by the commissioners on uniform laws in 2003, and not yet adopted in Michigan, will broaden some of the remedies available under the Code.

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 (NCCUSL) and the American Law Institute (ALI) originally approved Article 2 the early 1950s and state adoption followed starting in the mid-1950's and 1960's. While periodic updates and clarifications have occurred since that time, the first wholesale update and revision of Article 2 occurred in 2003.[2] It has not yet been adopted in Michigan.

The Predominant Factor Test

The threshold issue in UCC litigation is whether an agreement arises out of a "transaction in goods" and therefore falls under the Code's provisions.[3] The term "goods" means "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than money which the price is to be paid, investment securities (Article 8) and things in action…"[4] 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.[5] 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 disc would not be a transaction in goods.

When a contract involves a mix of goods and services, the majority of jurisdictions employ a predominant factor test.

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 a hybrid contract as one for goods or services, courts have looked to contractual language, the manner of billing, and the mobility of goods at the time of the contracting.[8] For example, contracts that refer to the transaction as a "purchase agreement," identify parties as "buyers" and "sellers," or show a price for goods that exceed the price for services are more likely to be controlled by Article 2.[9]

For example, in *D N Garner Co Inc v Georgia Palm Beach Aluminum*

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Window Co,[10] plaintiff-buyer, a general contractor who was renovating an apartment building, sued for breach of a contract for the sale and installation of windows after defendant-seller's windows did not meet the architect's specifications at the price in the original offer. Finding that defendant-seller's bid did not segregate the cost of the windows from the cost of the services, and despite the fact that a substantial amount of service was involved in installing the goods, the court held that the predominant character of the transaction was the sale of goods that the UCC's provisions control.[11] Distinguishing contract formation under common law, the court looked to the UCC's expanded concept of contract formation and reversed the trial court upon findings of material fact.[12]

- **Practice pointer:** For mixed contracts for goods and services, ask if the contract was primarily for the rendition of services with goods incidentally involved or a transaction of a 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? 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 have great practical importance. Note also that 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 if four years have passed since plaintiff's action accrued. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of a breach.[14] 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, and also preclude reduction of the limitation period in consumer contracts.

Ultimately, the Supreme Court found that "the UCC and the economic loss doctrine reflect the proper approach for resolution of defective product claims in the commercial arena…"

The Economic Loss Doctrine

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 out of contractual relationships, Michigan's decision to join the majority and adopt the economic loss doctrine is particularly instructive in relation 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]

Contemplating the economic loss doctrine in conjunction with the UCC, Michigan's Supreme Court 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 Supreme 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. The economic loss doctrine thus serves as a tool to eliminate tort claims that are otherwise pled in conjunction with, or as an alternate to, remedies that fall within the UCC.

For example, in *Citizens Ins Co v Osmose Wood Preserving, Inc*,[18] plaintiff filed a lawsuit against 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 Michigan Court of Appeals

Article 2 expands the common law concept of contracts by easing the rules of contract formation, reducing formalities, and imposing a broader range of obligations from statute and from course of dealing, usage or trade, or course of performance.

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 concluded the plaintiff's action was governed by the UCC.[19]

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 and held that, in essence, plaintiff's fraud claim is merely a restatement of its breach of warranty claims.[20]

The 2003 Amendments create direct obligations between sellers and remote purchasers, and potential plaintiffs will therefore no longer need to rely on tort actions to maintain claims against product manufacturers. For these reasons, product manufacturers will not be able to use the economic loss doctrine to dismiss these types of actions and there may be an increase in litigation.[21]

Contract Formation: UCC versus the Common law

Article 2 expands the common law concept of contracts by easing the rules of contract formation, reducing formalities, and imposing a broader range of obligations from statute and from course of dealing, usage or trade, or course of performance.

Unlike the common law, which requires an exchange of communications, a contract under 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 for the price of $500 or more (increased to $5000 by the 2003 amendments) 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 it is received.[24] Among other changes, the 2003 Amendments replace the term "writing" with "record" to include electronic information.

A contract under Article 2 of the UCC means "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" means "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 parties, and the practices or methods of dealing in a place, vocation, or trade.

- **Practice pointer:** If you are verifying or challenging contract formation under the UCC, ask your client for all acknowledgments, confirmations, emails or other documents that confirm the sale or delivery of goods. Even in the absence of a signed agreement, these documents can serve as a "writing in confirmation of the contract" to satisfy the statute of frauds as between merchants.

Relating the Breach to the Remedy

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 custom, and considers whether delivered goods conform to the contract, and whether deliveries of non-conforming deliveries have been rejected. In contrast to common law, the Code allows for certain flexibility to cure non-conforming tender and delivery and 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 demon-

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In contrast to common law, the Code allows for certain flexibility to cure non-conforming tender and delivery and various remedies and options upon breach by the seller or by the buyer.

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strates 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]

- **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 recover 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] 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 it to sort through every board and to re-cut over 25% of them to bring them within specifications. The court found a significant issue regarding the nonconformity of the goods which, if established, could significantly diminish or negate plaintiff's recovery.[32]

State adoption of the 2003 amendments will mark a substantial increase in remedies available to sellers who gain entitlement to consequential damages than were previously available.

- **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 buyer accept seller's non-conforming tender of delivery? (If so, did buyer provide notice of breach to seller within a reasonable time after discovery?)
  - Did buyer purchase substitute goods? If so, were the substitute goods purchased in good faith and without unreasonable delay?
  - Did 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 contracting, had reason to know?

Remedies — in General

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] To that end, state adoption of the 2003 amendments will mark a substantial increase in remedies available to sellers who gain entitlement to consequential damages than were previously available.[34] 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 a breach and because of the aggrieved party's particular circumstances.

Seller's Remedies

In general, aggrieved sellers have the right to withhold or stop delivery, proceed to 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 allow sellers to claim consequential damages.

> *A seller that 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.*

Under §2-703, aggrieved sellers may:

(a) withhold delivery of such goods;

(b) stop delivery by a bailee (under §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 §2-704);

(d) resell goods or the undelivered balance thereof in good faith and in a commercially reasonable manner and recover the difference the resale price and the contract price together with the Seller's Incidental Damages under §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, the seller's direct damages for undelivered goods are calculated using a resale, market rate, or profit formulas under §2-706 and §2-708. A seller that 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, the 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 moving of goods wrongfully rejected?
  - Were commissions paid upon re-sale?
  - Did seller incur charges for storage and handling of goods after the breach?

Methods for calculating seller's damages are illustrated in *Nobs Chemical, USA v Koppers Co, Inc.*[40] Nobs Chemical contracted to sell 1,000 metric tons of a chemical, to Koppers, Co., Inc. (Koppers) for $540,000.00. Nobs Chemical arranged to purchase 1,000 metric tons from its Brazilian supplier at $400 per ton and expected transportation costs of $45.00 per ton. After Koppers breached, Nobs Chemical lowered the quantity it had on order from its supplier, from 4,000 metric tons to 3,000 metric tons, but lost a supplier discount of $25.00 per ton. At the time of the breach, the market value of the chemical dropped to between $220.40 and $264.48 a metric ton.

Nobs Chemical argued for the market rate formula to recover the contract, claiming it was entitled to the difference between the contract price ($540,000.00) and the market price (between $220,400 and $264,480) and also claimed consequential damages due to the loss of its $25.00 per ton discount for the remaining 3,000 tons on order. In rejecting Nobs Chemical's argument, the Fifth Circuit found that, because Nobs Chemical never acquired the goods from its Brazilian supplier, an action for the purchase price on resale was unavailable.[41]

As to the claim for $75,000.00 in consequential damages for the loss of a $25.00 per ton 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" and reiterated that §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 basic philosophy "that the aggrieved party may be put in as good a position as if the other party had fully performed," and affirmed the application of the profit formula, which awarded Nobs Chemical a total $95,000.00, the difference between the contract price ($540,000.00) and Nobs Chemical's costs ($445,000.00).[43]

Buyer's Remedies

When a seller fails to make delivery or repudiates, or the buyer rightfully rejects or justifiably revokes

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acceptance, the buyer may cancel the contract, and in addition, "cover" by purchasing substitute goods and seek to recover the difference in price or damages for non-delivery.[44]

Cover damages are available when a buyer, in good faith and without reasonable delay, makes a reasonable purchase of, or a contract to purchase goods in substitution for those due from seller.[45]

In *Louis Dreyfus Corp v JB Brown*,[46] plaintiff-buyer entered 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. Plaintiff-buyer learned in a phone call that defendant-seller had harvested all the soybeans and was over 20,000 bushels short, immediately purchased 20,000 bushels of soybeans $8.34 per bushel and the remainder for $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 for $23,821.60, which included $21,656.00 as 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 together with incidental and consequential damages, less the expenses saved in consequence of seller's breach.[48]

- Practice pointer. If the 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 may be used, making any proper allowance for the cost of transporting goods to or from such other place.[49] Evidence of a relevant price prevailing at a time or place other than the one described in Article 2 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.[50]

When a seller fails to make delivery or repudiates, or the buyer rightfully rejects or justifiably revokes acceptance, the buyer may cancel the contract, and in addition, "cover" by purchasing substitute goods and seek to recover the difference in price or damages for non-delivery.

With regard to accepted non-conforming goods, if the buyer provides notification of the breach to the seller within a reasonable time after discovery, then it 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.[51] Buyers that cover are also entitled to incidental or consequential damages, less the expenses saved in consequence of the seller's breach.[52]

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.[53]

Buyer's special damages are defined under §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"; and consequential damages include: (a) any 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) injury to person or property proximately resulting from any breach of warranty.[54]

In *SM 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 a hospital, contracted with defendant-seller for mixed concrete that was to test to a compressive strength of 3,000 pounds per square inch. On visual inspection, the buyer's superintendent refused to accept the first delivery of concrete, which 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 was abrading or peeling, plaintiff-buyer performed core sampling tests and found that nine of ten samples averaged a compressive strength of 2,400 pounds per square inch. Plaintiff-buyer performed two load tests, the second of which proved the strength of the slab was satisfactory for use in the project. Plaintiff-buyer notified defendant-seller and claimed

The measure of damages for breach of 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.

$14,588.10 in set offs for the costs of testing. In response, defendant seller ceased further shipments of concrete. Plaintiff-buyer was then required to buy concrete from another source at an added expense of $1,278.96.

Finding that plaintiff-buyer decided to leave the concrete in place instead of removing it, the *Reeves* Court held that "plaintiff neither rejected the concrete nor revoked its acceptance under the Code."[56] Applying §2-714, the court ultimately found that the notice of defect during the time of compression testing was timely and upheld the trial court's award of $14,588.10 for the costs of testing as incidental damages. Additionally, the court found the cost of obtaining additional concrete after defendant's refusal to deliver the amount contracted for was a reasonable cost of "cover" because it exceeded the contract price.[57]

The measure of damages for breach of 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.[58] For example, in *General Supply & Equip Co. v Phillips*,[59] Phillips sued General Supply and Equipment Company, Inc. on a contract for PVC paneling used to cover greenhouses, alleging that the product was warranted to last for five to seven years. Within three years the panels darkened and reduced the amount of sunlight entering the greenhouses, resulting in the loss of plants and the greenhouse business. The *Phillip's* court found that no damage was done to the greenhouse structures and that the correct measure of damage for breach of warranty was the cost of replacing the defective paneling with equal quality as that represented by the seller, less the salvage value.[60]

Conclusion

While the 2003 Amendments to Article 2 are still on the horizon for adoption by most state jurisdictions, counsel should be aware that substantial changes could lead to increased litigation and higher damage claims. The fundamentals of UCC-based litigation will remain the same. Quick identification of the threshold issues and operative facts can assist counsel with strategies for early motion practice, better containment of damages, and more effective case management.

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Endnotes

1. §1-102(1).
2. While the NCCUSL and the ALI have approved the 2003 Amendments to Article 2, this article recognizes that the pre-amended form as the common denominator to most state-based jurisdictions.
3. §1-102.
4. §2-105(1).
5. §2-107.
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 (1981) at §2.
7. *BMC Industries, Inc v Barth Industries, Inc*, 160 F3d 1322, 1329-30 (11th Cir 1998) (internal citations omitted).
8. *Id*. at 1330.
9. *Id*.
10. 233 Ga App 252; 504 SE2d 70 (1998).
11. *Id*. at 255-56.
12. *Id* at 256.
13. §2-725(1).
14. §2-725(2).
15. In evaluating a potential motion on the pleadings, counsel should be aware that the UCC recognizes that supplementary

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general principles of law remain applicable. Unless displaced by the particular provisions of the UCC, the principles of law and equity, including the law merchant 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 §1-103.

16. *Neibarger v Universal Cooperatives, Inc,* 439 Mich 512, 521; 486 NW2d 612 (1992) (citations omitted).
17. *Neibarger* at 528-29.
18. 231 Mich App 40; 585 NW2d 314 (1988).
19. *Id*. at 317.
20. *Id*.
21. See §2-313A and §2-313B.
22. §2-204 (emphasis added).
23. §2-201.
24. §2-201.
25. §1-201(11).
26. §1-201(3).
27. §2-610.
28. §2-610 comment 1 (2000).
29. §2-601.
30. §2-602.
31. 223 AD2d 779 (1996).
32. *Id*. at 781.
33. §1-106 (emphasis added).
34. See §2-710.
35. §2-607(1).
36. §2-607(2).
37. §2-607(4).
38. §2-706.
39. §2-710.
40. 616 F2d 212 (5th Cir. 1990).
41. *Id*. at 215.
42. *Id*. at 216.
43. 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, 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 contacting 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 $25.00 per ton supplier discount, then it could claim entitlement to such damages as a matter of law.
44. §2-711.
45. §2-712.
46. 709 F2d 898 (5th Cir. 1983).
47. *Id*. at 901.
48. §2-713.
49. See §2-723(2).
50. §2-723(3).
51. §2-714(1).
52. §2-712.
53. §2-717.
54. §2-715(2).
55. 39 Ill App 3d 353; 350 NE2d 321 (1976).
56. *Id*. at 357.
57. *Id*. at 358.
58. §2-714(2).
59. 490 SW2d 913 (1972).
60. *Id*. at 920.