CHAPTER 4

THE UNIFORM COMMERCIAL CODE SALE OF GOODS

WHAT IS THE UNIFORM COMMERCIAL CODE (UCC)?

A look at the Uniform Commercial Code (UCC) Table of Contents tells us that this subject is very broad. No lawyer, business person or college professor knows all of the Uniform Commercial Code. In fact, court opinions interpreting the UCC could fill rooms.

This chapter will not attempt to discuss the entire UCC or even the entire Sale of Goods article. Rather, this chapter will include a brief discussion of the UCC, generally speaking. We will then highlight parts of UCC Article 2 on the Sale of Goods that are likely to impact a supplier or purchaser of construction materials. Another chapter of this book will discuss UCC Article 9 on Secured Transactions. These chapters will give you an idea of some of the issues covered by the UCC but should not be relied on to solve any particular problem.

As the name implies, the UCC is *uniform*, it concerns *commercial* transactions, and it is a *code*.

Code

The Uniform Commercial Code (UCC) is a "code" or a "collection of statutes." This is the type of law that may be adopted by all U.S. legislatures, including the U.S. Congress, the Virginia General Assembly, other state legislatures, and even a county board of supervisors. Codes are intended by the legislature to create new law in the targeted subject areas.

The other source of law is "case law" or "common law." For centuries, courts have been in the business of resolving disputes. When a court resolves a particular dispute, the record of this decision is case law, which may be used as authority in a future case. In future disputes, litigants may argue that their case is similar to a prior case and that the prior case law should be followed.

Often, to resolve a dispute, a court must interpret the "statutes" or codes created by the legislature. It is often difficult to determine how a statute or code should be applied to a particular fact situation. The law is usually written broadly so that it may be applied judicially. Courts must "fill in" the gaps in the statute.

An "Official Comment from the drafters of the Uniform Commercial Code" follows each UCC code section. The official comments explain the intent behind each code section and provide examples of appropriate factual situations. Most state legislatures also add a state comment describing how the new Uniform Commercial Code changed the law in that state. These official comments also fill in the gaps in the UCC and help courts, lawyers and business people better understand the UCC.

Commercial

The UCC concerns a wide variety of commercial issues, including the sale of goods, banking and security interests. The UCC does not apply to:

1. The sale of real estate
2. Security interests or liens in real estate
3. Service agreements or employment contracts
4. Contracts involving significant labor
5. Marriage settlements or other domestic relations law.

The table of contents tells us that the UCC covers the following:

Article 1: General Provisions. Provides application of the UCC, subject matter and general definitions.
Article 2: Sales. Covers the sale of goods. This will be discussed in some detail here.
Article 2.A: Leases. Covers the lease of goods.
Article 3: Commercial Paper. Negotiable instruments such as promissory notes and bank checks.

Article 4: Bank Deposits and Collections. Covers the relationship between banks as they pass bank checks, deposits and credits among them.
Article 4.A: Funds Transfers. Covers modern electronic funds transfers.
Article 5: Letters of Credit. Covers letters of credit issued by banks, usually used by business people to guarantee payment of obligations.
Article 6: Bulk Transfers. Concerns the "bulk transfer" of all of a business' inventory.
Article 7: Warehouse receipts, Bills of Lading and other documents of title. Covers these documents used in large wholesale transactions concerning the ownership and risk of loss of goods.
Article 8: Investment Securities. Concerns the regulation of investment securities.
Article 9: Secured Transactions. Covers security interests in all types of personal property, including accounts receivable, equipment and inventory. This will be discussed in some detail later.

Uniform

The UCC was intended as a Uniform Model Code that might be adopted by every state legislature. Prior to the UCC, each state legislature created its own commercial transaction code. The laws in different states could vary widely. As the nation's economy matured, interstate commerce became increasingly important. The variations in state law became a tremendous problem for businesses and banks dealing across state lines.

Many business people, lawmakers and academics saw a need for a uniform set of laws covering commercial transactions to facilitate interstate commerce. This would promote interstate commerce, create more comfort and security for interstate business transactions, increase competition and lower costs. A national conference of lawmakers, lawyers and college professors worked for years studying the various commercial laws of the 50 states, debating the pros and cons of these variations and drafting what they viewed as the best "Uniform Commercial Code."

This process has continued for decades. New articles are added over time, and specific sections of existing articles are revised.

The "Uniform Commercial Code" is a model. It is not law in any state unless and until a state legislature adopts it as the law of that state. Any state can decide not to adopt the UCC or can decide to make revisions to the code that satisfies that state's particular heritage or commercial needs. Accordingly, the UCC is not entirely uniform in all 50 states. Also, each state's court system can reach different results when interpreting the code provisions. Business people cannot assume, therefore, that the law will be exactly the same in each state. Nonetheless, the UCC has facilitated much greater uniformity of commercial laws.

UCC law, therefore, is derived from three places:

1. The actual UCC statute passed by the state legislature
2. The official comment to the statute
3. Case law that interprets the statute.

For the purposes of this discussion, we will refer to the Uniform Commercial Code sections in the Model Code. Code section text and numbers in each state will be identical or very similar. Uniform Commercial Code Article II, Section 305 (2-305), for example, is Virginia Code 8.2-305, New York Code Section 2-305 and Pennsylvania Code Section 2305.

Keep in mind that the UCC law can vary from state to state. This discussion is based generally on the Virginia, Maryland and Pennsylvania Uniform Commercial Code provisions. Fortunately, if you understand the Uniform Commercial Code in one state, you *probably* understand it in all states. This discussion is also a very brief and general attempt to give you some idea of how a few of the UCC code sections work. As usual, however, you should not rely on any portion of this book to provide you with a legal solution to any specific problem.

INTRODUCTION TO UCC ARTICLE 2 (SALE OF GOODS)

The Uniform Commercial Code Article 2 on the Sale of Goods is basically a codification of existing commercial law. The UCC drafters tried to write down the generally understood business practices between merchants for the sale of goods. The UCC "fills in the gaps," providing controlling contract terms where the contracting merchants either didn't agree or just forgot to discuss the matter. In many commercial transactions, the buyer and seller only

discuss how many goods, how much to pay, and perhaps when delivery or payment is due. It is only later, after problems arise, that merchants will also discuss or argue about many more specific terms such as: "Where will the goods be delivered?" or "Is the buyer under any obligation if the goods are slightly defective?" The UCC answers most of these questions by basically providing the parties with a "50-page fine print contract," whether they know it or not.

The parties are almost always allowed to "contract out of the UCC." If the merchants do discuss and agree to terms different from the UCC, then the parties' own terms will apply.

The UCC takes a very pragmatic and common sense approach to commercial transactions. It is usually not precise and does not provide exact rules. Many flexible terms are used, such as "reasonable" or "standards in the industry" or "commonly accepted practice." This can be frustrating in that the answers to a dispute are not always clear. A buyer can still argue about whether a seller took a "reasonable" approach. However, these terms do allow flexible and common sense solutions to practical problems.

The UCC has a philosophy of elastic performance to try and keep deals together. This philosophy frowns upon an "all or nothing" approach. The parties have to work together to keep things moving. For example, a buyer is generally not relieved of any further obligation if there are defects or delays in some deliveries. The seller will have a right to "cure" defects and continue deliveries. The buyer may be entitled to a credit for damages from the defects or delay, but the buyer must continue to take deliveries.

Definitions

Merchants

Some UCC rules apply only to "merchants" or transactions "between merchants."[1] The UCC often holds parties to "commonly accepted practices" or "industry standards." Only persons familiar with this business should be held to these standards. Ordinary household consumers, for example, don't know the industry standards and would be vulnerable to a merchant with more experience. Experienced merchants are held to a higher standard, therefore, than ordinary consumers.

A "merchant" is a person who: (1) deals in goods of the type in question; (2) holds themselves out as having particular knowledge or skill with goods of this type; or (3) is using a broker, agent or intermediary who holds themselves out as having particular knowledge or skill in this type of goods.[2]

Most construction material buyers and sellers will be merchants for transactions in the ordinary course of their business. A lumberyard will definitely be a merchant for transactions in lumber, although it may not be a merchant in a transaction involving the purchase of a new computer accounting system. A carpentry subcontractor would also be a merchant for the transaction involving the purchase of lumber. This is something that the carpentry subcontractor does on a regular basis and in which the carpentry subcontractor has experience, knowledge and skill.

Note that you can be held to the higher standard of a merchant, even if you do not actually have special knowledge or skill.[3] First, if you "hold yourself out as an expert," other people may assume that you are. If a brand new carpentry subcontractor talks big to the lumberyard, he cannot later claim that he did not know the standards in the industry. Secondly, many businesses use expert brokers or agents to help them. It is a good idea to hire an expert to bring knowledge and skill to a transaction, but it will mean that the merchant rules will apply to the transaction.[4] Buyers and sellers should choose their brokers carefully for this reason.

When a small lumberyard purchases its first computer accounting system, the computer seller is an experienced merchant in computers, but the lumberyard is not. The computer seller will be held to the higher merchant standard but not the lumberyard. In the lumber transaction described above, both the lumberyard and the carpentry subcontractor are merchants, which will mean that more UCC provisions will apply to the transaction.

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1 UCC Section 2-104.
2 UCC Section 2-104(1).
3 UCC Section 2-104(1).
4 UCC Section 2-104(1).

Goods

Goods are "all things which are moveable."[5] Lumber, asphalt, concrete, computers, trucks and gift shop greeting cards are all goods. UCC Article 2 applies to the sale of all such "goods." Note that goods can include items that are now attached to real estate but can later be "severed" or removed from the real estate.[6] This includes stone, sand and timber, as well as agricultural crops like corn.

The UCC does not apply to any transaction to buy or sell the real estate itself. More importantly, Article 2 does not cover any service contract like an employment contract for a salesperson.[7] The UCC also does not apply if labor is a "significant part" of a contract. A contract for the sale of lumber is definitely a sale of goods, and Article 2 applies. A contract for carpentry labor only, where the owner is supplying the material, is definitely a service contract, and Article 2 will not apply.

Many construction contracts are in the "gray area," where it is hard to tell whether the UCC applies.[8] For example, in a typical carpentry subcontract for labor and materials, the labor is a "significant part" of the contract and Article 2 will not apply. Mere delivery and unloading of materials are probably not "significant labor." Many truck drivers essentially "install" stone, however, by spreading the stone evenly over a road when they deliver it. Is this enough to make it a labor and materials contract? What about ready mix concrete? In a way, concrete is material delivered to the site the same way as lumber. What if the batch plant is on site, however, and the ready mix contractor has a supervisor and six other employees on site at all times? Many such transactions are in gray areas, and it is not clear whether the UCC applies.

FORMATION AND MODIFICATION OF CONTRACT

When Do You Have a Contract?

Think about how contracts are formed in real life. You have letters and telephone conversations. Material suppliers send offers, proposals and quotes. Contractors send purchase orders. These documents go by electronic mail, regular mail and facsimile machine. Sometimes the parties never write anything down and instead deal "on a hand shake." How do you know when you are bound to a contract? This is the issue of "contract formation."

Some contracts go on for years, with monthly deliveries of materials. Can the terms of this contract change over time? Prices rise. Methods of delivery change. Material specifications change slightly. Are you bound to these changes? This is the issue of "contract modification."

To determine what specific terms or provisions are in a contract, the agreement must be "interpreted." This is discussed in another section of this chapter, Contract Interpretation.

Hypotheticals

Contract Creation—Hypothetical #1: A contractor calls a lumberyard and asks, "What do you want for spruce 2x4 studs?" The salesperson answers, "$1.79 a piece." The contractor asks, "Do you have 2,000?" The salesperson answers, "Yes."

Do the contractor and lumberyard have a contract? Is the lumberyard bound to sell 2,000 studs at $1.79 a piece? Is the contractor bound to buy? Why or why not?

Contract Creation—Hypothetical #2: The carpentry contractor calls and requests a price for 2,000 spruce 2x4 studs. The lumber salesperson responds, "That would be $3,580." The contractor says, "OK, that is a deal, please deliver them tomorrow." The salesperson responds, "No problem." Later in the day, the salesperson discovers that all 2x4 studs have been committed to other purchasers and none will be available for at least 30 days. The salesperson calls back within one hour of the earlier conversation and informs the contractor that they will not be able to deliver.

Do these parties have binding contract? What if the contractor had requested 200 studs instead of 2,000?

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[5] UCC Section 2-105(1); *Ritz-Craft Corp. v. Stanford Management Group*, 800 F. Supp. 1312, 1317 (D. Md. 1992) [a mobile home falls within the definition of "movable goods" and that the UCC applied].

[6] UCC Section 2-105(1); UCC Section 2-107.

[7] UCC Section 2-102.

[8] *Burton v. Artery Co.,* 279 Md. 94, 367 A.2d 935 (1977) [UCC applied where seller sold and placed trees, shrubs, and sod]; 139 *Riverview, LLC v. Quaker Window Products*, 90 Va. Cir. 74 (Norfolk Cir. Ct. 2015) [UCC applied to the sale of windows installed, *citing Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 148, 501 S.E.2d 393 (1998)].

Contract Creation—Hypothetical #3: The contractor calls the lumberyard and requests a price on 2,000 spruce 2x4 studs. The lumber salesperson faxes the contractor an offer of 2,000 studs for $3,580. The contractor writes the word "Accepted" across the face of the offer, signs it and faxes it back to the lumberyard.

Do these parties have a contract? Is each bound? The lumberyard discovers that afternoon that it has already committed all spruce studs available and tells the contractor that it cannot deliver. Is the lumberyard liable for damages? The lumberyard asserts that there was no contract because no time or place for delivery was agreed, no credit or payment terms were agreed, and there was no agreement on the quality of the studs to be delivered. Does this matter? Does this mean there is no binding contract?

If the contractor now has to pay $1.99 per stud for a total of $3,980, is the seller liable for damages? How much?

Contract Creation

Once an offer has been made and accepted, the parties have a binding contract. In order to have a contract, "consideration must flow both ways." Consideration is any thing of value. When a lumberyard offers to sell 2,000 spruce studs at $1.79 a piece, this promise is worth something. When the contractor promises to pay for the 2,000 studs when delivered, this promise is also worth something. Consideration is flowing both ways. The parties have a contract.

Under the UCC, an offer can be accepted in "any medium and manner, which is reasonable."[9] Sending a response letter is usually a reasonable manner of accepting an offer. Simple performance may also be enough.[10] If a contractor says he will take 2,000 studs if the supplier can provide them tomorrow, it may not be necessary for the lumberyard to send a return letter. Rather, it can accept by performance. If the delivery truck simply appears at the contractor's yard the next day with 2,000 studs, there has probably been an offer and a reasonable manner of acceptance. There is a binding contract.

Firm Offers

When a *merchant* submits an offer in writing to buy or sell goods, the offer is open for a "reasonable" time.[11] This means there will be a binding contract if a contractor accepts a material supplier's firm offer (offer) within a reasonable time, even though the supplier has not promised to keep the offer open for any particular time.

What is a "reasonable" time depends on the circumstances and the knowledge each party has of the other's circumstances.[12]

A material supplier or buyer could put a time limit on any offer.[13] This would mean that they "contracted out" of the UCC provision by making an explicit time limit term. The UCC provision on "firm offers" is only to "fill in the blank," if neither the buyer nor the seller discuss the time limit on any offer.[14]

Suppose a contractor sends a written request for proposals, stating in its fine print that "all proposals must be kept open for 30 days." This could be a problem. That provision must be "separately signed" by the material supplier to be binding.[15]

There is also a problem with holding open any offer more than three months. An agreement to keep an offer open more than three months is not binding unless "supported by consideration."[16] This means, basically, that there must be an agreement of some type. Remember that a firm offer is only an offer going one way, which has not yet been accepted. If a promise is made in exchange for the offer or a payment is made to keep the offer open, then there is "consideration" and the offer can be kept open longer than three months. This would be an "option contract," in which one party is paying to keep an offer open for an extended period of time. A contractor may pay a premium price for one load of wood, in order to get a guaranty of future deliveries at the same price. The contractor has paid for this option, and the firm offer will be open more than three months.

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[9] UCC Section 2-206(a).
[10] UCC Section 2-206(1)(b).
[11] UCC Section 2-205.
[12] UCC Section 2-206(2).
[13] UCC Section 2-205.
[14] UCC Section 2-205.
[15] UCC Section 2-205.
[16] UCC Section 2-205, Official Comment 3.

Based on this UCC provision, the written offer in Contract Creation—Hypothetical #3 was a "firm offer," which the contractor accepted within a reasonable time by writing "Accepted" across the front and faxing it back to the lumberyard. These parties had a binding contract.

Essential Parts of a Contract

The Uniform Commercial Code takes a very elastic, practical and common sense approach to contracts for the sale of goods:[17] Many contracts can be oral; written agreements do not have to say "Contract" across the top; and letters are often enforceable contracts. It is not necessary to have agreement on all terms.[18]

Terms Can Be Missing

The UCC will fill in these blanks. Even the price of the goods can be missing.[19] There will still be a binding contract if the parties never agree on a time for delivery, the manner of delivery, the place for delivery or the time that payment is due.[20] It is not even necessary to know exactly *when* a contract existed,[21] because it can develop over a series of conversations, letters or actions. All of these UCC "fill in the gap" provisions are discussed in greater detail under the Contract Interpretation section below.

In Contract Creation—Hypothetical #3 above, the lumberyard faxed an offer for 2,000 2x4 studs for a price of $3,580. The buyer approved the offer and sent it back. These parties had an enforceable contract, even though they had not agreed to a delivery place or time and had not agreed on the payment or credit terms. The "fill in the blank" provisions of the UCC, discussed further in the Contract Interpretation section, tells us that delivery will be at the seller's place of business within a reasonable time, unless otherwise agreed.[22] Payment is due before the seller is obligated to deliver the goods unless otherwise agreed.[23] And, even though they had not discussed material quality or specifications, the seller provided an implied "warranty of merchantability with the sale."[24] This means that the seller warranted that the 2x4's would be of sufficient quality to pass without objection in the trade and would be fit for their ordinary purposes.[25]

Essential Elements

It is essential only that both parties intend that they be bound, and the agreement must be clear enough for a court to fashion a remedy for breach of the contract.[26] Accordingly, in Contract Creation—Hypothetical #1 above, there was no contract. When the contractor asked and was provided information on the price and availability of spruce 2x4 studs, neither the contractor nor the lumberyard intended to make a contract. They intended to request and provide information. There was no "meeting of the minds," and there was no contract.

What if a contractor told a supplier, "I promise I will do business with your supply house some day?" The contractor may make such a promise in writing and may intend to be bound. He may have made the promise in exchange for some price reduction on an earlier delivery. In this case, there would be an intention to be bound and consideration for the promise to "do more business someday." This would *not* be an enforceable contract for the sale of goods, however, because the agreement is not sufficiently clear for a court to fashion a remedy.[27] A court would have no idea what materials the contractor was promising to purchase, when, or the price to be paid. This is simply too indefinite to be enforced.

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[17] UCC Section 2-204(1).
[18] UCC Section 2-204(2).
[19] UCC Section 2-305(1).
[20] UCC Section 2-311(1).
[21] UCC Section 2-204(2).
[22] UCC Section 2-308(a); UCC Section 2-309(1).
[23] UCC Section 2-310(a).
[24] UCC Section 2-314(1); *See* section below, Warranties.
[25] UCC Section 2-314(2)(c); *See* section below, Warranties.
[26] UCC Section 2-204; *Flowers Baking Co. v. R-P Packaging, Inc.*, 229 Va. 370, 329 S.E.2d 462 (1985).
[27] UCC Section 2-204(3).

When a Writing is Necessary

Any contract for the sale of goods with a price of $500 or more will not be enforceable 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."[28] This is known as the Statute of Frauds.

This "writing" is not necessarily a formal contract.[29] A letter or handwritten note is sufficient. There just needs to be something written, in addition to verbal conversations, and the writing must be "signed" by the other party.[30] The concept of "signature" is also broad. A formal signature is definitely not necessary.[31] Initials, a stamp, an electronic mail signature,[32] or probably even the identifying marks made by a fax machine are sufficient. The writing would still be sufficient if it omits or incorrectly states some of the terms.[33]

In Contract Creation—Hypothetical #2, the contractor and lumberyard made a verbal agreement for the purchase of $3,580 in spruce 2x4 studs. This agreement would not be enforceable, and the lumberyard would not be able to sue for damages. A verbal agreement for 200 studs for $364, however, would be enforceable since it is under the $500 threshold.

Exceptions

There are some exceptions to the Statute of Frauds and no writing is required if: (1) the seller had to specially manufacture the goods, (2) both parties admit that a contract for sale was made, (3) the goods have already been delivered and accepted, or (4) payment has already been made and accepted for the goods.[34]

Written Confirmation

As another exception to the Statute of Frauds, the Uniform Commercial Code added a new feature designed to grease the wheels of commerce. After a verbal agreement is made either a buyer or seller can prepare and send a "confirmation" of the contract.[35] If the confirmation is sent between merchants, the party receiving the confirmation can be bound to it, unless they send written notice of objection within 10 days of receipt.[36] This means that buyers and sellers must read their mail and send return letters (or at least handwritten objections) if they believe mail received does not accurately describe agreements made. There are other places in the UCC where merchants can lose contract rights if they fail to read and respond to mail from other merchants.[37]

In Contract Creation—Hypothetical #2, the contractor could not enforce the agreement to sell 2,000 spruce 2x4's for $3,580 because there was no writing satisfying the Statute of Frauds. If the contractor had sent a letter confirming their agreement, and the lumberyard did not object within 10 days, this confirmation would have served as the necessary writing and the agreement would have been enforceable.

Battle of the Forms

Let's think again about the way modern commerce works. Material suppliers mail or fax offers. Contractors send back purchase orders. Both offers and purchase orders often have detailed "fine print." The fine print terms on the offer often conflict with the fine print terms on the purchase order. What provisions are in the final contract?

Contract on Base Terms

The first thing to remember is that these parties have a contract on the terms on which there is agreement.[38] It doesn't matter that some terms are missing or in complete conflict.[39]

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[28] UCC Section 2-201(1).

[29] UCC Section 2-201(1); *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276 (4th Cir.), cert. denied, 484 U.S. 823, 108 S. Ct. 86 (1987).

[30] UCC Section 2-201(1); *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276 (4th Cir.), cert. denied, 484 U.S. 823, 108 S. Ct. 86 (1987).

[31] UCC Section 2-201, Official Comment 1.

[32] *Lamle v. Mattel, Inc.,* 394 F.3d 1355, 1362 (Fed. Cir. 2005) [name on an email is a valid writing and signature to satisfy the Statute of Frauds]; Va. Code Anno. §59.1-485 (Michie 1950); Maryland Commercial Law Code Section 21-106; DC Code Section 28-4906.

[33] UCC Section 2-201(1).

[34] UCC Section 2-201(3).

[35] UCC Section 2-207(1).

[36] UCC Section 2-207(2)(c).

[37] *See* section below, Battle of the Forms.

[38] UCC Section 2-207(3).

[39] UCC Section 2-204(3).

Most states have adopted some form of the Uniform Electronic Transactions Act.[40] These laws give legally binding effect to transactions conducted entirely by electronic means. However, these laws usually apply only where parties have agreed to conduct transactions electronically.[41] The official comments to the UETA do discuss agreements to buy and sell goods, purchase orders or other sales contracts, so these agreements are almost certainly covered by the UETA and electronic signatures are enforceable. Most state UETA statutes apply to their Uniform Commercial Code Article 2 on the Sale of Goods. For more information, see the chapter, Contract Terms and Preserving Rights; section, Electronic Transactions, Copies and Facsimiles.

Firm Offers and Price Quotes

In order to have an enforceable contract, there must be an "offer" that has been accepted. It can be important in establishing the terms of the contract whether the buyer or seller made the initial offer. The terms of the offer will be the contract, if the offer is accepted.[42] Once an initial offer is made, the recipient must object to terms in the offer or those terms will be part of the contract. Additional or different terms in a response do not become a part of the contract if there is an objection *or* if those additional or different terms "materially alter" the agreement.[43] Accordingly, it is easier to establish terms in an initial offer. It is more difficult to change terms through a response.[44] The party that sent the initial offer has an advantage in this respect. All buyers and sellers would prefer to "fire the first shot" in the Battle of the Forms by making the first firm offer.

It is sometimes difficult to tell whether a correspondence is a firm offer or simply conversation. An offer must be sufficiently detailed regarding the product, quantity and price so that an acceptance would result in an enforceable contract.[45]

There does seem to be some prejudice in the courts against seller quotes as firm offers. Generally, price quotes are not considered offers, but rather a "mere invitation to enter into negotiations."[46] It is the submission of a purchase order by a buyer that is generally viewed as an offer, which may then be accepted or rejected by the seller.[47] Sellers should be particularly careful to include all important terms in proposals and make it clear the documents are an "offer" that can be accepted by acknowledgment or calling for delivery.[48]

A seller should either sign the offer or make sure there is no signature line for the seller.[49] An offer should not state that all orders are subject to review and acceptance at seller's place of business, as this would mean that there was no offer ready for acceptance.[50] A seller can overcome the prejudice against seller offers by making sure an offer is clearly expressed and ready for acceptance.[51]

Responses and Confirmations

When the second party (buyer or seller) sends the return document (which is definitely accepting or confirming an agreement), the parties will have a contract even though the confirmation contains provisions adding to or differing from the original offer.[52]

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[40] *See* chapter, Contract Terms and Preserving Rights; section, Electronic Transactions, Copies and Facsimiles; Va. Code Anno. §59.1-485 (Michie 1950); Maryland Commercial Law Code Section 21-106; 73 P.S. §2260.101; 73 P.S. §2260; DC Code Section 28-4906.

[41] *See e.g.,* Va. Code Anno. §59.1-486 (Michie 1950).

[42] *Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc.*, 814 A.2d 217 (Pa. Super. Ct. 2002).

[43] *See* subsection below, Responses and Confirmations.

[44] *Kraft Foods N. Am., Inc. v. Banner Eng'g & Sales, Inc*., 446 F. Supp. 2d 551(E.D. Va. 2006); *USEMCO, Inc. v. Marbro Co., Inc.,* 483 A.2d 88, 60 Md.App. 351 (1984).

[45] *Reilly Foam Corp. v. Rubbermaid Corp.*, 206 F.Supp.2d 643, 650 (E.D. PA 2002).

[46] *Kraft Foods N. Am., Inc. v. Banner Eng'g & Sales, Inc*., 446 F. Supp. 2d 551, 579 (E.D. Va. 2006); *USEMCO, Inc. v. Marbro Co., Inc.,* 483 A.2d 88, 93, 60 Md.App. 351 (1984); *Reilly Foam Corp. v. Rubbermaid Corp.*, 206 F.Supp.2d 643, 650 (E.D. PA 2002).

[47] *J. B. Moore Elec. Contractor, Inc. v. Westinghouse Elec. Supply Co*., 221 Va. 745, 748, 273 S.E.2d 553 (1981).

[48] *Kraft Foods N. Am., Inc. v. Banner Eng'g & Sales, Inc*., 446 F. Supp. 2d 551, 579 (E.D. Va. 2006).

[49] *J. B Moore Elec. Contractor, Inc. v. Westinghouse Electrical Supply Co.*, 221 Va. 745, 273 S.E.2d 553 (1981).

[50] *Kraft Foods N. Am., Inc. v. Banner Eng'g & Sales, Inc*., 446 F. Supp. 2d 551, 569-70 (E.D. Va. 2006); *but see J. B. Moore Elec. Contractor, Inc. v. Westinghouse Electrical Supply Co.*, 221 Va. 745, 747-48, 273 S.E.2d 553 (1981).

[51] *J. B. Moore Elec. Contractor, Inc. v. Westinghouse Elec. Supply Co*., 221 Va. 745, 273 S.E.2d 553 (1981); *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 369 A.2d 1017 (1977); *Reilly Foam Corp. v. Rubbermaid Corp.*, 206 F.Supp.2d 643, 650 (E.D. PA 2002); *Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc.*, 814 A.2d 217 (Pa. Super. Ct. 2002).

[52] UCC Section 2-207(1).

Under common law prior to the Uniform Commercial Code, the "mirror image" rule required that the buyer's acceptance be a mirror image of the seller's offer.[53] At common law, if the acceptance is not a mirror image of the offer, it rejects the initial offer and operates as a counteroffer. This is still the rule for most contract negotiations. If the contract involves the sale of goods, however, the Uniform Commercial Code controls.

The Uniform Commercial Code rejects the mirror image rule and converts a common law counteroffer into an acceptance even if it states additional or different terms."[54] The UCC states:

> A definite and seasonal expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.[55]

This means that if there is a timely response to an offer that indicates an acceptance, the parties have a contract even if the response has additional or different terms than the offer. In a response, there is a difference between "additional" terms (that add some new term to the offer) and "different" terms (that conflict with a term in the offer).

The UCC considers "additional terms" to be "proposals for addition to the contract."[56] If the transaction is *between merchants*, these additional terms will become a part of the contract unless the additional provisions: (1) "materially alter" the agreement, (2) the other party objects to the new terms or (3) the original offer was expressly limited to the terms of the offer.[57] The UCC states that:

> The additional terms are to be construed as proposals for additions to the contract. Between merchants, such terms become part of the contract unless:
>
> a) the offer expressly limits acceptance to the terms of the offer;
> b) they materially alter it; or
> c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.[58]

Courts have disagreed on the fate of "different" terms that conflict with terms in the offer. Some courts follow the same rule as for additional terms and the different terms become a part of the contract if there is no objection.[59] The majority view, however, is the "knock out" rule."[60] The conflicting terms in the offer and acceptance knock each other out, so that neither is in the contract. The UCC filler terms, discussed below, are used to fill in the gaps.[61] The contract would be the terms agreed by the parties, which would be the terms in the offer and acceptance that do not conflict, plus the contract terms added by the UCC.

It is important to join the "Battle of the Forms" within the meaning of the UCC. It is not enough to respond with a confirmation that is silent about the terms in an offer. The recipient must expressly reject or object to any objectionable terms of sale or propose different terms.[62] Sending purchase orders that only acknowledge the material and pricing, but were otherwise silent, certainly constitutes an acceptance of a supplier's proposal and cannot be a "counteroffer" proposing a sale with no terms. Simply telephoning a supplier and verbally requesting shipment of materials, as often happens, also constitutes an acceptance of a supplier's proposal and would not be a counteroffer.[63]

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[53] James J. White & Robert S. Summers, *Uniform Commercial Code*, §1-3 (5th ed. 2000).

[54] *Idaho Power Co. v. Westinghouse Electric Corp.,* 596 F.2d 924, 926 (9th Cir. 1979).

[55] UCC Section 2-207(1).

[56] UCC Section 2-207(2).

[57] UCC Section 2-207(2).

[58] UCC Section 2-207(2).

[59] UCC Section 2-207, Official Comment 3; *Boese–Hilburn Co. v. Dean Mach. Co.,* 616 S.W.2d 520, 527 (Mo.Ct.App.1981).

[60] UCC Section 2-207, Official Comment 6; *Flender Corp. v. Tippins Int'l, Inc.*, 830 A.2d 1279 (Pa. Super. Ct. 2003); *Reilly Foam Corp. v. Rubbermaid Corp.*, 206 F.Supp.2d 643, 653-54 (E.D. PA 2002). There are apparently no Virginia or Maryland cases currently that rule on this issue.

[61] *See* subsection below, Contract Terms Added by the UCC.

[62] UCC Section 2-207.

[63] UCC Section 2-207(1).

Even terms limiting the seller's liability may be included in an initial offer and will become a part of the contract unless the buyer expressly objects.[64]

A response or confirmation can be made conditional on an agreement to the additional or different terms. A buyer could respond to an offer by stating "I will agree to this only if you agree to remove your limitations of liability and extend your payment terms to 90 days." This would not be an acceptance.[65] This is a counteroffer and there is no contract unless the additional or different terms are accepted.[66]

If additional or different terms are added in a response or confirmation (and the response or confirmation is not made conditional on an agreement to the additional or different terms), it becomes relevant whether the additional or different terms were "material." Lawyers can spend a long time and a lot of your money arguing about whether the additional provisions "materially altered" the contract. This exception is possible protection if a return purchase order has a very important and costly provision in the fine print. It is normally better and easier, however, to limit acceptance of an offer and object to any new terms added later.

Terms that would not be material alterations in a response or confirmation would include provisions for reasonable interest on unpaid invoices, limiting remedies for delays outside the seller's control, or a clause fixing a reasonable time for complaints.[67] Courts have held that addition of an attorney's fee provision is a material alteration.[68] An indemnification clause[69] or a "no damage for delay" clause[70] would materially alter the terms of an agreement. If the offer had included warranties, then a confirmation containing a disclaimer of warranties and limitation of remedies would "materially alter" the agreement.[71] On the other hand, if the offer had excluded warranties, then a confirmation adding warranties would "materially alter" the agreement.[72] This difference exemplifies the importance of making the first firm offer.

Conclusions on Battle of the Forms

It is important to both buyers and sellers to be the first to make a firm offer. It is easier to establish terms in an offer, than to add different terms in a response acceptance or confirmation.[73] For example an offer to buy or sell can add warranty rights or limit remedies and warranty rights.[74] Once an offer has done either, however, a response or confirmation adding warranty rights or eliminating warranty rights would not be enforceable as a material alteration of the original offer.[75] As discussed below, it is also easier to limit acceptance of an offer than to make a response acceptance conditional. A signed agreement from the other party may be necessary, or is at least advisable, to change the terms of an offer. Accordingly, both buyers and sellers should endeavor to "fire the first shot" in the Battle of the

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[64] *Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc.*, 814 A.2d 217 (Pa. Super. Ct. 2002); *Idaho Power Co. v. Westinghouse Electric Corp.,* 596 F.2d 924, 926 (9th Cir. 1979) [Terms of the offer limiting seller's liability constituted terms of the agreement even though the purported acceptance omitted these terms].

[65] Courts differ on the exact wording required to make a response a counteroffer and not an acceptance. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 101-02 (3d Cir. 1991). Many courts hold that there is no counter offer unless the acceptance is *expressly* conditional on the *assent* to the terms in the response. The responder must clearly reveal an unwillingness to proceed with the transaction without assurance of assent to the different or additional terms. *Reaction Molding Technologies, Inc. v. General Elec. Co*., 588 F.Supp. 1280,1288 (E.D. Pa. 1984); *Egan Machinery Co. v. Mobil Chemical Co.,* 660 F.Supp. 35 (D. Conn. 1986).

[66] If the parties perform at this point, as if they had a contract, UCC Section 2-207(3) would apply, which states that: Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act. *See Deere & Co. v. Ohio Gear*, 462 F.3d 701 (7th Cir. 2006).

[67] UCC Section 2-207, Official Comment 5.

[68] *Herzog Oil Field Serv., Inc. v. Otto Torpedo Co.*, 570 A.2d 549 (Pa. Super. Ct. 1990); *Food Team Intern., Ltd. v. Unilink, LLC*, 872 F.Supp.2d 405, 421-22 (2012). These cases imply that a limited right to legal fees may not be material and UCC Section 2-207, Official Comment 5 states that a clause fixing the seller's standard credit terms where they are within the range of trade practice would not be material.

[69] *Trans-Aire International, Inc. v. Northern Adhesive Co.*, 882 F.2d 1254, 1263 (7th Cir. Ill. 1989).

[70] *USEMCO, Inc. v. Marbro Co., Inc.,* 60 Md.App. 351, 483 A.2d 88, 94-95(1984).

[71] *Valtrol, Inc. v. General Connectors Corp*., 884 F.2d 149,155 (4th Cir. S.C).

[72] *Valtrol, Inc. v. General Connectors Corp*., 884 F.2d 149,155 (4th Cir. S.C).

[73] *Egan Machinery Co. v. Mobil Chemical Co.,* 660 F.Supp. 35, 37-38 (D. Conn. 1986); *USEMCO, Inc. v. Marbro Co., Inc.,* 60 Md.App. 351, 483 A.2d 88 (1984).

[74] *Kraft Foods N. Am., Inc. v. Banner Eng'g & Sales, Inc*., 446 F. Supp. 2d 551(E.D. Va. 2006); *Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc.*, 814 A.2d 217 (Pa. Super. Ct. 2002).

[75] *USEMCO, Inc. v. Marbro Co., Inc.,* 60 Md.App. 351, 483 A.2d 88 (1984); *Valtrol, Inc. v. General Connectors Corp*., 884 F.2d 149 (4th Cir. S.C).

Forms. Make sure that your offer is clearly expressed as a definite offer to buy or sell, with enough detail regarding the goods and the price to be an enforceable contract and including strong terms of sale.

It is also always preferable to get a signed agreement, rather than depending on the Battle of the Forms to establish your terms. A signed agreement will eliminate much uncertainty and make it much harder for the other party to add or modify terms.[76]

The best advice is also to expressly limit acceptance of all proposals, offers, purchase orders or confirmations you send out. Offers sent out should state that "This proposal is subject to the terms and conditions on the reverse and any acceptance of this proposal shall be limited to the terms described in this proposal." This would make it more difficult for the return "acceptance" to change the terms of the agreement.[77]

Even if the initial offer limited acceptance to the terms of the offer, the other party could send a response or confirmation that expressly rejects the terms of the offer and states that any contract must be on the terms of the response. This is a "counteroffer," and you have no contract unless there is agreement to the changes.[78] If you ship or accept product at this point, however, you are taking a risk that your initial offer will not apply and that the response terms do apply.[79] This is another instance where it is important to read your mail and send written objections if you receive a confirmation that you believe does not accurately describe an agreement. A final signed agreement is also advisable to eliminate doubt regarding terms.

It is important to have good forms available for offers, proposals, purchase orders and confirmations. The provisions you have in the fine print of a firm offer will be a part of your contract, unless they are expressly rejected.[80] The fine print provisions in these documents involve a fairly small, one-time investment by you or your company, but can considerably reduce your risk and costs for years to come.[81]

The sample Supplier Proposal in the Appendices states:

> Acceptance is limited to terms of this Proposal. Seller objects to any different or additional terms contained in any purchase order, offer or confirmation sent or to be sent by Buyer, which are expressly rejected. The price offered will be held firm only if acknowledgment is received by Seller or Buyer calls for delivery within 30 days of this Proposal, either of which shall be an acceptance of all terms herein. This Proposal is conditional on Buyer's agreement to all terms and Seller is otherwise unwilling to proceed with this transaction. This is the final expression of this agreement and here will be no waiver or modification of any of these terms unless in writing signed by both parties. If Seller does expressly make any further agreement regarding these goods, all terms of this Proposal shall be incorporated into and shall become a part thereof.

If you are sending a return document or "confirmation," you have an opportunity to change or neutralize some of the harsh terms in the original offer you receive.[82] It is more difficult to add different terms in a response acceptance or confirmation, however, than it is to establish terms in an offer.[83] To effectively change terms, a response acceptance or confirmation must be expressly conditional on assent to those different terms. It is not enough to say that "acceptance is limited to the different terms and conditions."[84] A response acceptance or confirmation must clearly

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[76] *See sub-subsection below* End of the Battle of the Forms *and subsection below* Modification of Contracts; *J. B Moore Elec. Contractor, Inc. v. Westinghouse Electrical Supply Co.*, 221 Va. 745, 752-53, 273 S.E.2d 553 (1981); *Columbia Nitrogen Corp. v. Royster Co.,* 451 F.2d 3, 11-12 (4th Cir. 1971).

[77] UCC Section 2-207(2)(a).

[78] Courts differ on the exact wording required to make a response a counteroffer and not an acceptance. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 101-02 (3d Cir. 1991); *see* prior subsection on Responses and Confirmations.

[79] *See e.g., Kraft Foods N. Am., Inc. v. Banner Eng'g & Sales, Inc*., 446 F. Supp. 2d 551(E.D. Va. 2006); *but also see Deere & Co. v. Ohio Gear*, 462 F.3d 701, 707-08 (7th Cir. 2006) and UCC Section 20-07(3), stating that the contract would consist of the terms on which the parties agree and the UCC supplementary terms.

[80] *J.B. Moore Elec. Contractor, Inc. v. Westinghouse*, 221 Va. 745, 273 S.E.2d 553 (1981).

[81] *See* chapter, Contract Terms and Preserving Rights; section, Contractor and Supplier Contract Forms.

[82] UCC Section 2-207.

[83] *Kraft Foods N. Am., Inc. v. Banner Eng'g & Sales, Inc*., 446 F. Supp. 2d 551(E.D. Va. 2006); *USEMCO, Inc. v. Marbro Co., Inc.,* 483 A.2d 88, 60 Md.App. 351 (1984); *Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc.*, 814 A.2d 217 (Pa. Super. Ct. 2002); *Egan Machinery Co. v. Mobil Chemical Co.,* 660 F.Supp. 35, 37-38 (D. Conn. 1986).

[84] *Reaction Molding Technologies, Inc. v. General Elec. Co*., 588 F.Supp. 1280, 1288 (E.D. Pa.1984).

express an unwillingness to proceed with the transaction unless there is assurance of assent to the different terms.[85] It is advisable to both parties to get an actually signed contract at this point if it is important to know the terms of the final agreement.

A buyer purchase order should state something like:

> Acceptance is limited to terms of this Purchase Order. Buyer objects to any different or additional terms expressed or implied in any quote, proposal, offer or confirmation sent or to be sent by Seller, which are hereby expressly rejected and superseded by this Purchase Order. This Purchase Order is expressly conditional on Seller's assent to all terms herein and Buyer is unwilling to proceed in this transaction without that assent. The first to occur of Seller's acceptance of this order or shipment of goods shall constitute Seller's agreement to all of the terms and conditions in this Purchase Order. This is the final expression of this agreement and there will be no waiver or modification of any of these terms unless in writing signed by both parties.

End of the Battle of the Forms

When does the Battle of the Forms end? It does seem clear that an actually signed and complete agreement would be final.[86] Subsequent letters and emails cannot change the terms of the agreement, unless they qualify as modifications to the agreement, discussed below.[87]

In the absence of an actually signed and complete agreement it is not clear that the Battle of the Forms ever ends.[88] An invoice sent on the day of delivery can act as a written confirmation that can add terms,[89] but could not change terms in light of the "knock out" rule.[90] A disclaimer of warranties and limit of liability on a product label can be effective if no prior contract had been formed.[91]

Modification of Contracts

To this point, we have been discussing the formation of a contract. Firm offers exist before any type of contract is formed. The Battle of the Forms determines what provisions exist in the contract between a buyer and a seller. Provisions can be added or subtracted from a contract *after* that original contract exists. These additions or subtractions are "modifications to the contract."

Modifications may occur in long-term contracts with successive, repeated deliveries. For example, a concrete ready mix plant may take set deliveries of cement or stone each week for months or years. The price may be set for long periods of time or it may fluctuate with the market. Such price changes would be modifications to the supply contract. Modifications can also occur in short-term or single delivery contracts.

Modifications to contracts for the sale of goods need no consideration to be binding.[92] This means you could modify a contract, even inadvertently, without receiving anything in exchange. It can be important to read your mail and object to any suggestions or assertions that you think would change your contract detrimentally.

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[85] *Reaction Molding Technologies, Inc. v. General Elec. Co*., 588 F.Supp. 1280, 1288 (E.D. Pa.1984); *Egan Machinery Co. v. Mobil Chemical Co.,* 660 F.Supp. 35, 37 (D. Conn. 1986).

[86] *J. B Moore Elec. Contractor, Inc. v. Westinghouse Electrical Supply Co.*, 221 Va. 745, 752-53, 273 S.E.2d 553 (1981); *Columbia Nitrogen Corp. v. Royster Co.,* 451 F.2d 3, 11-12 (4th Cir. 1971).

[87] *J. B Moore Elec. Contractor, Inc. v. Westinghouse Electrical Supply Co.*, 221 Va. 745, 752-53, 273 S.E.2d 553 (1981); *Columbia Nitrogen Corp. v. Royster Co.,* 451 F.2d 3, 11-12 (4th Cir. 1971).

[88] *See* official comment to UCC Section 2-207(2), which states: "Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different terms."

[89] *Flender Corp. v. Tippins Int'l, Inc.*, 830 A.2d 1279 (Pa. Super. Ct. 2003).

[90] *Herzog Oil Field Serv., Inc. v. Otto Torpedo Co.*, 570 A.2d 549, 550 (Pa. Super. Ct. 1990).

[91] *Hill v. BASF Wyandotte Corp.,* 696 F.2d 287, 291 (4th Cir. S.C. 1982); *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991).

[92] UCC Section 2-209(1); *Ritz-Craft Corp. v. Stanford Management Group*, 800 F. Supp. 1312, 1317 (D. Md. 1992).

Verbal Modifications to Written Contracts

Even written contracts can be modified verbally.[93] However, the modified contract would still need to comply with the Statue of Frauds.[94]

Your contract can prohibit any modification, except in a signed writing. For this reason the sample Supplier Proposal above states that "there will be no waiver or modification of any of these terms unless in writing signed by both parties." However, this prohibition to verbal modification is only effective if the contract is signed. You cannot obtain this protection in the Battle of the Forms, by just including this provision in an unsigned but accepted offer.[95] An attempted modification that violates such a "no oral modification" provision or violates the Statute of Frauds can still operate as a waiver.[96] Accordingly, it is still always best to object in writing to anything you believe violates your contract.

Course of Performance

Under the UCC, the Course of Performance is the way that the parties have performed throughout the life of the contract. This can determine whether there have been modifications to a contract.[97] Examples are the prices charged on invoices, the manner of delivery and the time for payment.

Such course of performance is very important under the UCC to help a court determine what the terms of any contract are *and* whether those terms have been modified.[98] If a buyer consistently makes payment 60 to 90 days after invoice for years, without objection, the seller may not be able to claim the buyer is in breach of a credit agreement requiring payment within 30 days of invoice. It looks like the seller agreed to modify the contract. If a seller raises its prices and the buyer pays the higher prices without objection for a long period of time, the buyer may not be able to return to the lower written prices in later litigation. [99]

The UCC again puts the burden on parties to object. If you think that the other party is not performing your contract, you should send some sort of written objection. You may decide not to enforce all the terms of the contract and "let them get away with it." However, you should still preserve your contract rights by sending a letter noting that deliveries are consistently late, materials are not completely meeting specifications or payments are late.[100]

Delegation and Assignment of Contracts

Either party can delegate its performance of a contract.[101] This means that someone else can perform the contract for them. A material supplier may have a distributor, another supplier or "subcontractor" ship goods to a buyer. The supplier may run short of certain materials or may want to simply "direct ship" from a manufacturer.

This delegation of duties is allowable under the UCC generally, even though the buyer may not be aware this can happen. Such delegation is not allowable if the parties so agreed or the other party had a "substantial interest" in having performance from the original contracting party.[102] This could happen in the case of hi-tech equipment that could be of substantially different quality from another manufacturer. Delegation in this instance may not be allowed.

In a delegation of duties, the original contracting party will remain responsible for performance.[103] If the new supplier fails to perform, then the original supplier is liable for damages to the buyer.

Assignments of contracts are also generally allowed by the UCC.[104] If a material supplier assigns a contract, the buyer now has its contract with the new supplier. For example, a material buyer may also want to assign a valuable supply

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[93] UCC Section 2-209.

[94] *See* section above, Essential Parts of a Contract; subsections, When a Writing is Necessary and Written Confirmation; UCC Section 2-209(3).

[95] UCC Section 2-209(2).

[96] UCC Section 2-209(4).

[97] UCC Section 2-208(1).

[98] UCC Section 2-208(3).

[99] UCC Section 2-208(1); *Crane Company v. Progressive*, 418 F.Supp. 662 (E.D.Va. 1976).

[100] UCC Section 2-208(1).

[101] UCC Section 2-210(1).

[102] UCC Section 2-210(1).

[103] UCC Section 2-210(1).

[104] UCC Section 2-210(2).

contract, if a supplier has committed to favorable prices for a long period of time. An assignment will not be allowed if it would be "a material change" in the other party's duty or materially increase the burden or risk of the other party.[105]

CONTRACT INTERPRETATION

Many disputes concern the correct interpretation of a contract in both oral and written forms. There may be no question that a contract exists. There may be many detailed provisions over which the parties have no doubt. A dispute may arise because of an event neither party anticipated when entering into the contract. Even detailed written contracts can have terms that are ambiguous, often because of unforeseen circumstances.

There is much contract case law that provides rules for the interpretation of contracts. Courts attempting to resolve all types of disputes have developed these contract interpretation rules over centuries. Most of this case law would apply to the interpretation of any type of contract, not just Article 2 of the UCC.[106] These general rules for the interpretation of contracts are beyond the scope of this UCC outline. An example, however, would be the Course of Performance, discussed above.[107] The course of performance can be very important to a court trying to interpret what the parties intended in their contract.

Where sophisticated business professionals enter into an arms-length transaction, the court will enforce the terms of the agreement between them absent some compelling reason that enforcement would be unreasonable or unjust.[108] The guidepost in determining the legal responsibilities of the parties is the contract itself. The contract, unless it is illegal or violates public policy, constitutes the law that governs the parties' relationship.[109]

When an agreement is plain and unambiguous in its terms, it will be given full effect.[110] This means that buyers *and* sellers of materials that are not consumers and are regularly in the business of buying and selling materials will usually be stuck with their contract terms. This is true, even if you were not even aware of some contract terms, because you did not read them or you never joined the "Battle of the Forms" by expressly objecting to terms and conditions received.

Contract Terms Added by the UCC

The UCC does have several special provisions that only apply to the interpretation of contracts for the sale of goods. These are mostly "fill in the gap" rules that provide the parties a contract term to resolve an issue they neglected to consider when entering into the contract.

Unconscionable Contract Terms

The UCC has a very vague, but flexible and useful, catchall provision concerning unconscionable contracts or clauses.[111] If a court determines that a contract is unconscionable, the court can simply refuse to enforce it.[112] If just one term of the contract is unconscionable, that one term can be stricken. The court can still enforce the balance of the contract.[113]

This provision gives the court great flexibility to avoid what the court considers an unfair result and to fashion a remedy that avoids a result the court considers unjust. The power in the court can keep a buyer or seller from gaining

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[105] UCC Section 2-210(2).

[106] Contracts should be read in the entirety; no words should be disregarded if possible. *Winn v. Aleda Const. Co.,* 227 Va. 304, 307, 315 S.E.2d 193 (1984). In construing a contract, effect must be given to each provision, if possible, giving the entire contract a harmonious construction. *Carpenter v. Town of Gate City*, 185 Va. 734, 740, 40 S.E.2d 268 (1946).

[107] *See* section above, Formulation and Modification of Contract; subsection, Modification of Contracts; sub-subsection, Course of Performance.

[108] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

[109] *McDevitt & Street Co. v. Marriott Corp*., 713 F. Supp 906, 914 (E.D. Va 1989), aff'd in part and rev'd in part 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991*, citing Chantilly Construction Corp. v. John Driggs Co.,* 45 B.R. 297, 306 (Bankr.E.D.Va.1985); *Bob Grissett Golf Shoppes, Inc. v. Confidence Golf Co.,* 44 B.R. 156, 159 (Bankr.E.D.Va.1984); *Russell County v. Carroll,* 194 Va. 699, 703, 74 S.E.2d 685, 687-88 (1953)**.**

[110] *McLean House v. Maichak*, 231 Va. 347, 349, 344 S.E.2d 889, 890 (1986); *Gordonsville Energy v. Virginia Elec. & Power Co.*, 257 Va. 344, 354, 512 S.E.2d 811, 817 (1999) [reiterating that "when contract terms are clear and unambiguous, the words used by the parties must be given their plain and ordinary meaning"].

[111] UCC Section 2-302.

[112] UCC Section 2-302(1).

[113] UCC Section 2-302(1).

too much by burying provisions in the fine print of a long contract form. It can also remedy unfair results caused by unequal bargaining power.

No buyer or seller should ever count on being able to get a contract term stricken as unconscionable. It is a far better practice to read contracts carefully and remove any provision that is unacceptable. It is impossible to predict how or whether a court will consider any particular contract clause unconscionable.

Open Price Term

Parties can have a binding contract even if they never agreed to a price.[114] This will be true, however, only if the parties intended to enter into a binding agreement.[115] Sometimes buyers or sellers haven't yet discussed price. They may agree to negotiate a price later, or they may agree on a formula or standard to set the price at a later time. In each of these cases, the UCC states, "The price is a reasonable price at the time of delivery."[116] Note that the parties are bound to the price *at the time of delivery*.[117] In the case of fluctuating prices, it could be very important whether the enforceable price was the market price at the time of the agreement or the market price at the time of later delivery.

Output, Requirements and Exclusive Dealings

It is possible for parties to a contract to agree that the seller will provide all of its production capacity or "output."[118] A buyer can agree that it will purchase from one supplier all of the buyer's "requirements." Buyers and sellers can agree to deal exclusively with each other.[119]

Delivery

All goods described in a contract must be delivered in a single lot, unless otherwise agreed.[120] In other words, a seller could not unilaterally decide to deliver some of the goods now and make the buyer wait until later for the rest.

Generally speaking, the place for delivery of goods is the seller's place of business.[121] A buyer cannot assume that there will be delivery to the buyer, unless such delivery is made a part of the contract.

Unless otherwise agreed, payment by the buyer is a condition precedent to the seller's duty to deliver.[122]

Time for Performance

Goods must be delivered within a "reasonable time" if the parties have not agreed on any other schedule.[123] This is again vague, but it does mean something. In most markets, it is not reasonable for a lumberyard to deliver two months after an order.

What is reasonable will vary depending on such factors as the nature of goods to be delivered, the purpose for which they are used, the extent of seller's knowledge of buyer's intentions, transportation conditions, the nature of the market and so on.[124] A court would look at (1) the course of dealing between the parties; (2) trade usage in the industry; and (3) buyer's notification to seller of time concerns.[125] A purchase order with a definite delivery date can make time of the essence for a material supplier.[126]

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[114] UCC Section 2-305(1).

[115] UCC Section 2-305(1).

[116] UCC Section 2-305(1).

[117] UCC Section 2-310(a).

[118] UCC Section 2-306.

[119] UCC Section 2-306.

[120] UCC Section 2-307.

[121] UCC Section 2-308(a).

[122] UCC Section 2-511(1).

[123] UCC Section 2-309(1); *USEMCO, Inc. v. Marbro Co., Inc.,* 60 Md.App. 351, 483 A.2d 88 (1984).

[124] *White and Summers Uniform Commercial Code*, Vol 1. Ch. 3 at 126; *Am Jur Sales* § 268 and *Corpus Juris Secondum Sales* §170.

[125] *Jamestown Terminal Elevator v. Heib*, 246 NW.2d 736 (ND, 1976); *Schiavi Mobile Homes v. Gagne*, 510 A.2d 236 (Maine, 1986) [Buyer's failure to object to date of performance resulted in court concluding that performance had occurred within reasonable time]; *Robinson v. Commercial Contractors*, 274 A.2d 160 (CT, 1970) [Adds intent of the parties to the "facts and circumstances" test, although this case does not address the time issue under the UCC but applies a common law contract standard]; *Thornton Construction Co. v. Mackinac Aggregates Corp.*, 157 N.W.2d 456 (MI 1968) [Court held that time of performance was reasonable based on both parties' understanding of timing of like projects in the industry].

[126] *Kirn v. Champion Iron Fence Co.*, 86 Va. 608, 10 S.E. 885 (1890).

The most common "counterclaim" or "back charge" dispute with a supplier is that the materials were delivered late and delayed the job. If the contract defines a particular delivery schedule, then the supplier can be liable for damages if the materials are delivered late. If there is no definite delivery schedule, however, then the supplier cannot be liable for damage as long as the materials are delivered in a reasonable time. In other words, if a supplier has not agreed to deliver goods on twenty-four hours verbal notice, there is no breach of contract if a supplier is unable to do so.

Time for Payment

Payment is due for goods supplied at the time and place of delivery, unless the parties have agreed otherwise.[127] This means that no credit or "time" is ever assumed. Most material supplier invoices state "due on receipt of invoice" or "due within 30 days." Such provisions on an invoice are actually granting more time for payment than otherwise exists. Material suppliers should consider remaining silent on invoices about the time for payment or stating "payment is due on the receipt of goods."

Many material suppliers and subcontractors are concerned about beginning work on a project before they have a signed contract. This may not be such a problem, however. On a sale of goods under the UCC, we have seen that the law will fill in most of the missing provisions. If the party on the other side of the transaction supplies the written contract, then the contract form provisions will help them far more than the provisions will help you. If you are in an unequal bargaining position, you may be better off without the written contract.

If the goods are shipped in multiple lots, a material supplier is also entitled to payment on each delivery.[128] A construction subcontractor with a labor and materials contract (not covered by the UCC) will be entitled to payment upon completion, but will not be entitled to partial payments as the work progresses. This may be a serious problem. A subcontractor would have to complete his entire contract, spending large sums of money for months on materials and payroll, without any progress payments. For this reason alone, many labor and material subcontractors must make sure they have a signed subcontract. A supplier of goods, however, may be better off without a written contract, deciding to utilize the terms provided by the UCC, if the supplier is unable to require the use of the supplier's form contract.

Where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment.[129] Post-dating the invoice or delaying the invoice's mailing, however, will correspondingly delay the start of the credit period.[130]

Unless otherwise agreed, payment by the buyer is a condition precedent to the seller's duty to deliver.[131] The buyer may make payment in any manner "current in the ordinary course of business."[132] If the parties have not made any other agreement as to credit or payment, the seller has the right to demand legal tender (cash).[133] In this case, however, the seller must give "any extension of time reasonably necessary" to procure the cash.[134]

Normally, the buyer has the right to inspect the goods before accepting them and before payment is due, unless otherwise agreed.[135] The term "COD" (collect on delivery) means that the buyer must pay for the goods before inspection.[136]

Termination or Modification of Ongoing Supply Contracts

Many verbal and written supply contracts run over a long period of time, with many successive deliveries. An example would be the ready mix contractor who gets weekly shipments of cement and stone. Either party can terminate such a contract at any time, unless otherwise agreed.[137] If your business is dependent upon a steady flow of materials, you may want to have a contract requiring shipments in steady quantities. Remember that a seller can

[127] UCC Section 2-310.
[128] UCC Section 2-307.
[129] UCC Section 2-310(d).
[130] UCC Section 2-310(d).
[131] UCC Section 2-511(1).
[132] UCC Section 2-511(2).
[133] UCC Section 2-511(2).
[134] UCC Section 2-511(2).
[135] UCC Section 2-513(1).
[136] UCC Section 2-513(3)(a).
[137] UCC Section 2-309(2).

agree to such a contract, even if the price or quantity is not set.[138] A buyer can get a commitment that the seller will ship all of the buyer's requirements, even if the buyer has not committed to buy from the seller.[139]

Any contract that can be terminated can also be modified. A material supplier that is able to terminate an ongoing supply relationship also can call the buyer and say, "I will terminate shipments unless you agree to a higher price or agree to do your own trucking."

F.O.B. and C.I.F. Terms

F.O.B. means "Free on Board."[140] Contracts, proposals or letters often state that materials will be delivered, for example, F.O.B. seller's plant, F.O.B. carrier or F.O.B. buyer's place of business.

When the term is F.O.B. place of shipment (usually the seller's plant), the seller must put the goods into the possession of the carrier at that place.[141] The seller bears the risk until the goods are in the possession of the carrier.[142] It would be the seller's problem, for example, if the goods are stolen or damaged before the seller puts them in the possession of the carrier.[143]

If the term is F.O.B. vessel or carrier, the seller also bears the risk and expense of loading the goods for the carrier.[144] If the term is F.O.B. the buyer's place of business or some other place of destination, the seller must deliver the goods to that place at the seller's risk and expense.[145] The term F.A.S. is similar; it means "Free Along Side" and is normally used in connection with shipments by boat.[146]

The term C.I.F. means "the price includes in a lump sum the cost of the goods, the insurance, and the freight."[147] The term C. & F. (or C.F.) means that the price includes "cost and freight" only.[148]

Title

In a normal construction material situation, title to goods normally passes at the time they are delivered.[149] This means that the buyer owns the goods once they are delivered, regardless of when payment is made. After delivery, the seller owns the right to obtain money from the buyer but no longer owns the goods. If a buyer fails to make payment and the seller takes the goods, the seller may be guilty of larceny for stealing the goods. The seller no longer owns them and cannot reclaim them unless the seller fits within an exception.[150]

The UCC states, "Title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place."[151] In some cases, the time or place that the seller completes his performance could be different than delivery at the construction project.

A rejection or other refusal by the buyer to receive or retain the goods will "revest" title in the seller.[152] This is true whether or not the buyer was justified in refusing the goods.[153]

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[138] *See* section above, Contract Interpretation; subsection, Contract Terms Added by the UCC; sub-subsection, Open Price Term.

[139] *See* section above, Contract Interpretation; subsection, Contract Terms Added by the UCC; sub-subsection, Output, Requirements and Exclusive Dealings.

[140] UCC Section 2-319(1).

[141] UCC Section 2-319(1)(a).

[142] UCC Section 2-319(1)(a).

[143] UCC Section 2-319; *See also* subsection below, Risk of Loss.

[144] UCC Section 2-319(1)(c).

[145] UCC Section 2-319(1)(b).

[146] UCC Section 2-319(2).

[147] UCC Section 2-320(1).

[148] UCC Section 2-320(3).

[149] UCC Section 2-401(2).

[150] *See* section below, Contract Performance and Breach; subsection, Seller's Right to Reclaim Goods.

[151] UCC Section 2-401(2).

[152] UCC Section 2-401(4).

[153] UCC Section 2-401(4).

Risk of Loss

Generally, the risk of loss stays with the seller until delivery.[154] It will be the seller's problem if the goods are damaged or stolen before the risk of loss transfers to the buyer. If the seller has breached the contract, however, and the buyer has rightfully rejected the goods, then the risk of loss remains with the seller after delivery.[155]

Warranties

Warranties can be "expressed" or "implied." Consider the following hypotheticals:

Warranty Hypotheticals

Warranty—Hypothetical #1: The carpentry contractor walks into a lumberyard and says, "I am building a house. Give me 2,000 2x4s." The house is framed using normal practices, but the 2x4s don't hold weight sufficiently. They bend and break, and soon the second floor deck falls in. The carpenter contacts the lumberyard and complains. The lumberyard's response is, "You never specified a particular strength 2x4, and I didn't promise any particular strength."

Is the lumberyard correct? Can the lumberyard be held liable for the cost of reframing the house?

Warranty—Hypothetical #2: A carpentry contractor walks in and requests 2,000 spruce 2x4 studs. The contractor uses the studs to frame a floor deck for a garage over a basement. He then parks his semi-tractor trailer truck in the garage. The floor deck collapses, and he calls the lumberyard to complain. The lumberyard's response is, "You are out of your mind if you thought wood 2x4 studs would hold up a semi-tractor trailer."

Who wins this argument? Would it make a difference if the contractor had told the lumberyard the purpose for the studs? Would it make a difference if the 19-year-old salesmen at the lumberyard had expressed an opinion that he thought, "The studs, framed 12 inches on center, would hold the truck?"

Warranty—Hypothetical #3: A brick manufacturer sends a sample brick to a masonry subcontractor in connection with a contract bid. They enter into a contract for 10,000 bricks. When the bricks arrive they are uneven in size and appearance. The masonry contractor complains, but the manufacturer's response is, "There was nothing in the specifications concerning these problems."

Who wins this argument? Can the contractor reject the brick and order brick from another manufacturer or will the first manufacturer be able to sue the buyer for the price?

Express Warranties

Modern automobile or equipment manufacturers normally supply lengthy written warranties to buyers. This is only one type of express warranty. Express warranties can arise in other ways, and a seller is often unaware that they are providing an express warranty at all.[156] Any affirmation of fact or any promise can create an express warranty.[157] In Warranty—Hypothetical #2, the 19-year-old salesmen stated an opinion that wood 2x4s studs would hold up a semi-tractor trailer. This may have been an express warranty for which his employer could be held liable.[158] Material salespersons must be trained *not* to express opinions on material performance. Salespersons should refer the buyer to architects, engineers or other professionals, unless the salesperson has had adequate training and does know how materials will perform.

Any type of description of goods supplied by a seller can also be an express warranty.[159] Advertising brochures, for example, which describe material capabilities, will be express warranties of material performance. Sample materials provided by a supplier, specifications, correspondence or other communications can also be express warranties.[160] If the goods eventually delivered do not confirm with the samples, specifications or correspondence, this will constitute a "breach of warranty." According to the UCC, an express warranty is created by "(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain ... or

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[154] UCC Section 2-509.
[155] UCC Section 2-510.
[156] UCC Section 2-313.
[157] UCC Section 2-313(1).
[158] UCC Section 2-313(2).
[159] UCC Section 2-313(1)(b).
[160] UCC Section 2-313(1)(c).

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."[161]

It is important to remember that the express warranty will not mean that other implied warranties do not apply. To do this, the written warranty must expressly exclude the implied warranties and this language must be conspicuous.[162] This is why you often see contracts and warranties with language in large, capitalized print stating "BUYER ACCEPTS THIS WARRANTY IN LIEU OF ANY OTHER WARRANTY EXPRESSED OR IMPLIED, INCLUDING THE WARRANTY OF MERCHANTABILITY."

Implied Warranties

Implied warranties are another type of "fill in the blank" provision where the UCC is supplying contract terms that the parties did not discuss.

Implied Warranty of Merchantability

In all sales of goods, unless expressly excluded, the seller warrants to the buyer that the goods are merchantable.[163] This means that the goods: (1) would pass without objection in the trade under the contract description; (2) are of fair, average quality within the description; (3) are fit for the ordinary purposes for which such goods are used; (4) are of even kind, quality and quantity within each unit or lot and among all units or lots involved; (5) are adequately packaged and labeled; and (6) conform to the promises or affirmations of fact made on the container or label.[164] These are again somewhat vague and flexible concepts, but they are very important to protect buyers of materials.

In Warranty—Hypothetical #2, holding up a semi-tractor trailer is not an ordinary purpose for wood 2x4 studs. That seller cannot be held liable for the failure. In Warranty—Hypothetical #1, however, it is an ordinary purpose to use wood studs to frame a house using normal framing practices. The lumberyard will be liable for the costs of this breach of warranty, including the cost of new labor and materials and possibly the damages from any personal injury that may have occurred. These studs were not of fair average quality and would not pass without objection in the trade.[165]

In Warranty—Hypothetical #3, a court would consider whether large shipments of brick are often of uneven size and color.[166] Would such a shipment normally pass without objection in the trade? Were they of even kind, quality and quantity, within variations permitted by the agreement? There would also be a question as to whether a single brick constituted an express warranty on how all 10,000 bricks would appear. These are the types of factual questions a court or jury must decide in a UCC breach of warranty lawsuit.

Other implied warranties may arise from course of dealing or usage of trade, unless excluded or modified.[167] The masonry contractor in Warranty—Hypothetical #3 may have purchased brick from this manufacturer for years. If these bricks had always had consistent color and size, then this course of dealing would create an implied warranty that future deliveries would be the same. Because of this breach of warranty, the contractor could refuse the brick delivery.

Implied Warranty of Fitness for a Particular Purpose

Under the implied warranty of merchantability, sellers warrant that their materials are fit "for ordinary purposes."[168] Sellers do not warrant that materials are fit for any particular purpose, however, unless the seller has reason to know the purpose for which the materials will be used and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.[169] Such a warranty is an implied warranty of fitness for a particular purpose.[170]

In Warranty—Hypothetical #2, the seller could have a problem if the carpenter had told the salesmen that he would use the wood studs to hold up a semi-tractor trailer. Material salespeople must be trained to listen to unusual statements from buyers about the use of materials and suggest that the buyer investigate whether the materials are fit for that purpose.

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[161] UCC Section 2-313.
[162] UCC Section 2-316(2).
[163] UCC Section 2-314(1).
[164] UCC Section 2-314(2).
[165] UCC Section 2-314(2).
[166] UCC Section 2-314(2)(d).
[167] UCC Section 2-314(3).
[168] UCC Section 2-314.
[169] UCC Section 2-315.
[170] UCC Section 2-315.

Implied Warranty of Title and against Liens and Infringement

All sellers of goods provide an implied warranty that the buyer will get good title (ownership) of the goods, free and clear of any liens.[171] Any seller who is a merchant regularly dealing with these types of goods warrants that the goods will not violate any patents or infringe on any other rights of third parties.[172] This would normally be an issue with tools, machinery and equipment. If a buyer supplied the specifications for the goods to be manufactured, however, the buyer is warranting to the seller/manufacturer that these specifications do not violate any patent or other third party rights.[173]

Exclusion of Warranties

Express and implied warranties are cumulative. In other words, a buyer would have the choice of suing under an express written warranty or an implied warranty or both. Even if an express warranty is offered, the seller must carefully exclude the implied warranty of merchantability.

The UCC permits disclaimers of express warranty.[174] If a seller has excluded all express warranties, it does not matter what any salesperson may have said in any meetings. The buyer has agreed in advance not to rely on any oral statement.[175] Unconscionability is not an element in determining whether waivers of express warranty are effective. A writing must only be "conspicuous" to exclude warranties under the UCC. It is the limitation of remedies, discussed below, that can possibly be avoided if unconscionable.[176]

It is not easy to contract out of the implied warranty of merchantability. Any exclusion of this warranty must be "conspicuous" and must specifically identify the warranty of merchantability.[177] This is why you often see such language in large print, all caps, in a contract or written warranty. This would make the exclusions conspicuous as a matter of law.[178] Language excluding any other implied warranty, such as warranty of fitness for a particular purpose, must be in writing and must be conspicuous, but does not need to be as specific.[179] It would be enough to state that "there are no warranties which extend beyond the description on the face hereof."[180]

The implied warranties of title and against liens and infringement can be excluded or modified only by specific language or by circumstances that give the buyer reason to know such warranties are not provided.[181]

It is also possible to limit the remedies available to a buyer for damage caused by any breach of contract, including any breach of warranty.[182] Material sellers should consider adding language to their credit agreements and offers that limits the buyer's remedies and the seller's liability for damages. This is discussed in the subsection below on Remedies for Breach of Contract. The ability of a general contractor, owner or other third party without a direct contract to sue the supplier for breach of warranty is also discussed in Remedies for Breach of Contract.

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[171] UCC Section 2-312.

[172] UCC Section 2-312(3).

[173] UCC Section 2-312(3).

[174] UCC Section 2-316(1) states: "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other ..." *See also Buettner v. R.W. Martin & Sons, Inc.*, 47 F.3d 116 (4th Cir. 1994) [Express warranty disclaimer between a seller and a buyer was valid and enforceable, even against a third party].

[175] *King Industries, Inc. v. Worlco Data Systems, Inc.*, 736 F. Supp 114, 118 (E.D.Va. 1989) *citing Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 291 (4th Cir. 1982) [the parol evidence rule precludes the admission of oral statements which contradict the terms of a written disclaimer].

[176] *Envirotec Corp. v. Halco Engineering, Inc.,* 234 Va. 583, 593, 364 S.E.2d 215, 220 (1988*).*

[177] UCC Section 2-316(2) states that "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous."

[178] *Armco, Inc. v. New Horizon Dev. Co.*, 229 Va. 561, 567, 331 S.E.2d 456, 460 (1985).

[179] UCC Section 2-316(2).

[180] UCC Section 2-316(2).

[181] UCC Section 2-312(2).

[182] UCC Section 2-316(4).

CONTRACT PERFORMANCE AND BREACH

Buyer's Right of Inspection

As discussed above,[183] the buyer normally has the right to inspect goods before payment is due.[184] If the parties have agreed that payment must be made prior to an opportunity to inspect (COD), then the buyer will still have an opportunity to later reject the goods or revoke any acceptance of the goods.[185]

Rejection of Goods

The buyer has the right to reject any goods that do not conform to the contract.[186] The buyer may reject the whole delivery or accept part of the delivery and reject the rest.[187] The buyer must pay the contract price for any goods that have been accepted.[188]

The buyer must affirmatively reject the goods within a reasonable time, or they will be deemed accepted.[189] If the buyer is a merchant and has the right to reject the goods, then the buyer will still have the obligation to act reasonably and to use reasonable care to hold the goods for a time sufficient for the seller to retrieve them.[190] The merchant buyer also must follow reasonable instructions received from the seller if the seller is geographically far away and unable to promptly retrieve the goods.[191] If the seller does not provide instructions, then the buyer must take reasonable efforts to resell the goods on the seller's account if the goods are perishable or will quickly decline in value.[192]

When a buyer rejects goods, the buyer must give the seller notice of any "particular defect which is ascertainable by reasonable inspection."[193] The buyer cannot later rely on any unstated defect to justify rejection or to establish breach if: (1) the seller could have cured the defect if the seller had received notice of it, or (2) the buyer and seller are both merchants and the seller, after rejection, made a request in writing for a full and final statement of all defects on which the buyer will rely.[194] Any seller whose goods have been rejected would be advised to make such a request in writing promptly. This may limit the defects on which the buyer can later rely. It may also provide the seller a notice of defects that the seller can promptly cure.

Seller's Right to Cure

If the buyer has rejected goods *and* the time for delivery has not passed, the seller may give the buyer notice of the seller's intent to cure.[195] In this case, the buyer must allow the seller to cure by making another delivery of goods that do conform to the contract.[196]

In a typical construction material context, the time for the seller's performance will not usually be "expired" at the time a buyer rejects the goods. If a supply contract states that "delivery shall be made by 10:00 a.m. on January 5," then the time for performance would have expired at that time. Most construction material supply contracts, however, do not state such a specific time for delivery. Delivery must be within a "reasonable time," therefore, and the seller would also have a reasonable time to cure any defective delivery.

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[183] *See* section above, Contract Interpretation; subsection, Contract Terms Added by the UCC; sub-subsection, Time for Payment.

[184] UCC Section 2-513.

[185] UCC Section 2-601; UCC Section 2-608.

[186] UCC Section 2-601(a).

[187] UCC Section 2-601.

[188] UCC Section 2-607.

[189] UCC Section 2-602(1); *Moore & Moore General Contractors, Inc. v. Basepoint, Inc.,* 253 Va. 304, 485 S.E.2d 131 (1997) [contractor's installation of nonconforming cabinets was an act inconsistent with supplier's ownership and amounted to acceptance of the goods under UCC].

[190] UCC Section 2-602.

[191] UCC Section 2-603.

[192] UCC Section 2-603(1).

[193] UCC Section 2-605(1).

[194] UCC Section 2-605(1).

[195] UCC Section 2-508(1).

[196] UCC Section 2-508(1).

Even if the time for performance has expired, the seller will have a right to cure within a reasonable time, if "the seller had reasonable grounds to believe [that the goods] would be acceptable with or without money allowance."[197] This is to avoid injustice to the seller by reason of a surprise rejection.[198]

Seller's Right to Reclaim Goods

The seller may have the right to reclaim goods if the buyer breaches. The buyer's right to retain goods is conditional upon the buyer making payments due.[199] The buyer's payment by a check is "conditional."[200] In other words, the buyer never really made payment if the check does not clear. If a check does not clear, the seller has the right to reclaim the goods if the seller makes demand within 10 days after delivery of the goods.[201]

The seller also has the right to reclaim goods within 10 days after the receipt if "the seller discovers that the buyer has received goods on credit while insolvent."[202] As long as the seller makes demand within 10 days after receipt in accordance with the UCC, the seller can reclaim and again become the owner of the goods.[203] If the owner fails to make demand within the time stated, then the buyer will remain the owner of the goods and the seller will only own a debt and be another creditor of the buyer.

To reclaim goods under the UCC, the creditor-reclamation claimant must prove:

1. The debtor was insolvent at the time of delivery
2. Written demand was made within 10 days of delivery (extended to 20 days after bankruptcy, if bankruptcy is filed within 45 days after delivery)
3. The goods are "identifiable" at the time of the reclamation demand
4. The goods are in possession and control of the debtor at the time of the reclamation demand.

A creditor should be sure to send notice by some method providing third-party verification of receipt, such as commercial courier, Federal Express, certified mail or service by the Sheriff. Otherwise, it will be difficult to prove receipt of written demand.

The right to reclaim goods is always important to creditors when a debtor files bankruptcy. A vendor with the right of reclamation becomes a secured creditor and may be able to retake possession of the goods sold. If there is no right or reclamation, the vendor is a general unsecured creditor.[204]

The bankruptcy code always has generally respected the state law right of reclamation in the UCC and now actually expands this right. A creditor can reclaim goods delivered within the 45 days prior to a bankruptcy petition, as long as written reclamation demand is delivered within 20 days after the bankruptcy petition.[205] A creditor can file for an administrative expense claim for any goods delivered within the 20 days prior to a bankruptcy petition in any event, regardless of whether any reclamation notice has been sent.[206]

If the buyer made a misrepresentation in writing concerning solvency within three months before delivery, then the 10-day limitation under the UCC does not apply.[207] The seller could reclaim the goods more than 10 days after delivery. Credit applications are important for this reason. They can be representations concerning solvency that induce a material seller to deliver.

The right to reclaim goods after delivery will be of limited help to a construction materials supplier, however, because the goods delivered will normally be resold promptly by the buyer. Once 2x4 studs go into the construction of a house or asphalt goes into the construction of a highway, title (ownership) of these materials has passed through the buyer to the owner of the property. It will be too late to reclaim. The seller's right to reclaim is subject to the rights

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[197] UCC Section 2-508(2).

[198] UCC Section 2-508, Official Comment 2.

[199] UCC Section 2-507(2).

[200] UCC Section 2-511(3).

[201] *In Re Helms Veneer Corp.*, 287 F.Supp. 840 (W.D. Va. 1968).

[202] UCC Section 2-702(2).

[203] UCC Section 2-702(2); *In Re Helms Veneer Corp.*, 287 F.Supp. 840 (W.D. Va. 1968).

[204] 11 USC §546(c). *See* chapter, Bankruptcy Primer for Creditors; section, Adversary Proceedings; subsection, Reclamation Rights.

[205] 11 USC §546(c). *See* chapter, Bankruptcy Primer for Creditors; section, Adversary Proceedings; subsection, Reclamation Rights.

[206] 11 USC §503(b)(9).

[207] UCC Section 2-702(2).

of this type of buyer in the ordinary course of business or a good faith purchaser.[208] Under those circumstances, a seller may not have a right to reclaim the goods but may have an administrative expense claim in the bankruptcy or state law mechanic's lien or payment bond rights.

It can also be very expensive or impossible for a construction materials supplier to repossess goods such as large quantities of gravel. Note also that successful reclamation of goods excludes all other remedies under the UCC.[209] In other words, the seller cannot reclaim the goods *and* sue the buyer for damages. Nonetheless, this right to reclaim can provide the seller an opportunity to get something from a bankrupt debtor where the seller may otherwise get nothing.

Where the seller discovers the buyer is insolvent, the seller may also refuse future deliveries unless the buyer pays cash for future deliveries *and* pays for all goods delivered up to that time.[210] The seller may also stop any deliveries that are under way.[211]

Excuse

A seller will be excused from contract obligations if performance of the contract as agreed "has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made."[212]

If stone deliveries were to be by barge and a drought emptied the canals to be used, the seller would have a complete excuse. Other examples would be an extreme shortage of materials because of labor disputes or crop failures. A seller is also excused from performance if the seller complied in good faith with governmental regulations that made performance impossible.[213] The arms embargo after the Persian Gulf War would be an example of this.

It is not enough that the cost of performance for the seller has increased dramatically.[214] It is no excuse that the seller will lose money by performing. "Impracticability" means something close to "impossibility" caused by conditions that were unexpected at the time of contract.[215] The seller will not be excused from conditions that were foreseeable at the time of the contract.

In order to be excused, the seller must also "notify the buyer seasonably that there will be a delay or non-delivery."[216] A seller is under an obligation to allocate production and deliveries among his customers to the extent possible where only part of a seller's capacity to perform is affected.[217]

Substitute Delivery

If an agreed method of delivery becomes unavailable or commercially impracticable, but a "commercially reasonable substitute is available," then the seller must use the substitute method of delivery and the buyer must accept it.[218]

Right to Adequate Assurance of Performance

A material buyer has the right to expect that goods will be delivered. A material seller has the right to expect payment for the materials. When reasonable grounds for "insecurity" arise, the other party may demand in writing an "adequate assurance of due performance."[219] If a seller, for example, has reasonable grounds to believe that the buyer will be unable to make payment, that seller could demand an assurance that the buyer is capable of paying, before goods are delivered.

"Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards."[220] The Official Comment to the UCC states that a seller

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[208] UCC Section 2-702(3).
[209] UCC Section 2-702(3).
[210] UCC Section 2-702(1).
[211] UCC Section 2-702(1); UCC Section 2-705(1).
[212] UCC Section 2-615(a).
[213] UCC Section 2-615(a).
[214] UCC Section 2-615, Official Comment 4.
[215] UCC Section 2-615, Official Comment 1.
[216] UCC Section 2-615(c).
[217] UCC Section 2-615(b).
[218] UCC Section 2-614(1).
[219] UCC Section 2-609(1).
[220] UCC Section 2-609(2).

has reasonable grounds for insecurity if a buyer falls behind in his account with the seller, even though the items involved have to do with separate and legally distinct contracts.[221] On the other hand, a buyer who requires precision parts has reasonable grounds for insecurity if he discovers the seller is making defective deliveries of such parts to other buyers.[222]

Anticipatory Repudiation

If either party "repudiates the contract," the other party can treat the contract as "breached" at the time of repudiation and does not have to wait until performance is due.[223] For example, a material supplier can tell a buyer that it will be unable to deliver, or the buyer could notice that the seller's manufacturing plant has closed down. In either case, the buyer does not have to wait until delivery is due in order to declare the seller in breach. Once the contract is "repudiated," the buyer can arrange for substitute goods and hold the seller responsible for damages.[224] A repudiation can be retracted, unless the aggrieved party has materially changed his position.[225]

An "installment contract" is one that requires multiple delivery of materials in separate lots.[226] There are special rules if there are defects in any one delivery of an installment contract.[227]

REMEDIES FOR BREACH OF CONTRACT

Seller's Remedies

If a buyer fails to make a payment due or wrongfully rejects goods or repudiates the contract, then the seller may:

1. Withhold delivery of further goods,
2. Stop any delivery that is under way,
3. Resell the goods and hold the buyer responsible for any damages (such as the costs of sale and any loss on the sale),
4. Recover lost profit,
5. Cancel the contract.[228]

The seller must do any resale of the goods in a "commercially reasonable" manner.[229] If the seller is entitled to damages, it is computed by subtracting the contract price from the market price at the time and place the goods were to be delivered plus any incidental costs, minus expenses saved by the breach.[230]

In unusual circumstances, the seller would be able to sue the buyer for the full contract price. This is normally only if the goods were specially manufactured and could not be resold after a reasonable effort.[231] The seller will usually need to take reasonable steps to resell the goods and then go after the buyer for lost profit and damages.

Buyer's Remedies

If a seller fails to make a delivery, or the seller makes a defective delivery, the buyer may reject the goods, cancel the contract and: (1) obtain "cover" goods (substitute materials), or (2) recover damages for the non-delivery.[232] The buyer can also recover damages for the defects in any accepted goods.[233] This would be a breach of warranty claim.

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[221] UCC Section 2-609, Official Comment 3.
[222] UCC Section 2-609, Official Comment 3.
[223] UCC Section 2-610.
[224] UCC Section 2-610(b).
[225] UCC Section 2-611.
[226] UCC Section 2-612(1).
[227] UCC Section 2-612.
[228] UCC Section 2-703; *See also* UCC Sections 2-704, 2-705, 2-706 and 2-708.
[229] UCC Section 2-706.
[230] UCC Section 2-708(1).
[231] UCC Section 2-709.
[232] UCC Section 2-711.
[233] UCC Section 2-714(1).

If the buyer covers and gets substitute goods, the buyer is also entitled to recover from the seller the cost of that cover (with a credit for the contract price).[234] The buyer can also get damages for incidental damages such as the cost of handling the defective goods delivered by the seller, the cost of obtaining cover and the cost of delay.[235] The buyer will be entitled to consequential damages only if the seller had reason to know the particular needs of the buyer.[236] Such consequential damages must be foreseeable by the seller.[237] The buyer has a duty to mitigate consequential damages by seeking adequate cover (substitute goods).[238]

The buyer's damages for non-delivery would be the difference between the market price at the time the buyer learned of the breach and the contract price, plus any allowable incidental and consequential damages.[239] This gives the buyer an incentive to obtain the best available substitute goods at the best available price promptly after the buyer learns of a breach.

If the buyer elects to accept defective goods, the seller is still liable for breach of warranty.[240] The damages for such a breach of warranty are the difference in value of the goods accepted and the value of the goods that should have been delivered as warranted.[241] The buyer is still entitled to incidental and consequential damages.[242]

A buyer is rarely entitled to "specific performance" of a contract for delivery of goods.[243] Only if goods are truly unique and unavailable elsewhere and monetary damages would not adequately compensate the seller, is it possible for a buyer to force the seller to perform and deliver the contract goods.[244]

If a buyer rightfully rejects defective goods, the buyer will have a security interest in the goods for the reasonable cost of handling the goods.[245] If the buyer rightfully rejects goods and the seller gives the buyer instructions on how to handle or resell the goods, the buyer can demand reimbursement for the expenses of such steps.[246]

Limitation of Liability

A buyer can agree that remedies will be limited for any breach of contract by a seller. One example would be an exclusion of express or implied warranties, discussed above in the section on Contract Interpretation, subsection, Exclusion of Warranties.

Where sophisticated business professionals enter into an arms-length transaction, a court will enforce the terms of the agreement between them absent some compelling reason that enforcement would be unreasonable or unjust.[247] When an agreement is plain and unambiguous in its terms, it will be given full effect.[248] Construction industry buyers and sellers are sophisticated business people. If they waive warranties or limit liability in contract documents, they will be held to those terms. These terms could even be inserted in an offer during the "Battle of the Forms" without the actual knowledge of the buyer.[249]

The Uniform Commercial Code provisions state:

> Section 2-719. **Contractual modification or limitation of remedy.**
> (1) ...

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[234] UCC Section 2-712(2).

[235] UCC Section 2-712(2).

[236] UCC Section 2-714); *See* subsection below, Limitation of Liability.

[237] UCC Section 2-715(2)(a).

[238] UCC Section 2-715(2)(a).

[239] UCC Section 2-713(1).

[240] UCC Section 2-714.

[241] UCC Section 2-714(2).

[242] UCC Section 2-714(3).

[243] UCC Section 2-716.

[244] UCC Section 2-716.

[245] UCC Section 2-711(3).

[246] UCC Section 2-603(2).

[247] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

[248] *McLean House v. Maichak*, 231 Va. 347, 349, 344 S.E.2d 889, 890 (1986); *Gordonsville Energy v. Virginia Elec. & Power Co.*, 257 Va. 344, 354, 512 S.E.2d 811, 817 (1999) [reiterating that "when contract terms are clear and unambiguous, the words used by the parties must be given their plain and ordinary meaning"].

[249] *Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc.*, 814 A.2d 217 (Pa. Super. Ct. 2002); *Idaho Power Co. v. Westinghouse Electric Corp.,* 596 F.2d 924, 926 (9th Cir. 1979).

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this title, and may limit or alter the measure of damages recoverable under this title, as by *limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts*; and
(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.
(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.[250]

A buyer can be bound to limits of liability and exclusions of warranties in a credit agreement for any sales of goods after the credit agreement is signed. A buyer can also be bound to these same limits of liability and exclusions of warranty if they are stated in each proposal or offer for each individual sale of goods.[251]

The sample Supplier Proposal in the Appendices states:

3. Seller agrees to replace or, at Seller's option, repair any defective goods within a reasonable time. Buyer's remedies for any delay or any defect in the materials are subject to and limited by any limitations contained in the manufacturer's terms and conditions to Seller. Further, Buyer's sole and exclusive remedy and Seller's limit of liability for any and all loss or damage resulting from defective goods shall be for the purchase price of the particular delivery and materials with respect to which loss or damage is claimed, plus any transportation charges actually paid by the Buyer. In no event shall Seller be liable for any damage due to delay of any type, nor consequential, special or punitive damages. THE FOREGOING WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING THE WARRANTY OF TITLE, AGAINST LIENS, INFRINGEMENT, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

4. Buyer shall make a careful inspection at the time of delivery. Buyer's failure to give written notice specifying any claim within ten (10) days of delivery shall constitute an unqualified acceptance of the labor and material as shown on delivery tickets and a waiver of all claims of shortages, damage or defect or any other claim. Seller will not be liable for any damage, warranty or remedy and back charges will not be accepted without prior notification, an opportunity to view and repair, replace or otherwise cure, and approval by Seller. No returned product will be accepted without prior approval. A restocking charge of 25% will apply on products approved for refund. These provisions evidence a clear intent to create a comprehensive set of remedies. First, the Limitations in any manufacturer's warranty are passed on to a buyer. This creates a "conduit relationship" for a distributor that did not manufacturer the goods. The eventual buyer and end user is limited to the manufacturer's warranties and remedies. The "middleman" distributor cannot be responsible for more than the manufacturer.

The Uniform Commercial Code Section discussed above also allows a limitation of the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods.[252] This could eliminate the potential for any claim or counterclaim against a seller for allegedly defective material, if the buyer has not paid the purchase price. A buyer would have at most a defense to a seller's claim for the unpaid purchase price. If the seller repairs or replaces any defective goods within a reasonable time, the buyer would owe the full purchase price.[253]

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[250] UCC Section 2-719 (emphasis added).

[251] UCC Section 2-207; *See e.g., Foley Co. v. Phoenix Engineering & Supply Co.*, 819 F.2d 60 (4th Cir. 1987) and *J. B. Moore Elec. Contractor, Inc. v. Westinghouse Electrical Supply Co.*, 221 Va. 745, 273 S.E.2d 553 (1981).

[252] UCC Section 2-719(1)(a); *Baptist Mem. Hosp. v. Argo Constr. Corp*., 2009 Tenn. App. LEXIS 502 (Tenn. Ct. App. 2009).

[253] *Marr Enterprises, Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951, 955 (9th Cir. 1977).

It is probably important to be clear in a contract that these remedies are "sole and exclusive." Remedies for breach of contract or breach of warranty are generally cumulative. Saying a buyer has one remedy does not necessarily mean that all other remedies are excluded.[254]

A buyer can argue that an exclusive or limited remedy "fails of its essential purpose."[255] If successful, the buyer would have remedies "as provided in the Uniform Commercial Code." It is difficult to argue, however, that limited remedies fail of their essential purpose. Failure of essential purpose generally relates to circumstances arising during the performance of the agreement and the application of the agreement to novel circumstances not contemplated by the parties.[256] Normally, there is nothing novel about the purchase of materials or the possibility that some of those materials would be defective. This is usually and precisely the risk contemplated in the exclusion of warranty and limitation of liability language in credit agreements or offers. Generally, in commercial cases, the "essential purpose" exclusion arises only where a seller has refused to make repairs or cannot repair the product.[257]

Remedies do not fail their essential purpose unless a seller in bad faith fails to replace allegedly defective material *and* fails to return the purchase price.[258] If a buyer *has not paid* a purchase price, there cannot be a failure of remedy to recover the purchase price—and there can be no failure of essential purpose in these remedies.[259] Failure of essential purpose generally involves sellers that fail to repair or replace defective material successfully *and* fail to refund a purchase price.[260]

A buyer can also waive incidental, consequential, special, punitive or delay damages. Damages are generally either "direct" or "consequential" ("indirect"). Direct damages are those which arise "naturally" or "ordinarily" from a breach of contract. They are damages that can be expected to result from a breach in the ordinary course of human experience. Consequential damages are those which arise from the intervention of "special circumstances" not ordinarily predictable.[261] Generally, direct damages are compensable. If damages are consequential, they are compensable only if it is determined that the special circumstances were within the "contemplation" of both contracting parties or were "predictable."[262]

Consequential damages are discussed in greater detail in another chapter of this book titled Changes, Delays and Other Claims. However, it is possible to waive the right to consequential damages in a contract, just as it is possible to waive other remedies. Consequential damages may be limited or excluded, unless they are unconscionable."[263] If experienced parties agree to allocate unknown or undeterminable risks, however, they should be held to their bargain. Courts should not be permitted to rewrite the agreement.[264]

As discussed above, the Uniform Commercial Code does have a catchall provision concerning unconscionable contracts or clauses.[265] If a court determines that a contract term is unconscionable, a court can simply refuse to

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[254] UCC Section 2-719(1)(b).

[255] UCC Section 2-719(2).

[256] *See Envirotech Corp. v. Halco Engineering Inc.*, 234 Va. 583, 593, 364 S.E.2d 215, 220 (1988); *See also Baptist Mem. Hosp. v. Argo Constr. Corp*., 2009 Tenn. App. LEXIS 502 (Tenn. Ct. App. 2009) for a good discussion of the relationship between failure of essential purpose and unconscionability and then a discussion of the split in authorities whether a latent defect barred by an agreed statute of limitations can cause a failure of essential purpose.

[257] *Riegel Power Corp. v. Voith Hydro Crowder Construction Co.,* 888 F.2d 1043, 1046 (4th Cir. 1989).

[258] *Riegel Power Corp. v. Voith Hydro Crowder Construction Co.,* 888 F.2d 1043, 1046 (4th Cir. 1989) [essential purpose exclusion generally applies where seller has acted in bad faith in making repairs or has repudiated its obligation to repair and replace].

[259] *Coastal Modular Corp. v. Laminators, Inc.,* 635 F.2d 1102, 1106 (4th Cir. 1980); *Dowty Communications Inc. v. Novatel Computer Systems Corp.,* 817 F. Supp. 581 (D.Md. 1992); *Marr Enterprises, Inc. v. Lewis Refrigeration Co.,* 556 F.2d 951, 955 (9th Cir. 1977) ["In our case, if the seller did not replace the defective parts, the purchaser was entitled to refund of the purchase price. Thus, mere failure to replace or repair would not cause the court to read in the general remedy provisions of the UCC as in the cases cited above"].

[260] *See Milgard Tempering v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990) and *Chatlos Systems v. National Cash Register Corp*., 635 F.2d 1081 (3d Cir. 1980).

[261] *Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc.*, 254 Va. 240, 243, 491 S.E.2d. 731, 732 (1997); *Pulte Home Construction v. Parex, Inc.*, 265 Va. 518, 526, 579 S.E.2d 188, 192 (2003) [whether damages are direct or consequential is a matter of law for decision by the Court. Plaintiff's damages of "uncompensated costs to repair homes, lost of the remainder of its contract with the general contractor, and revenue loss due to damaged business reputation all constituted consequential damages"].

[262] UCC Section 2-715(2) states that "consequential damages resulting from the seller's breach include; ... any loss resulting from general or particular requirements and needs of which the seller *at the time of contracting had reason to know* ..." (emphasis added).

[263] UCC Section 2-719(3).

[264] *Envirotech Corp. v. Halco Engineering Inc.*, 234 Va. 583, 593, 364 S.E.2d 215, 220 (1988), *citing S.M. Wilson & Co.* v. *Smith International, Inc.*, 587 F.2d 1363, 1374-76 (9th Cir. 1978).

[265] UCC Section 2-302.

enforce it.[266] In a commercial sale, however, it is difficult to argue that limitations of remedy or exclusions of warranty are unconscionable. Courts will rarely find unconscionable contract terms in commercial cases.[267] Commercial cases should not be confused with consumer cases, where courts are more likely to find unconscionable contract terms.[268]

It is also possible to waive damages for delay in a "no damage for delay" clause, which is discussed in greater detail in the Changes, Delays and Other Claims chapter of this book.

Third Party Claims

In a construction context, a materials supplier will normally supply goods to a subcontractor, who then supplies the goods to a general contractor, who then supplies the goods to a real estate owner. The general contractor and owner are "third parties" to the supply contract between the supplier and subcontractor. The general contractor and owner do not have "privity of contract" with the supplier.

Third parties, with no privity of contract, cannot normally make a claim for breach of contract. The third party owner or general contractor *has no contract* with the supplier.

Third parties with no contract *can* sue for *negligence* that causes personal injury or property damage. When there is a car accident, the victim can successfully sue for personal injury and property damage, even though there is no contract. The lines between contract actions and negligence actions can often be muddled. For example, owners often sue suppliers on a negligence theory, claiming property damage. The "economic loss rule," however, precludes recovery of damages based on economic loss alone, even in a negligence action, absent privity of contract.[269] The economic loss rule's privity requirement applies where damage is claimed because goods purchased fail to meet some standard of quality."[270]

The Uniform Commercial Code has an exception to the normal privity of contract rule stating that "[l]ack of privity ... shall be no defense in any action brought against the ... seller of goods to recover damages from breach of warranty ..."[271] If you buy a malfunctioning dishwasher from a department store, you can sue the manufacturer under the UCC, even though you have no privity of contract with the manufacturer.

However, recovery for breach of warranty for a third party not in privity is limited to the warranty that exists between the contracting parties. If the original contract of sale excluded or modified warranties or remedies for breach, such provisions are equally operative against beneficiaries of warranties under this section.[272] In other words, if a material supplier had excluded express and implied warranties in its sales contract with the subcontractor, these warranties are also excluded to the general contractor or owner. The end user of a product can enjoy no more contractual rights than are enjoyed by the original purchaser."[273]

Even without a contractual exclusion of warranties, a third party not in privity probably cannot recover consequential (indirect) damages, which arise from the intervention of special circumstances not ordinarily predictable. Although the UCC does not require privity for recovery of direct damages resulting from breach of warranty, the Code does require privity to recover consequential damages resulting from breach of warranty.[274]

[266] UCC Section 2-302(1).

[267] *Reibold v. Simon Aerials, Inc.,* 859 F.Supp. 193, 198 (E.D.Va. 1994), *citing White & Summers Uniform Commercial Code* §12-11; *Kaplan v. RCA Corp.,* 783 F.2d 463 (4th Cir. 1986) [where the court held that terms limiting the seller's liability and excluding consequential damages were not unconscionable, given the buyer's business acumen and experience, even though the buyer was a small family-owned corporation and the seller was a national corporation]; *Envirotech Corp. v. Halco Engineering Inc.*, 234 Va. 583, 364 S.E.2d 215, 220 (1988) [where the parties are "sophisticated business men with access to legal counsel"].

[268] *Carlson v. General Motors Corp*., 883 F.2d 287, 293, 295 (4th Cir. 1989).

[269] *Moore & Son v. Drewry*, 251 Va. 277, 467 S.E.2d 811 (1996); *See* chapter, Changes, Delays and Other Claims; section, Contract Clauses and Theories; subsection, Economic Loss Rule.

[270] *Sensenbrenner v. Rust, Orling & Neal*, 236 Va. 419, 423, 374 S.E.2d 55, 57 (1988) [Economic loss rule applied where negligent installation of a swimming pool resulting in damage to a home. Damage to the home amounted to economic loss and nothing more than disappointed economic expectations. The claim related to property damage and was subject to the economic loss rules privity requirement].

[271] UCC Section 2-318.

[272] UCC Section 2-318, Official Comment 1; *139 Riverview, LLC v. Quaker Window Products*, 90 Va. Cir. 74 (Norfolk Cir. Ct. 2015) [Owner limited to return of the purchase price against window manufacturer].

[273] *Buettner v. R.W. Martin & Sons, Inc.*, 47 F.3d 116, 119 (4th Cir. 1994).

[274] *See Pulte Home Corporation v. Parex*, 265 Va. 518, 579 S.E.2d 188 (2003) [lack of privity bars claim for consequential damages]. This results from the interplay between UCC Section 2-318 and 2-715. UCC 2-318 provides that "[l]ack of privity between plaintiff and defendant shall be no defense in any action brought against the ... seller of goods to recover damages from breach of warranty ..." UCC Section 2-715(2), however, states that "Consequential damages resulting from the seller's breach include;…any loss resulting from general or particular requirements and needs of which the seller *at the time of contracting had reason to know* ..." (emphasis added). Most courts hold that the "at the time of contracting" language in this section implies that there is a contract between the parties and therefore, to

Notice of Breach to Seller

The Uniform Commercial Code Section 2-607(3) states that when a buyer has accepted goods, the buyer must notify the seller within a reasonable time after the buyer discovers or should have discovered any breach—or be barred from any remedy.[275] This generally means that a buyer has to notify a seller fairly promptly after delivery if there are any defects in the material. Otherwise, the buyer will lose the right to claim breach of contract or breach of warranty.[276]

This code section is helpful to a seller, especially where a buyer waits to complain of problems until after the seller files suit to collect the purchase price. However, the UCC probably does not require written notice or a complete statement of defect,[277] and a buyer may claim that notice of defects was given verbally to employees of the seller. It is also not clear how long a buyer can wait to complain.[278]

These uncertainties can be eliminated in a contract term requiring written notice and an opportunity for the seller to cure within a defined period of time, like paragraph 4 in the sample Supplier Proposal Form shown above and also available in the Appendices.

recover for consequential damages, the plaintiff must be in privity with the defendant. *See Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc.,* 254 Va. 240, 245, 491 S.E.2d 731, 733 (1997) [Plaintiff's damages of uncompensated cost to repair homes, loss of the remainder of its contract with the general contractor, and revenue loss due to damage to business reputation all constituted unrecoverable consequential damages].

[275] UCC Section 2-607(3).

[276] *Begley v. Jeep Corp., 491 F. Supp. 63* (W.D. Va. 1980) [Whether plaintiffs gave defendants reasonable notice of breach of warranty is ordinarily a question of fact reserved for the jury, however, if the evidence is clear, the court can rule as a matter of law that a party failed to give proper notice. Plaintiffs violated the letter and spirit of by waiting over two years to give defendants notice and sanction of dismissal should operate against them]; *Hebron v. American Isuzu Motors, Inc*., 60 F.3d 1095 (4th Cir. 1995) [a two-year delay in giving notice under subsection (3) was unreasonable as a matter of law where no explanation for the delay was provided and actual prejudice was sustained].

[277] *Cancun Adventure Tours, Inc. v. Underwater Designer Co*., 862 F.2d 1044 (4th Cir. 1988) [The provision does not require that notification include a clear statement of all objections. A buyer simply is required to notify the seller that the transaction is troublesome and should be watched]; *See also Virginia Transformer Corp. v. P.D. George Co.*, 932 F. Supp. 156 (W.D. Va. 1996).

[278] *Begley v. Jeep Corp*., 491 F. Supp. 63 (W.D. Va. 1980) [Plaintiffs violated the letter and spirit of by waiting over two years to give defendants notice and sanction of dismissal should operate against them]; *Hebron v. American Isuzu Motors, Inc*., 60 F.3d 1095 (4th Cir. 1995) [a two-year delay in giving notice under subsection (3) was unreasonable as a matter of law where no explanation for the delay was provided and actual prejudice was sustained].