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THE SALES CONTRACT—BUYER'S REMEDIES*

PAUL M. BARNES**

INTRODUCTION

The Remedial Consequences of Acceptance or Rejection of the Goods

In general, the buyer's remedies under the Code are not substantially different than under pre-Code Wisconsin law. The remedies for breach depend largely on whether the buyer has finally accepted the goods. This is true whether buyer's or seller's remedies are being considered. Consequently, both this article on buyer's remedies and the following article on seller's remedies treat the question of available remedies (1.) from the standpoint of remedies before acceptance and (2.) from the standpoint of remedies after acceptance.

Buyer's Right to Accept or Reject Nonconforming Goods

In many instances, rejection of nonconforming goods may be the most effective remedy that the buyer has. Moreover, a buyer who effectively rejects obviously cannot be held to have accepted the goods. Since acceptance of the goods has important remedial consequences from the standpoint of both parties to the sales contract, it becomes important to determine when the buyer has a right of rejection.

The general rule is found in section 402.601. Where nonconforming goods are delivered, the buyer may reject the whole, accept the whole, or accept any commercial unit and reject the rest. Partial acceptance must be of an entire "commercial unit," the test of a commercial unit being whether partial acceptance would so materially impair the value of the remainder as to constitute bad faith or be unreasonable.¹

Section 402.601, taken at its face value, appears to state the rule sometimes applied in cases arising under the Uniform Sales Act that there is no room for the doctrine of substantial performance in a commercial contract. Under section 402.601, the buyer may reject "if the goods or the tender of delivery fail in any respect to conform to the contract." The strict performance rule, which this section appears to impose on the seller, however, is subject to mitigating influences of other Code provisions. These provisions include sections 402.612 (buyer may reject an installment under an installment contract only

* This article is substantially the same as that contained in a chapter of the same title and by the same author appearing in the *Wisconsin Uniform Commercial Code Handbook*, a joint activity of the state bar of Wisconsin, Marquette University, and the University of Wisconsin.

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¹ See WIS. STAT. §402.105(6) and UNIFORM COMMERCIAL CODE §2-601, comment 1 (1962 Official Text).

if the nonconformity substantially impairs the value of the installment and may treat the whole contract as breached only if the nonconformity substantially impairs the value of the whole contract); 402.508 (seller has substantial opportunity to cure defective tenders); 402.608 (buyer's right to revoke acceptance is more limited than his right to reject in the first place); 402.614(1) (where agreed manner of delivery, etc., fails, buyer must accept a commercially reasonable substitute); 402.-504(2) (failure of seller to make a proper contract with carrier, etc., is ground for rejection only if material delay or loss ensues); 401.203 ("good faith" requirement may prevent rejection for a technicality when buyer's motive is simply to get out of a bad deal). In addition, the agreement of the parties, including usage of trade, can of course affect performance requirements and the right of rejection.

Because failure to make an "effective rejection" constitutes acceptance, the buyer must take affirmative action in order to avoid acceptance, even where the goods are wholly non-conforming.²

To make an effective rejection the buyer must (a) act within a reasonable time after delivery or tender, and (b) seasonably notify the seller.³ What is reasonable or seasonable depends on the circumstances, usage of trade and the like.⁴ A reasonable time for giving notice may be fixed by agreement.⁵ What constitutes notification is defined in section 401.201(26).

The buyer's notice must state the particular defects upon which he is basing his rejection if the defect is ascertainable by reasonable inspection and is curable, or "between merchants"⁶ if the seller makes written demand for particularization. Failure to state a particular defect in the foregoing circumstances precludes the buyer from relying on the unstated defect to justify rejection or establish breach.⁷ The seller may have the right to cure his default by making a second tender in some cases.⁸

Section 402.606(1) provides that acceptance of goods occurs when the buyer (a) after reasonable opportunity to inspect signifies (whether by words, action such as payment, or silence when it is time to speak) to the seller his willingness to accept them, or (b) fails to make an effective rejection, or (c) does any act inconsistent with the seller's ownership (such as resale for the buyer's own account), but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

² WIS. STAT. §402.606(1)(b).

³ WIS. STAT. §402.602(1).

⁴ See WIS. STAT. §§401.205 and 402.208.

⁵ WIS. STAT. §401.204.

⁶ See WIS. STAT. §402.104(3).

⁷ WIS. STAT. §402.605(1).

⁸ WIS. STAT. §402.508.

Acceptance of part of a commercial unit is an acceptance of that entire unit⁹ but does not bind the buyer to accept the whole lot.

Caveat. *It has been suggested that the buyer may, without thereby being held to have accepted defective goods, retain part of them as evidence in case of trial under section 402.515 which provides that either party upon notice to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including any in the other's possession.¹⁰ Comment 2 to section 2-515 of the Uniform Commercial Code (1962 Official Text), however, states that the right therein granted does not conflict with the seller's right to reell rejected good and that prompt action by the parties is required; this may indicate the advisability of the buyer's preserving evidence other than by attempting to retain goods until trial.*

Under section 402.608 the buyer may revoke his acceptance of a materially non-conforming lot or any commercial unit thereof if such goods were accepted on the reasonable assumption that the non-conformity would be cured and it is not, or if acceptance was induced by seller's assurance or by the difficulty of discovering defects.

Revocation must be made by giving notice to the seller within a reasonable time after the buyer discovers or should have discovered the defect and before the goods have undergone any substantial change in condition not caused by their own defects.

A revoking buyer has the same rights and duties as to the goods as if he had rejected them. See the discussion below.

The buyer has a duty to hold rejected goods which are in his possession with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them, and the buyer cannot exercise ownership of them.¹¹

A merchant buyer in control of rejected goods is under the additional duty to follow any reasonable instructions of the seller if the seller has no agent or place of business at the market of rejection, but the buyer may demand indemnity for his expenses. In the absence of instructions the merchant buyer has a duty to make a reasonable effort to sell the goods for the seller's account if they are perishable or threaten to decline in value speedily, and he is entitled to reimbursement for expenses, including a selling commission.¹²

Subject to the aforementioned duty as to perishables, if the seller gives no instructions within a reasonable time, the buyer may store, reship or sell rejected goods for the seller's account.¹³

⁹ WIS. STAT. §402.606(2).

¹⁰ See 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UCC 232-233.

¹¹ WIS. STAT. §402.602(2).

¹² WIS. STAT. §402.603.

¹³ WIS. STAT. §402.604.

Statute of Limitations

An action for breach of a sales contract must be commenced within six years after the cause of action accrues and this period may not be changed by agreement.¹⁴ The Wisconsin statute differs from the official Code version which sets a four-year period and permits it to be reduced to one year by agreement.¹⁵

The statute starts to run when the breach occurs, even if the aggrieved party doesn't know of the breach. A breach of warranty normally occurs when delivery is tendered.¹⁶

Unlike the official Code version, Wisconsin has retained the implied warranty of quiet possession;¹⁷ the statute of limitations would not start to run until such possession is disturbed.

If an action commenced within the six-year period is terminated, a new action for the same breach may be commenced after expiration of such period and within six months after termination of the first action.¹⁸

Contract Drafting Suggestions

The Code rules referred to in this article may be changed by agreement within the limits of unconscionability.¹⁹ At least minimum adequate remedies must be available.²⁰

In addition to the general limitation of unconscionability, the following more specific provisions should be kept in mind:

- (1.) Any limitation of consequential damages for personal injuries in the case of consumer goods is prima facie unconscionable.²¹
- (2.) A provision for liquidated damages must state a reasonable amount.²²
- (3.) If a remedy is intended to be exclusive, it must be expressly so stated; otherwise it will be optional.²³
- (4.) If a remedy stated to be "exclusive" fails of its purpose, the remedies provided by the Code are applicable.²⁴

Within the foregoing limitations, in connection with the buyer's remedies the parties may consider it advisable to include in the sales contract one or more of the following provisions:

- (1.) A provision stating whether the shipment must be accepted or rejected in its entirety.

¹⁴ WIS. STAT. §402.725(1).

¹⁵ UNIFORM COMMERCIAL CODE §2-725 (1962 Official Text).

¹⁶ WIS. STAT. §402.725(2).

¹⁷ WIS. STAT. §402.312(1)(c).

¹⁸ WIS. STAT. §402.725(3); of WIS. STAT. §330.35.

¹⁹ See WIS. STAT. §§401.102(3) and 402.719.

²⁰ UNIFORM COMMERCIAL CODE §2-719, Comment 1 (1962 Official Text).

²¹ WIS. STAT. §402.719(3).

²² WIS. STAT. §402.718(1).

²³ WIS. STAT. §402.719(1)(b).

²⁴ WIS. STAT. §402.719(2).

- (2.) A provision stating the time and manner of giving notice of rejection or revocation of acceptance.
- (3.) A provision stating the buyer's duties with regard to rejected goods, such as reshipment within limited time or resale for seller's account.
- (4.) A provision denying right of resale or specifying the time and manner of resale of rejected goods and of accounting for the proceeds.
- (5.) A provision limiting buyer's remedies, e.g., to repair and replacement of non-conforming goods.
- (6.) A provision specifying the measure of damages and limiting or negating incidental and consequential damages.
- (7.) A provision liquidating damages.
- (8.) A provision designating a particular time and place for determining market price in measuring damages.
- (9.) A provision identifying goods and providing for specific performance or replevin.

BUYER'S REMEDIES BEFORE ACCEPTANCE

Index of Remedies

Section 402.711 of the Wisconsin Statutes lists the buyer's remedies where goods are not delivered or are rightfully rejected or acceptance is justifiably revoked:

- (a) The buyer may cancel with respect to any goods involved or as to the whole if the breach goes to the whole contract,²⁵ and whether or not he has done so he may recover so much of the price as has been paid and may also (i) "cover" and recover damages under section 402.712, or (ii) recover damages for non-delivery under section 402.713.
- (b) Where the seller fails to deliver or repudiates, the buyer may also (i) recover goods which have been identified to the contract,²⁶ or (ii) obtain specific performance or replevy the goods.²⁷
- (c) Where the buyer has rightfully rejected or justifiably revoked acceptance he has a security interest in goods in his possession for any payments made on the price and expenses incurred in their inspection and handling and may hold such goods and resell them in the manner provided in section 402.706.

Unlike pre-Code law, under the Code a buyer may cancel and recover payment made on the purchase price, and in addition may recover damages.²⁸

²⁵ WIS. STAT. §402.612.

²⁶ WIS. STAT. §402.502.

²⁷ WIS. STAT. §402.716.

²⁸ In addition to WIS. STAT. §402.711, see the definition of cancellation in WIS. STAT. §402.106(4). See also WIS. STAT. §402.720.

Right to Damages Measured by "Cover"

In the event of breach the buyer may buy substitute goods elsewhere and if he acts reasonably and in good faith he can recover the difference between his actual cost and the contract price (less any expense saved by seller's breach) even though hindsight may prove he could have used a cheaper method of cover. In addition, the buyer may recover any incidental or consequential damages as defined in section 402.715.²⁹

Although section 402.712(3) states that failure to cover does not bar the buyer from any other remedy, such failure may bar consequential damages which could reasonably be prevented by cover,³⁰ and may also bar the right of replevin.³¹

Right to Damages Measured by "Market"

In lieu of "covering" in case of non-delivery or repudiation by the seller, the buyer may elect to recover damages measured by the difference between the market price when the buyer learned³² of the breach and the contract price, plus any incidental and consequential damages less any expenses saved by seller's breach.³³

Market price is to be determined as of the place of tender for goods of the same kind in the same branch of trade.³⁴

Published market quotations may be used to prove the market price of goods regularly traded in an established commodity market.³⁵

If evidence of the appropriate market price is not readily available, prices in comparable times or markets may be used with due allowance for transportation costs, provided that the buyer warns the seller of his intention to introduce such evidence.³⁶

Right to Sell Rejected Goods

Under section 402.711(3) a buyer may resell rejected goods and retain from the proceeds any prepayments and incidental expenses. He must account to the seller for the balance and may not retain his damages from the proceeds, but his right to cover or claim damages is not impaired by the resale.³⁷

The resale must be conducted in the manner provided in section 402.706.

Right to Specific Performance and Replevin

Normally, the remedies of "cover" and damages will be adequate, but if not, section 402.716 gives the buyer the right to specific per-

²⁹ See WIS. STAT. §402.712.

³⁰ WIS. STAT. §402.715(2)(a).

³¹ WIS. STAT. §402.716.

³² See WIS. STAT. §401.201(25).

³³ WIS. STAT. §713.

³⁴ WIS. STAT. §402.713(2) and UNIFORM COMMERCIAL CODE §2-713, comment 2 (1962 Official Text).

³⁵ WIS. STAT. §402.724.

³⁶ WIS. STAT. §402.723.

³⁷ UNIFORM COMMERCIAL CODE §2-711, comment 2 (1962 Official Text).

formance "where the goods are unique or in other proper circumstances." The decree may also include damages or other relief.³⁸

Where "cover" is not reasonably available and goods have been identified to the contract the buyer has a right to replevy them.³⁹

If the seller becomes insolvent within ten days after receipt of the first installment of the purchase price of goods which have been identified to the contract, the buyer may recover such goods upon tender of the unpaid balance of the price.⁴⁰ Whether this remedy will stand up under section 60 of the Bankruptcy Act remains to be determined.⁴¹

BUYER'S REMEDIES AFTER ACCEPTANCE

Effect of Acceptance

When the buyer accepts goods he becomes liable for the contract price; in case of partial acceptance the price is apportioned on the contract.⁴²

Acceptance precludes rejection, and also revocation of acceptance except in limited circumstances under section 402.608.

Acceptance does not bar the buyer's right to damages or other remedy for non-conformity, but he must notify the seller of breach within a reasonable time after he discovers or should have discovered it, and the burden of proof to establish breach is on the buyer.⁴³

Defense of Litigation

If the buyer is sued for patent infringement or the like,⁴⁴ in order to preserve his remedy against the seller he must so notify him within a reasonable time and must turn over control of the litigation to the seller if the latter so demands and agrees to bear all expenses and satisfy any adverse judgment.⁴⁵

If the buyer is sued for breach of warranty he may notify his seller to come in and defend, and, whether or not the seller does so, he will be bound by any *fact* (but apparently not *law*) finding in such litigation.⁴⁶

The foregoing provisions also apply in cases where the buyer is obliged to hold the seller harmless for infringement or the like.⁴⁷

For procedure to follow, see the impleader statutes.⁴⁸ Note that under section 402.607(3) it may be possible to bind an out-of-state party who could not be served and interpleaded.

³⁸ See also WIS. STAT. §401.106 with respect to liberal administration of remedies.

³⁹ WIS. STAT. §402.716(3).

⁴⁰ WIS. STAT. §402.502.

⁴¹ See HAWKLAND, A TRANSACTIONAL GUIDE TO THE UCC 257-258.

⁴² WIS. STAT. §402.607.

⁴³ *Ibid.*

⁴⁴ See WIS. STAT. §402.312(3).

⁴⁵ WIS. STAT. §§402.607(3)(b) and 402.607(5)(b).

⁴⁶ WIS. STAT. §402.607(5).

⁴⁷ See WIS. STAT. §402.312(3).

⁴⁸ WIS. STAT. §§260.19 and 263.15.

Right to Damages

A buyer who has accepted goods may recover as damages for any breach by the seller of his contract obligations the loss resulting in the ordinary course of events, including in proper cases, any incidental and consequential damages.⁴⁹

The measure of damages for breach of warranty is normally the difference, at the time and place of acceptance, between the value of the accepted goods and the value they would have had if they had been as warranted, but special circumstances may show damages of a different amount.⁵⁰

Right of Recoupment

Section 402.717 of the Wisconsin Statutes provides that a buyer may recoup his damages resulting from any breach of contract by deducting them from any part of the price still due under the same contract. The buyer must notify the seller of his intention to use this remedy.

A seller who cashes a buyer's check for the diminished price under these circumstances should inform the buyer that he is reserving all his rights to claim the full price, where such is the case.⁵¹

BUYER'S REMEDIES NOT DEPENDENT ON ACCEPTANCE

Incidental and Consequential Damages

Whether the buyer elects to "cover" under section 402.712, or to claim damages for non-delivery under section 402.713 or for non-conformity under section 402.714, he may also recover incidental and consequential damages as provided in section 402.715.

Incidental damages include any reasonable expense incident to the delay or other breach, including costs of inspecting, handling and caring for rejected goods, and expenses in effecting cover.

Consequential damages include any loss resulting from requirements of which the seller at the time of contracting had reason to know, but not a loss which could reasonably have been prevented by cover or otherwise, and also include personal and property damage proximately resulting from breach of warranty.⁵²

Contract clauses limiting or excluding consequential damages are valid unless they operate in an unconscionable manner; such a limitation of damages for personal injuries in the case of consumer goods, i.e., goods bought for personal, family or household use,⁵³ is prima facie unconscionable.⁵⁴

⁴⁹ WIS. STAT. §402.714.

⁵⁰ WIS. STAT. §402.714(2).

⁵¹ See WIS. STAT. §401.207 with respect to reservation of rights.

⁵² WIS. STAT. §402.715.

⁵³ WIS. STAT. §409.109(1).

⁵⁴ See WIS. STAT. §402.719(3).

Remedies for Fraud

Section 402.721 provides that rescission or rejection for fraud is not an election of remedies which bars a claim for damages or any other remedy available as in the case of a non-fraudulent breach. The common law principles relative to fraud still supplement the Code.⁵⁵

Action Against Third Party Tortfeasors

The buyer has a right of action against a third party who injures goods in which the buyer has an interest, even though he does not have title.⁵⁶ Joinder of buyer and seller as parties plaintiff under section 260.10 would appear to be the proper procedure to follow.

⁵⁵ WIS. STAT. §401.103.

⁵⁶ WIS. STAT. §402.722 states the rule in this area.