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# THE SALES CONTRACT--SELLER'S REMEDIES\*

PAUL M. BARNES\*\*

## INTRODUCTION

Because the seller's remedies, as well as the buyer's remedies, depend to a large degree on whether the buyer has finally accepted the goods, the discussion of the incidents of acceptance and rejection in the preceding article on buyer's remedies also is relevant to a discussion of the seller's remedies. Moreover, the statute of limitations discussed in the preceding article applies to seller's remedies as well as to buyer's remedies. The contract drafting suggestions discussed in the preceding article also are relevant here.

### *Seller's Remedies Not Dependent Upon Acceptance*

Whether or not the buyer has accepted the goods, if he breaches the contract the seller (1) is entitled to incidental (but not consequential) damages,<sup>1</sup> (2) may sue for fraud,<sup>2</sup> and (3) may sue third party tortfeasors under the rules of section 402.722 if the seller still has an interest in the goods.<sup>3</sup>

## SELLER'S REMEDIES BEFORE ACCEPTANCE

### *Index of Remedies*

Section 402.703 of the Wisconsin Statutes lists the seller's remedies where the buyer wrongfully rejects or revokes acceptance of goods, or fails to pay sums due on or before delivery. The seller may: (1.) withhold the goods; (2.) stop delivery by any bailee;<sup>4</sup> (3.) identify goods to the contract;<sup>5</sup> (4.) resell and recover damages;<sup>6</sup> (5.) recover damages for non-acceptance<sup>7</sup> or in a proper case, the price;<sup>8</sup> (6.) cancel.

These remedies are essentially cumulative, and whether pursuit of one remedy bars another depends on the particular facts.<sup>9</sup>

### *Right to Damages Measured by Resale Price*

Under section 402.706 on buyer's breach, or insolvency,<sup>10</sup> the seller

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\* 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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<sup>1</sup> WIS. STAT. §402.710.

<sup>2</sup> WIS. STAT. §402.721.

<sup>3</sup> See also paragraphs title "Remedies for Fraud" and "Action Against Third Party Tortfeasors" in the preceding article.

<sup>4</sup> WIS. STAT. §402.705.

<sup>5</sup> WIS. STAT. §402.704.

<sup>6</sup> WIS. STAT. §402.706.

<sup>7</sup> WIS. STAT. §402.708.

<sup>8</sup> WIS. STAT. §402.709.

<sup>9</sup> UNIFORM COMMERCIAL CODE §2-703, comment 1 (1962 Official Text).

<sup>10</sup> WIS. STAT. §402.702.

may resell withheld goods for his own benefit, whether or not title has passed, and if he does so "in good faith and in a commercially reasonable manner" he may recover the difference between the resale price and the contract price, together with any incidental damages,<sup>11</sup> less any expenses saved by reason of buyer's breach. The seller may retain any profit made on resale.<sup>12</sup>

The resale may be public or private and as a unit or in parcels. A public resale must be at a usual place for such sale if one is available and should be by auction. The seller may buy.<sup>13</sup>

Notice of intention to resell must be given the buyer, the notice must relate the resale to the broken contract and, unless the goods are perishable or threaten to decline in value speedily, the notice must specify time and place. If the goods cannot be viewed at the sale, notification of the sale must state where they can be inspected if it is to be a public sale.<sup>14</sup>

If the resale rules of section 402.706 are not followed, the resale price will not be conclusive and the seller would then have to prove market price and damages under section 402.708.

Unidentified goods may be resold only at a private sale unless there is a recognized market for public sale of futures in such goods.<sup>15</sup> As an alternative, the seller may identify finished goods to the contract and may complete and identify unfinished goods<sup>16</sup> and may resell them at public or private sale under section 402.706 or collect damages under section 402.708 or sue for their price under section 402.709.

#### *Right to Damages Measured by Market or Loss of Profit*

The measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place of tender and the contract price plus any incidental damages, or if this is inadequate to put the seller in as good a position as performance would have done, then he may recover his loss expected profit (taking into account reasonable overhead) and any incidental damages.<sup>17</sup>

The foregoing measure of damages is open to the seller, whether or not he has resold the goods.

If evidence of a market price at the time and place of tender is not available, proof may be made under the provisions of sections 402.723 or 402.724.<sup>18</sup>

As in the case of an aggrieved buyer, the seller may collect in-

<sup>11</sup> WIS. STAT. §402.710.

<sup>12</sup> WIS. STAT. §402.706(6).

<sup>13</sup> See WIS. STAT. §§402.706 and 402.328 as to auction sales.

<sup>14</sup> WIS. STAT. §402.706(2), (3) and (4).

<sup>15</sup> WIS. STAT. §402.706(4)(a).

<sup>16</sup> WIS. STAT. §402.704.

<sup>17</sup> WIS. STAT. §402.708.

<sup>18</sup> See paragraphs titled "Right to Damages Measured by 'Market'" in preceding article.

cidental damages,<sup>19</sup> but there is no provision in the Code specifically allowing a seller consequential damages (such as for loss of good will or future orders) as in the case of a buyer,<sup>20</sup> and therefore it would appear that no consequential damages may be had.<sup>21</sup>

*Right to Recover the Price; Specific Performance*

The seller may recover the price of conforming goods identified to the contract and any incidental damages even though the buyer has not accepted the goods, (1.) where they have been lost or damaged within a commercially reasonable time after risk of loss has passed to the buyer, or (2.) where the seller is unable to resell the goods.<sup>22</sup>

Inasmuch as an action for the price is essentially an action for specific performance, in such case the seller must hold the goods for delivery to the buyer if the latter pays, except that if resale becomes possible, the seller may do so and credit the net proceeds to the buyer<sup>23</sup>

*Right to Withhold Goods*

Delivery may be withheld upon the buyer's breach or repudiation.<sup>24</sup>

The seller may refuse delivery except for cash, "including payment for all goods theretofore delivered under the contract," if the buyer becomes insolvent.<sup>25</sup>

Withholding delivery is not an election of remedies; the seller may also pursue the above mentioned remedies for damages or the price.

*Right to Stop in Transit*

Where the seller has a right to withhold goods (i.e., where buyer has breached or is insolvent) the seller may stop delivery by a carrier or other bailee but, except where buyer is insolvent, only carload or larger shipments in transit may be stopped.<sup>26</sup>

Delivery may be stopped until occurrence of one of the events stated in section 402.705(2). The procedure for stopping delivery is set forth in section 402.705(3). Wisconsin Statutes section 407.303 gives the carrier protection in honoring a seller-consignor's orders on non-negotiable bills of lading.

After stoppage, seller's rights in the goods are the same as if he had never made delivery.<sup>27</sup>

The Code leaves open the question of whether a seller who ships direct to the buyer's customer may stop goods in transit; Comment 2 to section 2-705 of the Uniform Commercial Code indicates seller

<sup>19</sup> WIS. STAT. §402.710.

<sup>20</sup> See WIS. STAT. §402.715.

<sup>21</sup> WIS. STAT. §401.106(1).

<sup>22</sup> WIS. STAT. §402.709(1).

<sup>23</sup> WIS. STAT. §402.709(2).

<sup>24</sup> WIS. STAT. §402.703(2).

<sup>25</sup> WIS. STAT. §402.702(1). See also WIS. STAT. §401.201(23) for definition of "insolvent" which encompasses both equitable insolvency and balance-sheet insolvency.

<sup>26</sup> WIS. STAT. §402.705(1).

<sup>27</sup> UNIFORM COMMERCIAL CODE §2-705, comment 6 (1962 Official Text).

may be barred from stopping in such case. This suggests advisability of including contract clauses (1.) giving seller the right to stop regardless of destination of shipment, and (2.) giving buyer right to direct seller to stop a shipment direct to buyer's customer where the latter breaches or becomes insolvent.

#### SELLER'S REMEDIES AFTER ACCEPTANCE

##### *Action for the Price*

Where the buyer accepts goods, he owes the price as provided in the contract and the seller's principal remedy is an action for the price and any incidental damages.<sup>28</sup>

The same section also gives the seller this remedy where goods are lost or damaged within a commercially reasonable time after risk of loss has passed to the buyer, but the seller must prove that the goods were conforming.

##### *Right to Reclaim the Goods*

Where a buyer receives goods on credit at a time when he is insolvent, the seller may reclaim them if he learns of this fact and makes demand within ten days after such delivery, although actual repossession may be done later.<sup>29</sup>

The aforementioned ten-day limitation does not apply if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery.<sup>30</sup> This suggests the advisability of including a representation of solvency in the sales contract.

The seller's right to reclaim is subject to the rights of a buyer in ordinary course of business or other good faith purchaser or lien creditor.<sup>31</sup>

**Caveat.** *In a case arising under Pennsylvania law, it was held that the seller's right to reclaim was inferior to the right of a trustee in bankruptcy who is given the status of a lien creditor under Pennsylvania's Code section corresponding to section 409.301(3) of the Wisconsin Statutes, as well as under section 70c of the Bankruptcy Act.<sup>32</sup> To avoid the Kravitz result, several states have omitted the phrase "or lien creditor" from their Code sections corresponding to Wis. Stat. section 402.702 (3). Notice, however, that "purchaser" may include a lien creditor, and also a donee.<sup>33</sup> Wisconsin omitted the phrase "under this Article," from section 402.702(3) (the phrase appears in the corresponding Official Code section) as surplusage and to avoid any doubt that the section's reference to "lien creditor" includes lien creditors under chapter 409 of the Wisconsin Statutes.*

<sup>28</sup> WIS. STAT. §402.709(1)(a). See also WIS. STAT. §402.607(1).

<sup>29</sup> WIS. STAT. §402.702(2).

<sup>30</sup> *Ibid.*

<sup>31</sup> WIS. STAT. §402.702(3).

<sup>32</sup> See *In re Kravitz*, 278 F. 2d 820 (3rd Cir. 1960); cf., *In re the Matter of Mort Co.*, 208 F. Supp. 309 (E.D. Pa. 1962).

<sup>33</sup> WIS. STAT. §§401.201(32) and (33).