

504.39 CONTRACTS - ISSUE OF UCC REMEDY - SELLER'S LOST PROFIT DAMAGES.¹

The (*state number*) issue reads:

"What amount of money damages is the plaintiff entitled to recover from the defendant for breach of contract?"

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damage resulting from the breach.

The plaintiff may also be entitled to recover actual damages. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of damages sustained, if any, as a result of the breach.

The law provides that where the buyer has breached the contract of purchase, the seller may recover from the buyer the profit (including a reasonable contribution to overhead) the seller would have made from full performance by the buyer.²

(In addition to recovering *his* profit (including a reasonable contribution to overhead), the seller may also recover any incidental damages.³ Such incidental damages include any commercially reasonable charges, expenses or commissions incurred [in stopping delivery of the goods] [in the transportation, care and custody of the goods after the buyer's breach] [in connection with the return or resale of the goods] [name other costs reasonably incurred]⁴.)⁵

(The buyer is entitled, however, to a credit for the scrap or salvage

value realized from the sale of unfinished goods.)⁶

The plaintiff's damages are to be reasonably determined from the evidence presented. The plaintiff is not required to prove with mathematical certainty the extent of the financial injury in order to recover damages. Thus, the plaintiff should not be denied damages simply because they cannot be calculated with exactness or a high degree of mathematical certainty. However, an award of damages must be based on evidence which shows the amount of the plaintiff's damages with reasonable certainty. You may not award any damages based upon mere speculation or conjecture.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence the amount of damages sustained by the plaintiff by reason of the defendant's breach of contract, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal amount such as "One Dollar" in the blank space provided.

1. The applicability of this measure of damages appears to be conditioned on the contract-market damage measure being "inadequate to put the seller in as good a position as performance would have done." N.C. Gen. Stat. § 25-2-708(2). Adequacy may be a mixed question of law and fact, but there is no practical reason to have a judge or jury make a preliminary finding that contract-market damages would fail as an adequate damages remedy in a given case. It would be a rare occurrence for a plaintiff to elect a lesser measure of damages. It remains a fundamental policy of the Code that "the aggrieved party may be put in as good a position as if the other party had fully performed" and to that end the remedies provided by the Code "shall be liberally administered." N.C. Gen. Stat. § 25-1-103.

2. N.C. Gen. Stat. § 25-2-708(2). Typical of the class of plaintiff that would benefit from this measure are volume sellers of standard priced goods and manufacturers. *Industrial Circuits Co. v. Terminal Communications, Inc.*, 26 N.C. App. 536, 543, 216

S.E.2d 919, 924 (1975).

3. N.C. Gen. Stat. § 25-2-708(2).

4. This has been added to the description of incidental damages as a result of the "due allowance for costs reasonably incurred" in *Id.*

5. N.C. Gen. Stat. § 25-2-710.

6. The "due credit for payments or proceeds of resale" does not reference a "resale" in the context of N.C. Gen. Stat. § 25-2-706. Rather, it refers to the scrap or salvage value of unfinished goods. See N.C. Gen. Stat. § 25-2-704(2). This is also consistent with pre-UCC North Carolina law. See *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 259 N.C. 400, 416, 131 S.E.2d 9, 22 (1963) (salvage value to be credited to breaching party).