

504.42 CONTRACTS - ISSUE OF UCC REMEDY - SELLER'S REMEDY OF ACTION FOR PRICE (SPECIFIC PERFORMANCE) FOR DELIVERED GOODS.

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 fails to pay the agreed price as it becomes due [but has accepted the goods] [and the goods conform to the contract but are [lost] [damaged] within a commercially reasonable time after the risk of their loss has passed to the buyer] the seller may recover the agreed price.¹

(A buyer accepts goods

[when, after a reasonable opportunity to inspect the goods, *he* signifies to the seller that the goods conform to the contract]

[when, after a reasonable opportunity to inspect the goods, *he* signifies to the seller that *he* will take or retain them in spite of their non-conformity]

[when, after a reasonable opportunity to inspect the goods, *he* fails to make an effective rejection]

[when *he* does any act inconsistent with the seller's ownership].)²

(Risk of loss passes to a buyer [on *his* receipt of the goods if the seller is a merchant.³ A "merchant" means a person who deals in goods of the kind or otherwise by *his* occupation holds *himself* out as having knowledge or skill peculiar to the practices or goods involved in the transaction (or to whom such knowledge or skill may be attributable by *his* employment of an agent or broker or other intermediary who by *his* occupation holds *himself* out as having such knowledge or skill)]⁴ [on the seller's tender of delivery to the buyer]⁵ [*state other time for risk of loss to pass to buyer*]⁶.)

(In addition to the agreed price, the seller may also recover *his* incidental damages.⁷ 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].⁸)

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. N.C. Gen. Stat. § 25-2-703(e) and § 25-2-709(1)(a).

2. N.C. Gen. Stat. § 25-2-606.

3. N.C. Gen. Stat. § 25-2-509(3).

4. N.C. Gen. Stat. § 25-2-104(1).

5. N.C. Gen. Stat. § 25-2-509(3).

6. For rules governing the passing of the risk of loss where the goods are shipped by carrier, see N.C. Gen. Stat. § 25-2-509(1), and where the goods are held by a bailee, see N.C. Gen. Stat. § 25-2-509(2). In addition, risk of loss may pass at such time or place as the parties might stipulate in their contract. N.C. Gen. Stat. § 25-2-509(4).

7. N.C. Gen. Stat. § 25-2-709(1).

8. N.C. Gen. Stat. § 25-2-710. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 325, 204 S.E.2d 188, 190 (1974).