

504.45 CONTRACTS - ISSUE OF UCC REMEDY - SELLER'S REMEDY OF ACTION FOR PRICE (SPECIFIC PERFORMANCE) FOR UNDELIVERED 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 (and the goods have been identified to the contract),¹ and [the seller is unable after reasonable effort to resell them at a reasonable price] [the circumstances reasonably indicate that the seller would not be able to resell them after reasonable effort at a reasonable price], the seller may recover the agreed price.²

(In addition to the agreed price, the seller may also recover *his* 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].⁴)

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. Whether goods have been "identified to the contract" will be an issue of fact only infrequently. Thus, the language regarding identification is optional and should not be used if there is no dispute over which goods were the subject matter of the contract. In the infrequent instance where identification is a fact issue, the jury may be given the following explanation:

A good is "identified to the contract"

[when the contract is made if it is for the sale of goods already existing and identified]

[when the goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers if the contract is for the sale of future goods].

N.C. Gen. Stat. § 25-2-501(1). For special identification rules pertaining to crops

and unborn animals, see N.C. Gen. Stat. § 25-2-501(1)(c). Finally, a seller may proceed to identify goods to the contract even after he learns of the breach, including completing the manufacture of unfinished goods so they can be identified to the contract. N.C. Gen. Stat. § 25-2-704.

2. N.C. Gen. Stat. § 25-2-703(e) and § 25-2-709(1)(b). Note that this instruction applies to a breach by the buyer while the goods are still in the possession or control of the seller. Under those circumstances, in order to maintain his action for price, the seller must hold for the buyer all goods that have been identified to the contract. When the price is paid, the seller must turn the goods over to the buyer. N.C. Gen. Stat. § 25-2-709(2). There are exceptions to this duty, such as where the goods are perishable. Also note that the seller has a duty to resell unless a resale is impractical under the circumstances. *Id.* The net proceeds from any resale are to be credited to the buyer, even after a judgment is obtained. *Id.*

3. N.C. Gen. Stat. § 25-2-709(1).

4. 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).