

504.48 CONTRACTS - ISSUE OF UCC REMEDY - DEFENSE (OFFSET) OF FAILURE TO MITIGATE.

*NOTE WELL: The common law duty of the non-breaching party to mitigate damages is certainly carried forward to and supplements the Uniform Commercial Code. N.C. Gen. Stat. § 25-1-103. However, the policies underlying the seller's and buyer's remedies are self-mitigating. The penalty for bad faith conduct or commercially unreasonable behavior is consignment to "contract-market" damages.*

*Incidental damages for sellers and buyers are available only to the extent they are "commercially reasonable" (N.C. Gen. Stat. § 25-2-710) or "reasonably incurred." N.C. Gen. Stat. § 25-2-715(1). Sellers have no right to consequential damages at all. N.C. Gen. Stat. § 25-1-106(1). Buyers may recover consequential damages in specified situations, but only those "which could not reasonably be prevented by cover or otherwise." N.C. Gen. Stat. § 25-2-715(2)(a).*

*For these reasons, the notion of "mitigation" is built in to the very elements to be considered in conjunction with seller's and buyer's damages. It is understandable that the Uniform Commercial Code does not have a separate section dealing with mitigation. No separate instruction concerning a seller or buyer's duty to mitigate thus appears here.*

*Notwithstanding, despite the Uniform Commercial Code's "self-mitigating" construction, situations will undoubtedly arise where a separate mitigation instruction would be appropriate. When such circumstances occur, the Court should have no hesitancy to adapt and give N.C.P.I.-Civil 503.90 (Contracts-Issue of Common Law Remedy-Defense (Offset) For Failure to Mitigate) and N.C.P.I.-Civil 503.91 (Contracts-Issue of Common Law Remedy-Defense (Offset) For Failure to Mitigate-Amount of Credit.)*