

# Performance and cure of sales contracts

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Commercial transactions class

Lecture 2.02

## Introduction

### Setting

- **Performance** consists of the duties and obligations each party has under a contract
- If the contract terms do not govern performance, the UCC will apply
- The basic obligation of the seller is to **transfer and deliver conforming goods**
- The basic obligation of the buyer is to **accept and pay for conforming goods**

### Objective

Today we look at what it means to **perform** and **breach** a sales agreement. After this lecture, you should be able to answer the following questions:

1. What is the difference between conforming and nonconforming goods?
2. What is the perfect tender rule?
3. What is the right to cure?
4. What is commercial impracticability?

## Obligations of good faith and commercial reasonableness underlie every sales and lease contract under the UCC

The parties cannot waive or disclaim the UCC's good faith requirement

- Unlike common law, the UCC provides the parties with maximum flexibility in how they carry out their obligations.
- The UCC has a good faith provision that imposes a duty of good faith and commercial reasonableness in all sales contracts.
- Good faith is defined under the UCC as "honesty in fact in the conduct or transaction concerned."
  - For a nonmerchant, good faith means **honesty in fact**

Merchants have a higher standard of good faith

- For a **merchant**, good faith requires **more** than honesty in fact
- For a merchant, good faith requires two elements:
  - honesty in fact **and**
  - the observance of reasonable commercial standards of fair dealing

Under the UCC, merchants have the duty to act in a commercially reasonable manner

- Good faith conduct is conduct that does not violate community standards of decency, fairness or reasonableness

- Case discussion: *Brunswick Hills Raquet Club v. Route 18 Shopping Center Associates*, 864 A.2d 387 (2005)
- In a lawsuit, the **jury** decides whether a merchant acted in good faith

### Course of performance, course of dealing, and trade usage

- The course of performance is a method to show what the parties intended through their own actions in performing the specific contract in questions.
- Course of dealing refers to how the parties acted in past contracts, not the current contract.
- Trade usage refers to any general practice of method of performance that is specific to a particular trade or industry.

## The UCC holds that sellers and buyers owe each other obligations

### The seller is obligated to transfer and deliver conforming goods

- The seller has an obligation to transfer and deliver conforming goods to the buyer.
- Conforming goods are the goods bargained for in the agreement.
- Under the UCC, the **tender of delivery** rule obligates the seller to have or tender the goods, give the buyer appropriate notice of the tender, and take any actions necessary to allow the buyer to take delivery.

### There are rules regarding **tender of delivery**

- **Tender of delivery** requires that the seller have and hold **conforming goods** at the disposal of the buyer
- The seller must give the buyer **reasonable notice** to enable the buyer to take delivery
- Tender must be at a reasonable **time** and in a reasonable **manner**
- Goods must be tendered in a **single delivery** unless the parties agree otherwise

## The Perfect Tender Rule

### The perfect tender rule dictates

- that the seller tender goods in a manner that matches the contract terms in every respect.
- If the seller fails to achieve perfect tender, the buyer has three options:
  - (1) Reject the entire shipment of goods within a reasonable time;
  - (2) Accept the shipment of goods as is; or
  - (3) Accept any number of commercial units and reject the rest of the goods in a reasonable time.

### There are exceptions to the perfect tender rule

- **Agreement of the parties:** The parties can include exceptions in their contract
- **Substitution of carriers:** If an agreed manner of delivery becomes impracticable or unavailable, a substitute may be sufficient

### The UCC provides rules for the place of delivery for noncarrier contracts

- If a contract does not specify a place of delivery, and the buyer is to pick up the goods, the **place** is the **seller's business**
- If the parties know that the goods are somewhere other than the seller's business, **their location is the place for delivery**

Under a **shipment contract**, a seller must comply with the following

1. put goods into the hands of a carrier
2. contract for their transport
3. give the buyer any documents necessary to get possession of the goods from the carrier
4. and tell the buyer that shipment has been made

Under a **destination contract**, a seller must comply with the following

1. tender the goods at a **reasonable hour**;
2. keep the goods available for a **reasonable period of time** for the buyer to take possession; and
3. obtain and promptly deliver to the buyer any **documents of title** necessary for the buyer to take possession of the goods from the carrier; and
4. **promptly notify** the buyer that goods are available for her to take delivery.

Right of the seller to cure

- If the buyer rejects goods under the perfect tender rule
  - the seller has the right to repair or replace the rejected goods so long as the time period for performance has not expired

If the time to perform has not expired

- the seller has the right to cure by
  - giving notice of the intent to cure and
  - tendering conforming goods in replacement of the rejected goods

The right to cure can exist even after the time period for performance has expired

- if the seller reasonably believed that the nonconforming goods would be acceptable to the buyer (e.g., seller delivered a higher quality of good than ordered)

## Commercial impracticability

The perfect tender rule does not apply when an unforeseen occurrence makes performance commercially impracticable

- Commercial impracticability applies when a contingency occurred that was not contemplated when the parties reach an agreement

The UCC excuses the seller's performance

- when a contract becomes commercially impracticable,
- when the delivery or non-delivery of goods has been made impracticable by the occurrence of an unanticipated event,

- and the unanticipated event directly affects a basic assumption of the contract

The events must have been unforeseen by either party at the time of contracting

- Commercial impracticability is a **NARROW** doctrine
- In cases of commercial impracticability, delay in delivery or nondelivery in whole or in part may not be a breach of contract

The perfect tender rule does not apply in cases of commercial impracticability

- Commercial impracticability applies when a contingency occurred that was not contemplated when the parties reach an agreement
- The events must have been **unforeseen by either party at the time of contracting**
- In cases of commercial impracticability, delay in delivery or nondelivery in whole or in part **may not be a breach** of contract

Destruction of goods, before risk of loss passed, may excuse the parties from performance

- The parties are excused from performance, when:
  - **An unexpected event** that is **no fault** of either party ...
  - Destroys **identified** goods ...
  - **Before** the risk of loss passed to the buyer

The UCC governs assurance and cooperation

- If a party has reasonable grounds to believe that another will not perform, he may demand an **assurance of performance**
- If performance requires the **cooperation** of the other party, a **failure to cooperate** relieves the obligation to perform

The basic obligation of the buyer is to accept and pay for conforming goods

Obligations and rights of the buyer

- Once the buyer has accepted the goods, the buyer must pay for them in accordance with the contract
- In the absence of an agreement, the UCC provides that the buyer must make full payment at the time and place that it receives the goods
- If the parties agree on credit for payment, interest typically begins accruing 30 days after shipment

There are rules regarding acceptance and rejection

- The buyer has the right before delivery or acceptance to inspect the goods in a reasonable manner
- A buyer's right to inspect the goods is **absolute**
- Acceptance of any part is acceptance of the whole

Buyer's Right of Inspection: Acceptance or Rejection

- Unless otherwise agreed upon, the buyer has a reasonable time period to inspect the goods.

After inspection, the buyer may

1. communicate to the seller that it has accepted the goods;
2. do nothing, and thus be presumed to have accepted goods unless it gives prompt notice of a rejection; or
3. notify the seller that it is rejecting the goods (or part of the goods)

If the seller has shipped conforming goods, the buyer has the duty to accept them

- The buyer has an obligation to affirmatively notify the seller of a rejection in a timely manner so that the seller has an opportunity to cure or recover the goods

Acceptance of the goods exists when

1. The buyer agrees to do so, or
  2. Fails to make an effective rejection, or
  3. Acts in a manner consistent with ownership.
- A buyer can accept only those goods that conform to the contract and reject the rest

The buyer may pay by any means specified by the parties, or by any reasonable means if the method is not specified

- When a sale is on **credit**, a buyer must pay according to the terms, not when the goods are received.

## Special rules for installment contracts

An installment contract requires or authorizes delivery in two or more lots

- The UCC provides for delivery and billing to be done in two or more separate lots through the use of an installment contract.
- Each lot must be accepted and paid for separately

A buyer or lessee can reject an **installment** only if

- a nonconformity **substantially impairs the value of the installment and cannot be cured**
- A buyer can reject the entire contract only when the nonconformity **substantially impairs the value of the entire contract**

## Conclusion

What did we learn today?

- Obligations of good faith and commercial reasonableness underlie every sales and lease contract under the UCC
- The basic obligation of the seller is to transfer and deliver conforming goods
- The basic obligation of the buyer is to accept and pay for conforming goods