

A high-volume pleasure-boat retailer with a nearly inexhaustible supply of boats entered into a written contract with a boater, signed by both parties, to sell him a power boat for \$12,000. The manufacturer's price of the boat delivered to the retailer was \$9,500. As the contract provided, the boater paid the retailer \$4,000 in advance and promised to pay the full balance upon the boat's delivery. The contract contained no liquidated damages provision.

Prior to the agreed delivery date, the boater notified the retailer that he would be financially unable to conclude the purchase; and the retailer thereupon resold the same boat that the boater had ordered to a third person for \$12,000 cash.

If the boater sues the retailer for restitution of the \$4,000 advance payment, how should the court decide?

- A. The boater's claim should be denied, because, as the party in default, he is deemed to have lost any right to restitution of a benefit conferred on the retailer.
- B. The boater's claim should be denied, because, but for his repudiation, the retailer would have made a profit on two boat-sales instead of one.
- C. The boater's claim should be upheld in the amount of \$3,500 (\$4,000 minus \$500 as statutory damages under the UCC).
- D. The boater's claim should be upheld in the amount of \$4,000 minus the amount of the retailer's lost profit under its contract with the boater.

Explanation:

Breaching buyer's recovery of advance payment

(UCC § 2-718)

Buyer who made advance payment before breach can recover amount paid minus seller's:

liquidated damages – amount set forth in contract

statutory damages – 20% of contract price or \$500, whichever is less (if no valid liquidated damages clause)

OR

actual damages – expectation damages plus any incidental damages (if amount exceeds statutory damages)

UCC = Uniform Commercial Code.

Under the UCC, a **breaching buyer** is entitled to **restitution damages** for the value of any advance payments it made to the seller. This ensures that the seller is not unjustly enriched at the buyer's expense (**Choice A**). However, the buyer's damages award will be **offset by** the seller's damages. If, as here, there is no liquidated damages provision, then the **seller's offset** is the **greater of** the following:

Statutory damages – \$500 or 20% of the total contract price, whichever is smaller

Actual damages – expectation damages (eg, lost profits if the seller is a **lost-volume seller**), plus any incidental damages (eg, shipping or transportation costs)

Therefore, an injured seller is not limited to a \$500 statutory offset when the seller's actual damages exceed that amount (**Choice C**).

Here, the retailer is a lost-volume seller, as evidenced by its nearly inexhaustible supply of boats. But for the boater's breach, the retailer would have made two sales (and two profits) rather than one. As a result, the retailer's actual damages are its lost profit from the sale to the boater plus incidental damages (none are indicated). The boater's claim should therefore be upheld in the amount of \$4,000 for the advance payment *minus* the amount of the retailer's lost profit.

(Choice B) The retailer would have made a profit on two boat sales instead of one had the boater not repudiated the contract. However, since the boater is entitled to restitution of the \$4,000 advance payment, the retailer's lost profit (from the sale to the boater) will be subtracted from—but not negate—the boater's claim.

Educational objective:

Under the UCC, a breaching buyer is entitled to restitution damages for the value of any advance payments it made to the seller, minus the amount of the seller's damages.

References

U.C.C. § 2-718 (Am. Law Inst. & Unif. Law Comm'n 2020) (liquidation or limitation of damages and deposits).

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