CHAPTER 2

Commercial Code—Sales

Editor’s Note

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Introduction

For the majority of American jurisdictions which had enacted the Sales Act, Article 2 would be a modernized revision of that half‑century old Act. Indeed, this Article began as a proposed replacement of the Uniform Sales Act until the decision was made to draft a comprehensive codification of commercial law. For South Carolina, Article 2 would break new ground by providing general statutory coverage of sales law for the first time.

When compared with most of the other articles of the Code, Article 2 would result in a proportionately greater change of existing law. This is due in part to the fact that sales practices have experienced more changes in the past few decades. Consistent with the basic approach of the Code to bring legal rules in closer harmony with commercial practice, this changing environment requires changing legal rules if this objective is to be accomplished. Other changes are based on an abandonment of a conceptual approach in favor of a more functional one in the formation of the rules of this Article. An outstanding example is the elimination of “title passing” as a solution to a number of important questions. Also several changes in the rules dealing with remedies for breach of a sales contract in favor of more liberal relief may be explained by the Code’s approach of imposing a greater degree of responsibility for performance on the parties. These generalities should become more meaningful with an examination of the sections in Article 2.

Since the approach of this study is to analyze each section of the Code and compare it with South Carolina law, only incidental reference will be made to the Uniform Sales Act when it appears to reflect the probable South Carolina common law. The main emphasis for comparative purposes continues to be on the South Carolina cases where available.

CROSS REFERENCES

Warehouse receipts and bills of lading, adequate compliance with commercial contract, see Section 36‑7‑509.

Part 1

Short Title, General Construction and Subject Matter

**SECTION 36‑2‑101.** Short title.

This Chapter shall be known and may be cited as Uniform Commercial Code—Sales.

HISTORY: 1962 Code Section 10.2‑101; 1966 (54) 2716.

OFFICIAL COMMENT

This Article is a complete revision and modernization of the Uniform Sales Act which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1906 and has been adopted in 34 states and Alaska, the District of Columbia and Hawaii.

The coverage of the present Article is much more extensive than that of the old Sales Act and extends to the various bodies of case law which have been developed both outside of and under the latter.

The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

SOUTH CAROLINA REPORTER’S COMMENTS

There is no similar statutory law in South Carolina today since the Uniform Sales Act, which this article replaces, has never been enacted in this State.

CROSS REFERENCES

The Consumer Finance Law, see Sections 34‑29‑10 et seq.

Contracts and agency generally, see Title 32.

Rights of secured party after default by debtor, governing law, see Section 36‑9‑110.

LIBRARY REFERENCES

Statutes 116.

Westlaw Key Number Search: 361k116.

C.J.S. Statutes Sections 240, 242.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Auctions and Auctioneers Section 20, Conduct of Auction Sales Under South Carolina Uniform Commercial Code.

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

Forms

South Carolina Legal and Business Forms Section 6:1 , Legal Principles.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Contracts. 30 S.C. L. Rev. 36.

South Carolina Amendments to Article 2 of the Uniform Commercial Code. 21 S.C. L. Rev. 400.

**SECTION 36‑2‑102.** Scope; certain security and other transactions excluded from this Chapter.

Unless the context otherwise requires, this Chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

HISTORY: 1962 Code Section 10.2‑102; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 75, Uniform Sales Act.

Changes: Section 75 has been rephrased.

Purposes of changes and new matter:

To make it clear that:

The Article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions.

“Security transaction” is used in the same sense as in the Article on Secured Transactions (Article 9).

Cross References:

ARTICLE 9.

Definitional Cross References:

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|  |  |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Present sale” | Section 2‑106. |
| “Sale” | Section 2‑106. |

SOUTH CAROLINA REPORTER’S COMMENTS

The language of this section . . . “applies to transactions in goods”, is designed to describe the broad coverage of the Sales Articles. (See Commercial Code section 2‑105(1) for definition of goods.) The scope of this article extends from a number of rules relating to the formation of sales contracts to matters of performance and remedies for breach. Expressly excluded are transfers of a security interest in goods which are covered under Article 9, Secured Transactions.

No attempt is made to affect existing or subsequently enacted regulatory statutes such as those designed to protect consumers in sales transactions (Retail Installments Sales Act) or statutes dealing with the transfer of motor vehicles (Certificate of Title Act), since these matters are of varying local public policy considerations. This Section makes it clear that any such statutes are not to be repealed by implication from legislative enactment of the Code.

CROSS REFERENCES

Secured transactions, see Sections 36‑9‑101 et seq.

LIBRARY REFERENCES

Sales 3.

Westlaw Key Number Search: 343k3.

C.J.S. Exchange of Property Section 1.

C.J.S. Sales Sections 3 to 4.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Master and Servant Section 23, Conspicuousness.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Property: Protections to Purchasers in Home Sales. 33 S.C. L. Rev. 131 (August 1981).

South Carolina Amendments to Article 2 of the Uniform Commercial Code. 21 S.C. L. Rev. 400.

NOTES OF DECISIONS

Contract for sale of goods 1

Express warranty 2.5

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1. Contract for sale of goods

The definition of “goods” in code 1962 Section 10.2‑105(1) is broad, but it must be noted that this article deals with, and the definition of goods is cast in terms of, the contract for sale; and sale “consists in the passing of title from the seller to the buyer for a price.” (Code 1962 Section 10.2‑106.1). Computer Servicenters, Inc. v. Beacon Mfg. Co. (D.C.S.C. 1970) 328 F.Supp. 653, affirmed 443 F.2d 906.

An agreement for performance of data processing services by the plaintiff for the defendant, with a separate charge for supplies unless the defendant provided them, where the payment contemplated was for the analysis, collection, storage, and reporting of certain data supplied the plaintiff by the defendant, was not an agreement for the sale of goods. Computer Servicenters, Inc. v. Beacon Mfg. Co. (D.C.S.C. 1970) 328 F.Supp. 653, affirmed 443 F.2d 906.

ARTICLE 2 of the Uniform Commercial Code is not applicable to lease transactions in general. Pursuant to Section 36‑2‑102, ARTICLE 2 applies to “transactions in goods” which is not broad enough to encompass leases in general. While ARTICLE 2 applies to “transactions in goods,” “goods” are defined in Section 36‑2‑105(1) as “all things...which are moveable at the time of identification to the contract for sale. . .” (emphasis added). Additionally, Section 36‑2‑106(1) limits references to the terms “contract” and “agreement” to “those relating to the present or future sale of goods.” D & D Leasing Co. of South Carolina, Inc. v. Gentry (S.C. 1989) 298 S.C. 342, 380 S.E.2d 823.

2. Mixed contracts

Mixed contracts, or contracts which involved both goods and services, are not automatically included within scope of Article 2 of Uniform Commercial Code merely because they are partially involved with exchange of goods. Ranger Const. Co. v. Dixie Floor Co., Inc. (D.C.S.C. 1977) 433 F.Supp. 442.

Uniform Commercial Code was inapplicable to contract under which defendant was to furnish all materials and labor for installation of flooring where it was apparent plaintiff was not contracting for materials alone, but was rather contracting for performance of entire segment of prime contract, accompanied by incidental sale of goods. Ranger Const. Co. v. Dixie Floor Co., Inc. (D.C.S.C. 1977) 433 F.Supp. 442.

2.5. Express warranty

Patient’s allegations that defendants expressly warranted to his treating physicians that the surgical mesh it sold had certain qualities and characteristics which were in fact untrue, that the United States Food and Drug Administration (FDA) had traced the alleged malfeasance of manufacturing and labeling the mesh to defendants, and inclusion of photocopy of actual surgical sticker included by defendants in packaging stating it was certain type of mesh were sufficient to state a claim against defendants for breach of express warranty under South Carolina law. Jones v. Ram Medical, Inc., 2011, 807 F.Supp.2d 501. Sales 2466

3. Questions of fact

Even where defendant’s contract repudiation was not specifically justified by 1962 Code Section 10.2‑609 [Section 36‑2‑609 (1976)] because contract for installation of flooring was predominantly characterized as service contract accompanied by incidental sale of goods, under common‑law theory of anticipatory repudiation there was question of fact for jury to determine whether plaintiff contractor’s refusal to pay defendant subcontractor under prior North Carolina construction contract demonstrated to defendant that plaintiff could not or would not substantially perform his promise under contract. Ranger Const. Co. v. Dixie Floor Co., Inc. (D.C.S.C. 1977) 433 F.Supp. 442.

**SECTION 36‑2‑103.** Definitions and index of definitions.

(1) In this chapter unless the context otherwise requires:

(a) “Buyer” means a person who buys or contracts to buy goods.

(b) [Reserved].

(c) “Receipt” of goods means taking physical possession of them.

(d) “Seller” means a person who sells or contracts to sell goods.

(2) Other definitions applying to this chapter or to specified parts thereof, and the sections in which they appear are:

“Acceptance.” Section 36‑2‑606.

“Banker’s credit.” Section 36‑2‑325.

“Between merchants.” Section 36‑2‑104.

“Cancellation.” Section 36‑2‑106(4).

“Commercial unit.” Section 36‑2‑105.

“Confirmed credit.” Section 36‑2‑325.

“Conforming to contract.” Section 36‑2‑106.

“Contract for sale.” Section 36‑2‑106.

“Cover.” Section 36‑2‑712.

“Entrusting.” Section 36‑2‑403.

“Financing agency.” Section 36‑2‑104.

“Future goods.” Section 36‑2‑105.

“Goods.” Section 36‑2‑105.

“Identification.” Section 36‑2‑501.

“Installment contract.” Section 36‑2‑612.

“Letter of credit.” Section 36‑2‑325.

“Lot.” Section 36‑2‑105.

“Merchant.” Section 36‑2‑104.

“Overseas.” Section 36‑2‑323.

“Person in position of seller.” Section 36‑2‑707.

“Present sale.” Section 36‑2‑106.

“Sale.” Section 36‑2‑106.

“Sale on approval.” Section 36‑2‑326.

“Sale or return.” Section 36‑2‑326.

“Termination.” Section 36‑2‑106.

(3) “Control” as provided in Section 36‑7‑106 and the following definitions in other chapters of Title 36 apply to this chapter:

“Check” Section 36‑3‑104.

“Consignee” Section 36‑7‑102.

“Consignor” Section 36‑7‑102.

“Consumer goods” Section 36‑9‑102.

“Dishonor” Section 36‑3‑507.

“Draft” Section 36‑3‑104.

(4) In addition Title 36, Chapter 1, contains general definitions and principles of construction and interpretation applicable throughout this Chapter.

HISTORY: 1962 Code Section 10.2‑103; 1966 (54) 2716; 2014 Act No. 213 (S.343), Sections 3, 4, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: Subsection (1): Section 76, Uniform Sales Act.

Changes: The definitions of “buyer” and “seller” have been slightly rephrased, the reference in Section 76 of the prior Act to “any legal successor in interest of such person” being omitted. The definition of “receipt” is new.

Purposes of changes and new matter:

1. The phase “any legal successor in interest of such person” has been eliminated since Section 2‑210 of this Article, which limits some types of delegation of performance on assignment of a sales contract, makes it clear that not every such successor can be safely included in the definition. In every ordinary case, however, such successors are as of course included.

2. “Receipt” must be distinguished from delivery particularly in regard to the problems arising out of shipment of goods, whether or not the contract calls for making delivery by way of documents of title, since the seller may frequently fulfill his obligations to “deliver” even though the buyer may never “receive” the goods. Delivery with respect to documents of title is defined in Article 1 and requires transfer of physical delivery. Otherwise the many divergent incidents of delivery are handled incident by incident.

Cross References:

Point 1: See Section 2‑210 and Comment thereon.

Point 2: Section 1‑201.

Definitional Cross References:

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| “Person” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

This section contains a few rather obvious definitions of terms (subsection 1), a cross reference to a number of other Article 2 sections which define additional terms (subsection 2) and sections in other articles of the Code which contain definitions applicable to Article 2.

These definitions are supplemented by those in Article 1 of the Code. To the “honesty in fact” definition of good faith under Commercial Code Section 1‑201(19), subsection 1(b) adds the requirement of “observation of reasonable commercial standards of fair dealing in the trade” for the standard of conduct for merchants. Where a merchant is involved, this additional standard of good faith will be applicable.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 3, reserved subsection (1)(b), which formerly had defined “good faith”.

2014 Act No. 213, Section 4, in the introductory text of subsection (3), inserted the definition of “control”.

CROSS REFERENCES

Delegation of performance and assignment of rights, see Section 36‑2‑210.

General definitions, see Section 36‑1‑201.

Warehouse receipts, bills of lading and other documents of title, “receipt of goods” defined, see Section 36‑7‑102.

LIBRARY REFERENCES

Sales 1, 54.

Statutes 179.

Westlaw Key Number Searches: 343k1; 343k54; 361k179.

C.J.S. Sales Sections 2, 82 to 83, 85 to 87, 108.

C.J.S. Statutes Sections 306, 309.

LAW REVIEW AND JOURNAL COMMENTARIES

Contract Modification Under Duress. 33 S.C. L. Rev. 615 (May 1982).

South Carolina Amendments to Article 2 of the Uniform Commercial Code. 21 S.C. L. Rev. 400.

**SECTION 36‑2‑104.** Definitions: “Merchant”; “between merchants”; “financing agency”.

(1) “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 attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) “Financing agency” means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller’s draft or making advances against it or by merely taking it for collection whether or not documents of title accompany or are associated with the draft. “Financing agency” includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 36‑2‑707).

(3) “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

HISTORY: 1962 Code Section 10.2‑104; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 5, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: None. But see Sections 15 (2), (5), 16(c), 45(2) and 71, Uniform Sales Act, and Sections 35 and 37, Uniform Bills of Lading Act for examples of the policy expressly provided for in this Article.

Purposes:

1. This Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer. It thus adopts a policy of expressly stating rules applicable “between merchants” and “as against a merchant”, wherever they are needed instead of making them depend upon the circumstances of each case as in the statutes cited above. This section lays the foundation of this policy by defining those who are to be regarded as professionals or “merchants” and by stating when a transaction is deemed to be “between merchants”.

2. The term “merchant” as defined here roots in the “law merchant” concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

The special provisions as to merchants appear only in this Article and they are of three kinds. Sections 2‑201(2), 2‑205, 2‑207 and 2‑209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a “merchant” under the language “who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . .” since the practices involved in the transaction are non‑specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be “merchants.” But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant.

On the other hand, in Section 2‑314 on the warranty of merchantability, such warranty is implied only “if the seller is a merchant with respect to goods of that kind.” Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods. The exception in Section 2‑402(2) for retention of possession by a merchant‑seller falls in the same class; as does Section 2‑403(2) on entrusting of possession to a merchant “who deals in goods of that kind”.

A third group of sections includes 2‑103(1) (b), which provides that in the case of a merchant “good faith” includes observance of reasonable commercial standards of fair dealing in the trade; 2‑327(1) (c), 2‑603 and 2‑605, dealing with responsibilities of merchant buyers to follow seller’s instructions, etc.; 2‑509 on risk of loss, and 2‑609 on adequate assurance of performance. This group of sections applies to persons who are merchants under either the “practices” or the “goods” aspect of the definition of merchant.

3. The “or to whom such knowledge or skill may be attributed by his employment of an agent or broker . . .” clause of the definition of merchant means that even persons such as universities, for example, can come within the definition of merchant if they have regular purchasing departments or business personnel who are familiar with business practices and who are equipped to take any action required.

Cross References:

Point 1: See Sections 1‑102 and 1‑203.

Point 2: See Sections 2‑314, 2‑315 and 2‑320 to 2‑325, of this Article, and Article 9.

Definitional Cross References:

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|  |  |
| “Bank” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract for sale” | Section 2‑106. |
| “Document of title” | Section 1‑201. |
| “Draft” | Section 3‑104. |
| “Goods” | Section 2‑105. |
| “Person” | Section 1‑201. |
| “Purchase” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

An important novelty of the Sales Article of the Code is that in a number of places, different rules are stated for mercantile transactions where a merchant is a party and non‑mercantile sales where an individual consumer is a party (e.g., Commercial Code Sections 2‑201, 2‑209, 2‑314, 2‑326, 2‑509 and 2‑603). Thus the definition of merchant as a professional under subsection 1 and transactions “between merchants” of subsection 3 are important since the application may determine the outcome of the controversy under a number of Code sections.

This broad definition of merchant and transactions “between merchants” would seem to apply to the vast majority of sales transactions.

Section 2‑104(2) gives a broad definition of “financing agency” as a “professional” who is in the business of supplying advances in sales transactions and includes individuals as well as banks and finance companies. Such a financer may be a “person in the position of a seller or buyer” with the rights of such under Commercial Code Section 2‑707.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 5, in subsection (2), inserted “or are associated with” at the end of the first sentence.

CROSS REFERENCES

Implied warranties, see Sections 36‑2‑314, 36‑2‑315.

Obligation of good faith, see Section 36‑1‑304.

Purposes and rules of construction, see Section 36‑1‑103.

Secured transactions, see Sections 36‑9‑101 et seq.

LIBRARY REFERENCES

Sales 1, 15.1.

Statutes 179.

Westlaw Key Number Searches: 343k1; 343k15.1; 361k179.

C.J.S. Sales Sections 2, 10.

C.J.S. Statutes Sections 306, 309.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Property: Protections to Purchasers in Home Sales. 33 S.C. L. Rev. 131 (August 1981).

Contract Modification Under Duress. 33 S.C. L. Rev. 615 (May 1982).

Contracts: Implied Warranties in Home Construction: Subsequent Purchasers. 33 S.C. L. Rev. 33 (August 1981).

**SECTION 36‑2‑105.** Definitions: transferability; “goods”; “future” goods; “lot”; “commercial unit”.

(1) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Title 36, Chapter 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 36‑2‑107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller’s interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) “Lot” means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

HISTORY: 1962 Code Section 10.2‑105; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Subsections (1), (2), (3) and (4)—Sections 5, 6 and 76, Uniform Sales Act; Subsections (5) and (6)—none.

Changes: Rewritten.

Purposes of changes and new matter:

1. Subsection (1) on “goods”: The phraseology of the prior uniform statutory provision has been changed so that:

The definition of goods is based on the concept of movability and the term “chattels personal” is not used. It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed.

Growing crops are included within the definition of goods since they are frequently intended for sale. The concept of “industrial” growing crops has been abandoned, for under modern practices fruit, perennial hay, nursery stock and the like must be brought within the scope of this Article. The young of animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth. The period of gestation of domestic animals is such that the provisions of the section on identification can apply as in the case of crops to be planted. The reason of this definition also leads to the inclusion of a wool crop or the like as “goods” subject to identification under this Article.

The exclusion of “money in which the price is to be paid” from the definition of goods does not mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction. Goods is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.

As to contracts to sell timber, minerals, or structures to be removed from the land Section 2‑107(1) (Goods to be severed from Realty: recording) controls.

The use of the word “fixtures” is avoided in view of the diversity of definitions of that term. This Article in including within its scope “things attached to realty” adds the further test that they must be capable of severance without material harm thereto. As between the parties any identified things which fall within that definition become “goods” upon the making of the contract for sale.

“Investment securities” are expressly excluded from the coverage of this Article. It is not intended by this exclusion, however, to prevent the application of a particular section of this Article by analogy to securities (as was done with the Original Sales Act in Agar v Orda, 264 NY 248, 190 NE 479, 99 ALR 269 (1934)) when the reason of that section makes such application sensible and the situation involved is not covered by the Article of this Act dealing specifically with such securities (Article 8).

2. References to the fact that a contract for sale can extend to future or contingent goods and that ownership in common follows the sale of a part interest have been omitted here as obvious without need for expression; hence no inference to negate these principles should be drawn from their omission.

3. Subsection (4) does not touch the question of how far an appropriation of a bulk of fungible goods may or may not satisfy the contract for sale.

4. Subsections (5) and (6) on “lot” and “commercial unit” are introduced to aid in the phrasing of later sections.

5. The question of when an identification of goods takes place is determined by the provisions of Section 2‑501 and all that this section says is what kinds of goods may be the subject of a sale.

Cross References:

Point 1: Sections 2‑107, 2‑201, 2‑501 and Article 8.

Point 5: Section 2‑501.

See also Section 1‑201.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Fungible” | Section 1‑201. |
| “Money” | Section 1‑201. |
| “Present sale” | Section 2‑106. |
| “Sale” | Section 2‑106. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Consistent with the broad scope of the Code in dealing with the transfer of personal property, subsection 1 defines “goods” (referred to in Commercial Code Section 2‑102 covering the general scope of Article 2) as movables, agricultural products and certain goods to be removed from realty such as timber and minerals.

“Investment securities” are covered under Article 8 of the Code and thus are expressly excluded from the definition of goods and from direct coverage under Article 2. It is pointed out in the official comments, however, that a section of Article 2 may be employed by analogy to securities when the situation involved is not covered by Article 8. When read in this light, the express exclusion may not be inconsistent with the case of Beckroge v South Carolina Public Service Co., 185 SC 210, 193 SE 315 (1936), which held that a contract for the sale of corporate stock comes within the meaning of the word “goods” as used in the South Carolina Statute of Frauds, SC Code Section 11‑103. (See Commercial Code section 8‑319 for the statute of frauds applicable to investment securities.).

Section 2‑105(2) states the obvious proposition that no interest may pass in goods until they come into existence and are identified to the contract. (See Commercial Code section 2‑501 on when identification occurs.) As a matter of terminology a contract to sell such “future goods” is a “contract to sell”.

Section 2‑105(3) and (4) recognizes that there may be a sale of a part interest or undivided share in fungible goods in which case ownership in common follows.

The definition of “lot” in subsection (5) is applicable to Commercial Code section 2‑612 dealing with installment contracts. The definition of “commercial unit” in subsection (6) is of importance in connection with the operation of Commercial Code sections 2‑601 and 2‑608.

CROSS REFERENCES

General definitions, see Section 36‑1‑201.

Investment securities, see Sections 36‑8‑101 et seq.

Special property and insurable interest in existing and future goods, see Section 36‑2‑501.

Statute of frauds, see Section 36‑2‑201.

LIBRARY REFERENCES

Sales 9.

Statutes 179.

Westlaw Key Number Searches: 343k9; 361k179.

C.J.S. Sales Sections 12, 15.

C.J.S. Statutes Sections 306, 309.

RESEARCH REFERENCES

ALR Library

48 ALR 6th 475 , What Constitutes “Future Goods” Within Scope of U.C.C. Article 2.

Treatises and Practice Aids

American Law of Products Liability 3d Section 18:16, Local Statutory Citations and Variations of U.C.C. S2‑103.

Attorney General’s Opinions

“Goods” includes animals and would include horse sold at auction. Op Atty Gen 92‑06.

NOTES OF DECISIONS

Contract for sale of goods 1

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Questions of fact 3

1. Contract for sale of goods

“Goods”. The definition of “goods” in code 1962 Section 10.2‑105(1) is broad, but it must be noted that this article deals with, and the definition of goods is cast in terms of, the contract for sale; and sale “consists in the passing of title from the seller to the buyer for a price.” (Code 1962 Section 10.2‑106.1). Computer Servicenters, Inc. v. Beacon Mfg. Co. (D.C.S.C. 1970) 328 F.Supp. 653, affirmed 443 F.2d 906.

An agreement for performance of data processing services by the plaintiff for the defendant, with a separate charge for supplies unless the defendant provided them, where the payment contemplated was for the analysis, collection, storage, and reporting of certain data supplied the plaintiff by the defendant, was not an agreement for the sale of goods. Computer Servicenters, Inc. v. Beacon Mfg. Co. (D.C.S.C. 1970) 328 F.Supp. 653, affirmed 443 F.2d 906.

ARTICLE 2 of the Uniform Commercial Code is not applicable to lease transactions in general. Pursuant to Section 36‑2‑102, ARTICLE 2 applies to “transactions in goods” which is not broad enough to encompass leases in general. While ARTICLE 2 applies to “transactions in goods,” “goods” are defined in Section 36‑2‑105(1) as “all things . . . which are moveable at the time of identification to the contract for sale . . .” (emphasis added). Additionally, Section 36‑2‑106(1) limits references to the terms “contract” and “agreement” to “those relating to the present or future sale of goods.” D & D Leasing Co. of South Carolina, Inc. v. Gentry (S.C. 1989) 298 S.C. 342, 380 S.E.2d 823.

2. Mixed contracts

Alleged verbal lump‑sum hybrid contract for design, fabrication, and erection of airplane hangar was for “sale of goods,” subject to statute of frauds under South Carolina law; although subcontractor asserted that contract was predominantly for services, erection services were incidental to sale of steel and cladding for hangar. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Frauds, Statute Of 84

Under the predominant factor test, used to determine whether a transaction that provides for both goods and services is a contract for the sale of goods governed by the Uniform Commercial Code (UCC), South Carolina courts evaluate transactions to determine if their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, e.g., contract with artist for painting, or is a transaction of sale, with labor incidentally involved, e.g., installation of a water heater in a bathroom. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Sales 528

Mixed contracts, or contracts which involve both goods and services, are not automatically included within scope of Article 2 of Uniform Commercial Code merely because they are partially involved with exchange of goods. Ranger Const. Co. v. Dixie Floor Co., Inc. (D.C.S.C. 1977) 433 F.Supp. 442.

Uniform Commercial Code was inapplicable to contract under which defendant was to furnish all materials and labor for installation of resilient flooring where it was apparent plaintiff was not contracting for materials alone, but was rather contracting for performance of entire segment of prime contract, accompanied by incidental sale of goods. Ranger Const. Co. v. Dixie Floor Co., Inc. (D.C.S.C. 1977) 433 F.Supp. 442.

3. Questions of fact

Even where defendant’s contract repudiation was not specifically justified by 1962 Code Section 10.2‑609 [Section 36‑2‑609 (1976)] because contract for installation of flooring was predominantly characterized as service contract accompanied by incidental sale of goods, under common‑law theory of anticipatory repudiation there was question of fact for jury to determine whether plaintiff contractor’s refusal to pay defendant subcontractor under prior North Carolina construction contract demonstrated to defendant that plaintiff could not or would not substantially perform his promise under contract. Ranger Const. Co. v. Dixie Floor Co., Inc. (D.C.S.C. 1977) 433 F.Supp. 442.

**SECTION 36‑2‑106.** Definitions: “contract”; “agreement”; “contract for sale”; “sale”; “present sale”; “conforming to contract”; “termination”; “cancellation”.

(1) In this chapter unless the context otherwise requires “contract” and “agreement” are limited to those relating to the present or future sale of goods. “Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. A “sale” consists in the passing of title from the seller to the buyer for a price (Section 36‑2‑401). A “present sale” means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are”conforming” or conform to the contract when they are in accordance with the obligations under the contract.

(3) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On “termination” all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

HISTORY: 1962 Code Section 10.2‑106; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Subsection (1)—Section 1 (1) and (2), Uniform Sales Act; Subsection (2)—none, but subsection generally continues policy of Sections 11, 44 and 69, Uniform Sales Act; Subsections (3) and (4)—none.

Changes: Completely rewritten.

Purposes of changes and new matter:

1. Subsection (1): “Contract for sale” is used as a general concept throughout this Article, but the rights of the parties do not vary according to whether the transaction is a present sale or a contract to sell unless the Article expressly so provides.

2. Subsection (2): It is in general intended to continue the policy of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance. However, the seller is in part safeguarded against surprise as a result of sudden technicality on the buyer’s part by the provisions of Section 2‑508 on seller’s cure of improper tender or delivery. Moreover usage of trade frequently permits commercial leeways in performance and the language of the agreement itself must be read in the light of such custom or usage and also, prior course of dealing, and in a long term contract, the course of performance.

3. Subsections (3) and (4): These subsections are intended to make clear the distinction carried forward throughout this Article between termination and cancellation.

Cross References:

Point 2: Sections 1‑203, 1‑205, 2‑208 and 2‑508.

Definitional Cross References:

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|  |  |
| “Agreement” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Remedy” | Section 1‑201. |
| “Rights” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

The definitions of this section will be commented on in the context of the sections in which these terms are employed.

CROSS REFERENCES

Course of dealing and usage of trade, see Section 36‑1‑303.

Cure by seller of improper tender or delivery, see Section 36‑2‑508.

Obligation of good faith, see Section 36‑1‑304.

Warehouse receipts, bills of lading and other documents of title, “contract for sale” defined, see Section 36‑7‑102.

LIBRARY REFERENCES

Sales 3, 84.

Westlaw Key Number Searches: 343k3; 343k84.

C.J.S. Exchange of Property Section 1.

C.J.S. Sales Sections 3 to 4, 108, 119.

NOTES OF DECISIONS

Contract for sale 1

1. Contract for sale

The definition of “goods” in code 1962 Section 10.2‑105(1) is broad, but it must be noted that this article deals with, and the definition of goods is cast in terms of, the contract for sale; and sale “consists in the passing of title from the seller to the buyer for a price.” (Code 1962 Section 10.2‑106.1). Computer Servicenters, Inc. v. Beacon Mfg. Co. (D.C.S.C. 1970) 328 F.Supp. 653, affirmed 443 F.2d 906.

An agreement for performance of data processing services by the plaintiff for the defendant, with a separate charge for supplies unless the defendant provided them, where the payment contemplated was for the analysis, collection, storage, and reporting of certain data supplied the plaintiff by the defendant, was not an agreement for the sale of goods. Computer Servicenters, Inc. v. Beacon Mfg. Co. (D.C.S.C. 1970) 328 F.Supp. 653, affirmed 443 F.2d 906.

ARTICLE 2 of the Uniform Commercial Code is not applicable to lease transactions in general. Pursuant to Section 36‑2‑102, ARTICLE 2 applies to “transactions in goods” which is not broad enough to encompass leases in general. While ARTICLE 2 applies to “transactions in goods,” “goods” are defined in Section 36‑2‑105(1) as “all things . . . which are moveable at the time of identification to the contract for sale . . .” (emphasis added). Additionally, Section 36‑2‑106(1) limits references to the terms “contract” and “agreement” to “those relating to the present or future sale of goods.” D & D Leasing Co. of South Carolina, Inc. v. Gentry (S.C. 1989) 298 S.C. 342, 380 S.E.2d 823.

A lease of equipment and a shipping order together were held to constitute a contract for the sale of goods and accordingly a contract which is subject to provisions of the Uniform Commercial code, although the title was not to pass to the defendant until the expiration of four years and then only at her option and upon the payment of a final, relatively nominal, consideration of sales tax. Mid‑Continent Refrigerator Co. v. Way (S.C. 1974) 263 S.C. 101, 208 S.E.2d 31.

**SECTION 36‑2‑107.** Goods to be severed from realty; recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller, but until severance, a purported present sale, which is not effective as a transfer of an interest in land, is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third‑party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer’s rights under the contract for sale.

HISTORY: 1962 Code Section 10.2‑107; 1966 (54) 2716; 1988 Act No. 494, Section 3.

OFFICIAL COMMENT

Prior Uniform Statutory Provision. See Section 76, Uniform Sales Act on prior policy; Section 7, Uniform Conditional Sales Act.

Purposes:

1. Subsection (1). Notice that this subsection applies only if the minerals or structures “are to be severed by the seller”. If the buyer is to sever, such transactions are considered contracts affecting land and all problems of the Statute of Frauds and of the recording of land rights apply to them. Therefore, the Statute of Frauds section of this article does not apply to such contracts though they must conform to the Statute of Frauds affecting the transfer of interests in land.

2. Subsection (2). “Things attached” to the realty which can be severed without material harm are goods within this article regardless of who is to effect the severance. The word “fixtures” has been avoided because of the diverse definitions of this term, the test of “severance without material harm” being substituted.

The provision in subsection (3) for recording such contracts is within the purview of this article since it is a means of preserving the buyer’s rights under the contract of sale.

3. The security phases of things attached to or to become attached to realty are dealt with in the Article on Secured Transactions (Article 9) and it is to be noted that the definition of goods in that article differs from the definition of goods in this article.

However, both articles treat as goods growing crops and also timber to be cut under a contract of severance.

Cross References:

Point 1: Section 2‑201.

Point 2: Section 2‑105.

Point 3: Article 9 and Section 9‑102(a)(44).

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Present sale” | Section 2‑106. |
| “Rights” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑107(1) is consistent with the broad definition of goods which comes within the scope of this article found in Commercial Code section 2‑105(1) as including timber, minerals, structures and the like attached to realty to be “severed by the seller”. If the severance is to be made by the buyer, the contract is for the sale of land and the Recording Act and the Statute of Frauds governing such transactions will apply. Cf. Alexander v Herndon, 84 SC 181, 655 SE 1048 (1909) which said that growing timber is part of land and a contract pertaining thereto is a contract to convey land.

Subsection (2) deals with growing crops and things attached to the realty which may be severed “without material harm thereto” and not covered by subsection (1). A contract of sale of such things comes within the scope of this Article regardless of whether the buyer or seller is to sever.

With respect to the rights of third parties, subsection (3) provides that the law relating to realty records shall govern even though the subject matter of the sale is otherwise classified as “goods” under subsections (1) and (2). In order for the buyer to enjoy maximum protection against the claims of third parties, this subsection authorizes a recording of his contract for the sale of things described in subsections (1) and (2) as though it were realty.

Note to 1988 Amendment.

Several timber‑growing states changed the 1962 Text to make timber to be cut under a contract of severance qualify as goods, regardless of the question who is to sever them. The section is revised to adopt this change. Financing of the transaction is facilitated if the timber is treated as goods instead of real estate. A similar change is made in the definition of “goods” in Section 9‑105 of the 1988 UCC Amendments. To protect persons dealing with timberlands, filing on timber to be cut is required in Part 4 of Article 9 to be made in real estate records in a manner comparable to fixture filing. See Sections 9‑401(1)(b), 9‑402(5) and 9‑403(7) of the 1988 UCC Amendments.

CROSS REFERENCES

Property and conveyances, generally, see Sections 27‑1‑10 et seq.

Secured transactions, see Sections 36‑9‑101 et seq.

Statute of frauds, see Section 36‑2‑201.

LIBRARY REFERENCES

Sales 10, 11.

Westlaw Key Number Searches: 343k10; 343k11.

C.J.S. Sales Sections 12 to 16.

RESEARCH REFERENCES

ALR Library

7 ALR 2nd 517 , Sale or Contract for Sale of Standing Timber as Within Provisions of Statute of Frauds Respecting Sale or Contract of Sale of Real Property.

Encyclopedias

S.C. Jur. Logs and Timber Section 4, Timber Rights as Realty.

S.C. Jur. Logs and Timber Section 5, Sale of Timber Treated as a Sale of Goods Under S. C. Code Ann. S36‑2‑107(2).

S.C. Jur. Logs and Timber Section 8, Estates in Land.

Treatises and Practice Aids

American Law of Products Liability 3d Section 18:27, Local Statutory Citations and Variations of U.C.C. S2‑107.

NOTES OF DECISIONS

Contract for sale of goods 1

1. Contract for sale of goods

South Carolina Code Section 36‑2‑107(3) is only intended to allow parties to contract for sale of goods to be severed from realty to record that contract as if it were contract for sale of realty and, thereby, preserve buyer’s rights; section creates no cause of action in conversion against purchaser of crop by co‑tenant of crop owner who failed to receive his share of payment for crop. Robison v. Gerber Products Co. (C.A.4 (S.C.) 1985) 765 F.2d 431. Tenancy In Common 43

South Carolina Uniform Commercial Code (UCC) section dealing with interests in timber did not convert all standing timber on property to goods and thereby divest mortgagee of his interest in the timber; UCC provision at issue did not cancel the effect of a mortgage or lien on timber that was already recorded in the real estate records, rather, any security interest later recorded on timber to be cut under a contract of sale would have been junior to any existing interests, and to hold otherwise would have permitted a mortgagor to unilaterally void an existing lien imposed by a mortgage on the real property, which included the timber, simply by thereafter executing a contract to sell the timber. Epstein v. Coastal Timber Co., Inc. (S.C. 2011) 393 S.C. 276, 711 S.E.2d 912. Logs and Logging 3(7)

Part 2

Form, Formation and Readjustment of Contract

**SECTION 36‑2‑201.** Formal requirements; statute of frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller’s business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 36‑2‑606).

HISTORY: 1962 Code Section 10.2‑201; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 4, Uniform Sales Act (which was based in Section 17 of the Statute of 29 Charles II).

Changes: Completely re‑phrased; restricted to sale of goods. See also Sections 1‑206, 8‑319 and 9‑203.

Purposes of changes:

The changed phraseology of this section is intended to make it clear that:

1. The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term even where the parties have contracted on the basis of a published price list. In many valid contracts for sale the parties do not mention the price in express terms, the buyer being bound to pay and the seller to accept a reasonable price which the trier of the fact may well be trusted to determine. Again, frequently the price is not mentioned since the parties have based their agreement on a price list or catalogue known to both of them and this list serves as an efficient safeguard against perjury. Finally, “market” prices and valuations that are current in the vicinity constitute a similar check. Thus if the price is not stated in the memorandum it can normally be supplied without danger of fraud. Of course if the “price” consists of goods rather than money the quantity of goods must be stated.

Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be “signed”, a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

2. “Partial performance” as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods. The overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.

Part performance by the buyer requires the delivery of something by him that is accepted by the seller as such performance. Thus, part payment may be made by money or check, accepted by the seller. If the agreed price consists of goods or services, then they must also have been delivered and accepted.

3. Between merchants, failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing under subsection (2) and is sufficient against both parties under subsection (1). The only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected. Compare the effect of a failure to reply under Section 2‑207.

4. Failure to satisfy the requirements of this section does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract. For example, a buyer who takes possession of goods as provided in an oral contract which the seller has not meanwhile repudiated, is not a trespasser. Nor would the Statute of Frauds provisions of this section be a defense to a third person who wrongfully induces a party to refuse to perform an oral contract, even though the injured party cannot maintain an action for damages against the party so refusing to perform.

5. The requirement of “signing” is discussed in the comment to Section 1‑201.

6. It is not necessary that the writing be delivered to anybody. It need not be signed or authenticated by both parties but it is, of course, not sufficient against one who has not signed it. Prior to a dispute no one can determine which party’s signing of the memorandum may be necessary but from the time of contracting each party should be aware that to him it is signing by the other which is important.

7. If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional writing is necessary for protection against fraud. Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

Cross References:

See Sections 1‑201, 2‑202, 2‑207, 2‑209 and 2‑304.

Definitional Cross References:

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|  |  |
| “Action” | Section 1‑201. |
| “Between merchants” | Section 2‑104. |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Notice” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Sale” | Section 2‑106. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

The Statute of Frauds has been subject to considerable controversy in Anglo‑American law since it was first passed in England in 1677 as Section 17 of the Statute of 29 Charles II. This controversy was continued in the drafting of Article 2 when a substantial number of members of the Commercial Code Drafting Committee voted to eliminate the requirement of a writing for the enforcement of a sales contract on the ground that it tends to promote more fraud than it prevents. (The British, after taking the lead in passing the first Statute of Frauds on which the American version is based, repealed it in 1954 as it applied to sales of goods on the ground that it had outlived its usefulness.) While the final decision was made to include a Statute of Frauds within Article 2, the resistance and controversy is reflected in the final draft of Commercial Code Section 2‑201 which would liberalize in several respects the present South Carolina Statute of Frauds, SC Code Section 11‑103, and the case decisions construing it.

Section 2‑201(1), Scope of Coverage, would require a writing only if the sale price of the goods being sold was $500.00 or more as contrasted with SC Code Section 11‑103 which applies to contracts for a sale of goods for a price of $50.00 or more.

The term “goods” would replace the terms “goods, wares and merchandise” as presently employed in the South Carolina Statute of Frauds. As pointed out in South Carolina Reporter’s Comments to Commercial Code Section 2‑105 which defines “goods”, the expressed exclusion of investment securities from the definition of goods and thus from the scope of Article 2 would be contrary to the case of Beckroge v South Carolina Public Service Co., 185 SC 210, 193 SE 315 (1937) which held the sale of existing corporate stock within the provision of the South Carolina Statute of Frauds. (Cf. Florence Printing Co. v Parnell, 178 SC 119, 182 SE 313 (1935) holding that a contract for sale of stock to be subsequently issued by a corporation is not within the Statute of Frauds.) As also pointed out in South Carolina Reporter’s Comments to Commercial Code Section 2‑105, however, Article 8 contains this Statute of Frauds covering a contract for the sale of securities. (See Commercial Code Section 8‑319 and SC Reporter’s Comments thereto.).

With respect to goods not in existence at the time of contracting, the present South Carolina case law treats this as not within the South Carolina Statute of Frauds. Wallace ads. Dowling, 86 SC 307, 68 SE 571 (1910). This is referred to as a minority American view, 49 Am Jur, Statute of Frauds, Section 252 (1943), and dates back to the South Carolina case of Gadsden v Lance, 16 McMullen Eq 87 (1841), where the court said “where they (goods) are to be made, or something is to be done to put them in a condition to be delivered according to the terms of the contract, it is not within the Statute.” More recently, the United States Court of Appeals, Fourth Circuit, reaffirmed this view of South Carolina law in Nolan Company v Graver Tank and Manufacturing Co., 301 F2d 43 (4th Cir 1962) by holding that an oral contract to supply and erect a large water tank was not within the South Carolina Statute of Frauds since the component parts had to be assembled and erected as part of the consideration.

The above line of cases may be modified by Commercial Code Section 2‑201(1) through the definition of “a contract for the sale of goods” found in Commercial Code Sections 2‑105(1) and 2‑106(1). Commercial Code Section 2‑105(1) expressly includes “specially manufactured goods” within the definition of “goods”. Commercial Code Section 2‑106(1) provides that “contract for sale includes both a present sale of goods and a contract to sell goods at a future time.” Since Commercial Code Section 2‑201 requires “a contract for sale of goods” to be in writing, these definitions of “goods” and “contract for sale” should be determinative of the scope of coverage of this Statute of Frauds under the Code which would seem to include a contract for the sale of future goods requiring work or labor to be bestowed upon them by the vendor.

While the Code may change the South Carolina rules with respect to goods to be manufactured in the future by bringing such contract within the Statute of Frauds, Commercial Code Section 2‑201(3)(a) will exclude coverage where the specially manufactured goods “are not suitable for sale to others . . .” and a substantial start has been made by the seller to manufacture the goods or commitment made for their procurement before repudiation. This rule, which had been codified in the Uniform Sales Act by Section 4, is based on the assumption that the danger of fraud by orally proving a contract is reduced in such case since it is unlikely that the seller would manufacturer goods which have no other market unless he were under a contract with the buyer to do so. Thus the same result may be reached under this Code section as in some of the South Carolina cases which held a contract not within the Statute of Frauds if the goods were to be manufactured where there was the additional fact that the goods were not suitable for sale to anyone but the buyer. For example, the subject matter of the sales contract in Wallace ads. Dowling, 86 SC 307, 68 SE 571 (1910), cited above for the proposition that a sale of future goods was not within the Statute, was a cameragraph to be made for the special use of the buyer. The facts of that case would seem to be within the exception to the Statute of Frauds provided by subsection (3)(a) and thus a similar result would be reached under the Commercial Code.

With respect to the sufficiency of the writing needed in order to satisfy the statute, the Commercial Code language in subsection (1), “some writing sufficient to indicate that a contract for sale has been made . . .” is considerably more liberal than the present language of the South Carolina Code, “. . . some note or memorandum in writing of the bargain to be made . . .”. The South Carolina case decisions have taken this to mean that in order for the memorandum to satisfy the South Carolina Statute, the writing must contain all of the material terms of the agreement. Boozer v Teague, 27 SC 348, 35 SE 551 (1886). The essential contents of the writing in order to satisfy the Statute was listed in Speed v Speed, 213 SC 401, 49 SE2d 588 (1948) as the identity of the contracting parties, the subject matter of the sale, and the consideration. Thus, in Pitts v Edwards, 141 SC 126, 139 SE 219 (1927), a memorandum of sale of cotton was held insufficient in not showing its grade, merely referring to a telephone conversation thereof. Also in Rigley v Gaymon, 95 SC 489, 79 SE 518 (1913), a writing was held to be insufficient which did not specify the price.

Under subsection (1), a writing which indicates that a contract for sale has been made would be sufficient even though it does not contain all of the material terms of the contract. Contrary to the rule of present case law construction of the South Carolina Statute cited above, the price, term and quality of the goods may be omitted from the writing and proved by parol or other evidence such as standard price lists or catalogs or current prices. (See Commercial Code Section 2‑305 which authorizes the “open price term” in a sales contract.) This minimum requirement of a writing is based on the experience that a stricter view tended to perpetrate rather than prevent fraud by permitting a party to slide out of an agreement reasonably certain of proof where some term was not included in the writing.

The stricter South Carolina view of specifying all essential terms in the writing is retained by subsection (1) with respect to the quantity term. The Code drafters view the quantity term as basic from which price, delivery, etc. could be determined. Also there is some danger that if the quantity term is omitted or if a greater quantity than is stated could be proved by parol evidence, the buyer or seller might establish an increase or decrease in the quantity other than that actually agreed upon as market conditions change making the contract more favorable to one party. Unlike other terms of the contract, there would be no objective standards with which to control this possible abuse.

In addition to the written evidence of a contract of sale containing the quantity, the signature of the parties sought to be bound, or that of his agent, must appear on the writing. This states the existing South Carolina case law construing the Statute of Frauds. That the signature by an agent of party sought to be bound is sufficient is in accord with South Carolina case law. A. M. Law & Co. v Cleveland, 172 SC 200, 173 SE 638 (1934). The rule of Wharton v Tolbert, 84 SC 197, 65 SE 1056 (1909), that a signature by an agent who has been given written authority to sell is sufficient to bind his principal should not be affected by the Code.

The rule in South Carolina that only the party sought to be bound on the contract need sign in order for the other party to enforce the contract, James K. Douglas and Company v Spears, 2 Nott & McC 207 (1819) would be generally continued under subsection (1). This rule pertains under existing law as well as the Code even though the contract would not be enforceable against the party who did not sign. (The argument that a contract for the sale of land could not be enforced against the party who signed where the nonsigning plaintiff could not be bound on the ground of lack of mutuality was rejected in Speed v Speed, 213 SC 401, 49 SE2d 588 (1948).

Section 2‑201(2), however, creates a mutuality‑of‑obligation rule under the special circumstances described i.e., where both parties are merchants, one confirms an oral agreement in writing and the other does not object to its contents within ten days after receipt. Of course, in order to charge the party who did not sign a written memorandum, the other party who sent the writing must prove the existence of the alleged facts in addition to the facts prescribed by the subsection in order to take the case out of the Statute of Frauds. This rule is novel and undoubtedly contrary to the South Carolina view described generally in the preceding paragraph although there are no cases dealing precisely with these facts. The Code rule is designed to take some of the sting out of the rule which would expose a businessman who sends a letter of confirmation after a telephone agreement to liability on the agreement but who would be precluded from enforcement against the other party.

Admission.

Section 2‑201(3)(b) resolves a conflict in American decisions in favor of the South Carolina view that an admission of a contract for sale in the pleadings satisfies the statute. Reid v Reid, 12 Rich Eq 213 (1861); Smith v Brailsford, I Desaus Eq 350 (1794); Wallace ads. Dowling, 86 SC 307, 68 SE 571 (1918).

In Walker v Preacher, 188 SC 431, 199 SE 675 (1938), the court approved the rule that a pleading admitting a parol agreement may constitute a sufficient writing to take the case out of the Statute of Frauds, but held that where the issue of invalidity is raised by a demurrer (where the complaint states that the contract is oral) this does not operate as a waiver of the protection afforded by the Statute. A similar result would seem appropriate under the Code since a demurrer which admits the existence of the contract only for the limited pleading purpose, is not the type of pleading contemplated by subsection (3)(b) (So held in a Commercial Code state in Beter v Helman, 41 Pa West 7 (1959)).

The remainder of the admission rule under subsection (3)(b) by “testimony or otherwise in court” which takes the case out of the statute also resolves a conflict in favor of the policy as expressed in one case, “the purpose of the Statute of Frauds is to protect a party, not from temptation to commit perjury but from perjured evidence against him”. (Quoted from Trossbach v Trossbach, 185 Md 47, 42 A2d 905 (1945)). Presumably, a party may institute suit on an oral contract and force an admission of the contract under oath from the party sought to be bound.

Payment or delivery.

Section 2‑201(3)(c) codifies the case law rule that acceptance of payment for the sale of goods or acceptance of the goods themselves is sufficient proof of the existence of the contract to remove it from the Statute of Frauds. Generally in accord, Franklin Sugar Refining Co. v Merchant’s Grocery Co., 133 SC 274, 130 SE 886 (1925); Griggs‑Paxton Shoe Co. v A. Friedheim & Brothers, 133 SC 458, 131 SE 620 (1926). Under existing law, however, either part payment or delivery of part of the goods satisfied the Statute of Frauds for the entire contract. Sahlman v O. Mills & Co., 3 Strob 384 (1849). Subsection (3)(c) would modify the part performance rule by making the oral contract enforceable only to the extent that goods have been actually received or paid for. This approach is similar to that stated in subsection (1) that in no event may an oral contract for the sale of goods be enforced in excess of the quantity term stated due to the danger of perjured testimony of showing a different amount by parol. The official comments indicate that if the court can make a just apportionment, the agreed price of any goods actually delivered can be recovered, or, if part of the price has been paid, the seller can be forced to deliver an apportionable part of the goods. This would be applicable, of course, only where the contract was divisible so that there would be no enforcement of an oral contract where the subject matter was a single object and there had been payment of something less than the full amount. An application of this rule is illustrated by the case of Williamson v Martz, 11 Pa D & C2d 33 (1958) where the court sustained a demurrer to a complaint which averred an oral contract to sell a vat to defendant for $1,600 and that defendant paid plaintiff $100 on account.

CROSS REFERENCES

Application of section to “or return” term of contract, see Section 36‑2‑326.

Price payable in money, goods, realty, or otherwise, see Section 36‑2‑304.

Provisions relative to contracts to make a will or devise, etc., see Section 62‑2‑701.

Statutes of frauds, generally, see Sections 32‑3‑10 and 32‑3‑20.

LIBRARY REFERENCES

Frauds, Statute of 81 to 96.

Westlaw Key Number Searches: 185k81 to 185k96.

RESEARCH REFERENCES

ALR Library

15 ALR 7th 7 , Applicability of UCC Article 2 to Mixed Contracts for Sale of Business Goods and Services: Manufacturing, Construction, and Similar Contracts.

48 ALR 6th 475 , What Constitutes “Future Goods” Within Scope of U.C.C. Article 2.

82 ALR 4th 709 , Sales: Construction of Statute of Frauds Exception Under UCC Section 2‑201(2) for Confirmatory Writing Between Merchants.

81 ALR 2nd 991 , Admissibility of Parol Evidence to Connect Signed and Unsigned Documents Relied Upon as Memorandum to Satisfy Statute of Frauds.

Encyclopedias

134 Am. Jur. Trials 199, Litigating Escape from Statute of Frauds in Contract Claim.

S.C. Jur. Logs and Timber Section 5, Sale of Timber Treated as a Sale of Goods Under S. C. Code Ann. S36‑2‑107(2).

S.C. Jur. Logs and Timber Section 29, Oral Reservation of Timber Rights Ineffective.

LAW REVIEW AND JOURNAL COMMENTARIES

Accord and Satisfaction. 26 S.C. L. Rev. 175.

Electronic commerce on the internet and the statute of frauds. 49 S.C. L. Rev. 787 (Summer 1998).

The Weed and the Web: Section 2‑201’s Corruption of the Code’s Substantive Provisions—The Quantity Problem. 1983 U Ill L Rev 811 (1983).

NOTES OF DECISIONS

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1. In general

If the contract is for the sale of goods in futuro, which are not in existence at the time, and for work and labor to be bestowed upon them by the vendor, or procured at his expense, so as to make work and labor the essential consideration of the contract it is not within the statute of frauds. Noland Co. v. Graver Tank & Mfg. Co. (C.A.4 (S.C.) 1962) 301 F.2d 43. Frauds, Statute Of 83; Frauds, Statute Of 84

Under South Carolina law, contract is valid if signed by only one party. Laidlaw Environmental Services, (TOC), Inc. v. Honeywell, Inc., 1996, 966 F.Supp. 1401, affirmed 113 F.3d 1232. Contracts 35

In considering whether a hybrid contract is one “for the sale of goods” under the UCC, courts generally employ the “predominant factor” or “predominant thrust” test. Under this test, courts evaluate transactions to determine whether their predominant factor or thrust is the rendition of service, with goods incidentally involved, or is a transaction of sale, with labor incidentally involved. U.S. v. Southern Contracting of Charleston, Inc., 1994, 862 F.Supp. 107. Sales 528

The predominant thrust of a contract to provide an incinerator was a transaction of sale, and the UCC therefore applied, notwithstanding that the contractor was required to design blueprints, submit plans for approval, obtain Department of Health and Environmental Control approval, and perform various other steps before manufacturing and delivering the incinerator. U.S. v. Southern Contracting of Charleston, Inc., 1994, 862 F.Supp. 107. Sales 532(8)

Buyer of television tower was entitled to summary judgment on tower seller’s claim for breach of oral contract because contract was one “for the sale of goods” and was thus subject to writing requirement of statute of frauds; correspondence between parties did not constitute confirmation of oral contract such that it would be ratified under “merchant’s exception” of statute of frauds. Kline Iron and Steel Co., Inc. v. Gray Communications Consultants, Inc., 1989, 715 F.Supp. 135.

Promissory estoppel may not be used to circumvent the writing requirements of Section 36‑2‑201. McDabco, Inc. v. Chet Adams Co. (D.C.S.C. 1982) 548 F.Supp. 456.

In action for seller’s breach of oral contract to sell noise‑control equipment, buyer could not circumvent statute of frauds, under UCC Section 2‑201(1), by resort to doctrine of promissory estoppel, since to hold otherwise would nullify UCC Section 2‑201(1). McDabco, Inc. v. Chet Adams Co. (D.C.S.C. 1982) 548 F.Supp. 456.

Retail installment contract and security agreement pertaining to purchaser’s prospective purchase of automobile did not constitute a binding contract requiring automobile dealership to finance the transaction upon either party’s inability to secure financing through third party lender, where, although installment contract was signed by purchaser when she met with dealership’s finance manager, it was never signed by dealership, in fact, dealership’s custom was to refrain from signing such documents until credit had been approved. Brewer v. Stokes Kia, Isuzu, Subaru, Inc. (S.C.App. 2005) 364 S.C. 444, 613 S.E.2d 802, rehearing denied, certiorari denied. Sales 738(4)

Confirming writing that satisfies Section 36‑2‑201(2) of Uniform Commercial Code does not prove terms of contract but merely eliminates statute of frauds defense, and recipient’s failure to object to confirming memorandum does not render its terms incontrovertible, such that party seeking to enforce contract still has burden of proving contract; trial judge erred in finding that invoice price was binding on buyer because of buyer’s failure to object under Section 36‑2‑201(2), and because buyer contested contract price, it was material fact in issue, such that summary judgment was improper. Hinson‑Barr, Inc. v. Pinckard (S.C. 1987) 292 S.C. 267, 356 S.E.2d 115.

In an action brought by a silver dealer for breach of an oral contract to purchase 300 ounces of silver, the dealer sufficiently the requirements of the rule governing the application of the doctrine of estoppel to overcome the defense of the statute of frauds under Section 36‑2‑201 since the dealer had suffered a detrimental change in position and since the dealer had lost more than an expected benefit in reliance upon a purchaser’s word. Atlantic Wholesale Co., Inc. v. Solondz (S.C.App. 1984) 283 S.C. 36, 320 S.E.2d 720.

2. Mixed or hybrid contracts

Alleged verbal lump‑sum hybrid contract for design, fabrication, and erection of airplane hangar was for “sale of goods,” subject to statute of frauds under South Carolina law; although subcontractor asserted that contract was predominantly for services, erection services were incidental to sale of steel and cladding for hangar. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Frauds, Statute Of 84

Under the predominant factor test, used to determine whether a transaction that provides for both goods and services is a contract for the sale of goods governed by the Uniform Commercial Code (UCC), South Carolina courts evaluate transactions to determine if their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, e.g., contract with artist for painting, or is a transaction of sale, with labor incidentally involved, e.g., installation of a water heater in a bathroom. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Sales 528

3. Admission of existence of contract

Purported subcontractor failed to show that general contractor admitted existence of verbal contract between them to steel supplier, in order for contract to be excepted from statute of frauds under South Carolina law; although general manager for general contractor testified that he called supplier to inform him that “the United States Government had notified [designer] that it would receive award of a contract for the project that included the building to be supplied by [supplier],” manager did not mention subcontractor and manager otherwise denied any contract with subcontractor. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Frauds, Statute Of 144

4. Specially manufactured goods

Subcontractor failed to show that its alleged verbal contract with general contractor should have been excepted from statute of frauds under South Carolina law, although subcontractor asserted that it made commitments for design of airplane hangar and orchestrated order of steel from supplier; subcontractor did not begin to manufacture the steel hangar and subcontractor did not make any commitment for procurement of specially manufactured steel for hangar. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Frauds, Statute Of 129(1)

5. Written confirmation of contract

Subcontractor failed to show that its alleged verbal contract with general contractor should have been excepted from statute of frauds under South Carolina law, although subcontractor asserted that it confirmed contract in writing and general contractor did not respond within 10 days; letter did not mention any contract, it only stated that subcontractor “was glad to be a part of [general contractor’s] team,” and letter, sent almost one year after alleged contract, was not sent within reasonable time. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Frauds, Statute Of 127

6. Signature of parties

Writings not signed by general contractor about alleged verbal contract between subcontractor and general contractor, such as subcontractor’s proposal letters, general contractor’s schedule of costs submitted to government, and standard draft contract, were not sufficient to except contract from statute of frauds under South Carolina law, although those documents cumulatively could have been used as evidence that there was verbal agreement. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Frauds, Statute Of 118(1)

7. Promissory estoppel

Although the doctrine of promissory estoppel may be used to avoid the statute of frauds’ writing requirement in South Carolina, it may not be used to create a legally enforceable promise when it would not otherwise be binding under ordinary contract principles. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Estoppel 85; Frauds, Statute Of 144

8. Verbal contracts

Subcontractor failed to show that it entered into verbal contract with general contractor under South Carolina law, although general contractor agreed that it would award subcontract to subcontractor if general contractor was awarded prime contract, and later general contractor was awarded the prime contract; general contractor never agreed to accept any particular proposal submitted by subcontractor and parties never agreed on price for alleged subcontract. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Contracts 25

Alleged oral contract requiring yacht manufacturer to repurchase yacht with which sole member of limited liability company (LLC) was dissatisfied did not fall within exception to South Carolina’s statute of frauds, which applied to otherwise valid contract that did not satisfy statute of frauds when party against whom enforcement was sought admitted in pleading, testimony, or otherwise in court that contract was made; testimony in which LLC’s sole member indicated that oral contract existed was not admission by party against whom enforcement of alleged contract was sought, and testimony of manufacturer’s representative establishing that manufacturer had agreed to replace initially purchased yacht with newer model pursuant to express warranty was not admission that contract was made. Fat Boy, LLC v. KCS Intern., Inc. (C.A.4 (S.C.) 2012) 462 Fed.Appx. 393, 2012 WL 268416, Unreported. Frauds, Statute Of 144

9. Preservation of issue for review

By not presenting issue before district court, limited liability company (LLC) waived appellate review of argument that yacht manufacturer had waived statute of frauds defense to LLC’s claim for breach of oral contract by failing to plead statute of frauds as affirmative defense, as required by rule. Fat Boy, LLC v. KCS Intern., Inc. (C.A.4 (S.C.) 2012) 462 Fed.Appx. 393, 2012 WL 268416, Unreported. Federal Courts 3405

**SECTION 36‑2‑202.** Final written expression; parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by course of performance, course of dealing, or usage of trade (Section 36‑1‑303); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

HISTORY: 1962 Code Section 10.2‑202; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 6, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. This section definitely rejects:

(a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;.

(b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and.

(c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.

2. Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

3. Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

Cross References:

Point 3: Sections 1‑205, 2‑207, 2‑302 and 2‑316.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Agreed” and “agreement” | Section 1‑201. |
| “Course of dealing” | Section 1‑205. |
| “Parties” | Section 1‑201. |
| “Term” | Section 1‑201. |
| “Usage of trade” | Section 1‑205. |
| “Written” and “writing” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

This section is a codification of the generally accepted parol evidence rule. Where a writing is intended by the parties as a final expression of their agreement, evidence is incompetent to vary or contradict the terms of the written agreement. In accord, e.g., J. B. Colt v Freeman, 124 SC 211, 117 SE 351 (1922); Hart v Harrison, 155 SC 147, 152 SE 17 (1930). As stated in Butler v Schilletter, 230 SC 522, 558, 96 SE2d 661 (1957), “a written agreement merges all prior negotiations and renders inadmissible testimony to vary or contradict its terms.”

Section 2‑202(a) expressly authorizes “course of dealing or usage of trade” and “course of performance” to explain or supplement a written agreement. This rule is similar to South Carolina case decisions. Burden v Woodside Cotton Mills, 87 SC 67, 68 SE 964 (1909), where parol evidence was admitted to explain the significance of words according to their usage. In Carter v American Fruit Growers, Inc., 130 SC 280, 125 SE 641 (1924), course of performance of prior dealings between the parties where similar shipments were treated as consignments and not sales was admissible tending to show the intention of the contracting parties. Commercial Code Section 1‑205(4) should be read with this section which expressly subordinates a course of dealing or usage of trade to unambiguous expressed terms on an agreement. This qualification is in accord with South Carolina case law holding that evidence of custom and usage is inadmissible to vary or explain unambiguous terms of a written agreement. Autrey v Bell, 114 SC 370, 103 SE 749 (1920).

Under Commercial Code Section 2‑202(b) proof of additional terms is excluded where the writing is intended as a complete and exclusive statement of the terms of the agreement. This is in accord with the general common law and South Carolina decisions where there is such an “integrated contract.” For example, in J. B. Colt Co. v Britt, 129 SC 226, 123 SE 845 (1924), the statement in a contract, “this instrument covers all the agreements between the purchaser and the company” was held to have effectively excluded the admission of evidence tendered by the buyer that the seller’s agent verbally agreed to install the goods. In Retailers Service Bureau v Smith, 165 SC 238, 163 SE 649 (1932), “this agreement constitutes the full understanding between us and verbal understandings with your agents, other than the conditions set forth herein, do not form a part of it”, effectively precluded evidence of additional terms.

Even though the contract does not expressly provide that the writing is an exclusive statement of the agreement, this may be inferred as a matter of the parties’ intention with respect to additional terms which would clearly have been included in the writing if agreed upon. This is the logical meaning of the phrase “the court finds the writing to have been intended also as a complete and exclusive statement . . .” in subsection (b). Rest., Contracts Section 240.

This Code section does provide that consistent additional terms may be admitted to explain a written agreement. This is in accord with South Carolina cases such as Burch v South Carolina Cotton Growers Coop. Ass’n., 181 SC 295, 187 SE 422 (1936), testimony of plaintiff held admissible to show what the parties meant by the term “optional pool” as used in written contract for sale of cotton; Breedin v Smith, 126 SC 346, 120 SE 64 (1923), preliminary negotiations leading to the execution of a contract held admissible to show the true meaning of the parties where it is doubtful from the language of the contract alone; Cooper & Griffin, Inc. v Cook & Co., Inc., 122 SC 314, 115 SE 312 (1922), resort to testimony outside the contract was admissible to explain the meaning of an undefined term in the written agreement.

The Code also permits evidence of consistent additional terms to supplement the written non‑integrated contract. This statement at first blush appears to be inconsistent with the statements of the parol evidence rule by the South Carolina court. Indeed, in the case of Butler v Schilletter, 230 SC 552, 558, 96 SE2d 661 (1957), the Court said, “a written contract cannot be supplemented by parol evidence.” The facts of this and other cases in which such a broad prohibition against parol evidence is stated have involved testimony which would vary or alter the terms of the written contract and thus the statement is too broad to express the true nature of the parol evidence rule. An analysis of the many cases in which the courts have dealt with the parol evidence rule leads to the conclusion that the rule assumes an agreement upon the writing as a complete statement of the bargain. If the parties never adopted the writing as a statement of the whole agreement, the rule does not exclude parol evidence of additional promises. As stated by Professor Williston, “The parol evidence rule does not apply to every contract of which there is written evidence, but only applies where the parties to an agreement reduce it to writing and agree or intend that that writing shall be their agreement.” 4 Williston, Contracts Section 633 (3rd ed 1961). Since this has caused considerable difficulty, it is necessary to examine a number of South Carolina cases in some detail to appreciate the conclusion that the Code rule permitting evidence to supplement a non‑integrated written contract would not substantially change South Carolina Law.

In Saulios v Mills Novelty Co., 198 SC 355, 17 SE2d 869 (1941), the defendant sold plaintiff an ice cream freezer with the purchase price secured by a conditional sales agreement and the defendant retook claiming a default. Plaintiff sought to show that at the time of contracting defendant’s agent told him that he could have four or five months to begin payment, the contract being silent on that subject. In holding for the plaintiff, the court stated (198 SC at p 362), “When the written instrument is silent as to an important issue thereof, parol evidence is admissible to prove it.”

In Ashe v Carolina & Northwestern Ry. Co., 65 SC 134, 43 SE 393 (1902), the written sales contract was silent as to the time in which the purchase price was to be paid. The Court admitted parol evidence to show such fact as it did not alter, vary or contradict the writing.

In Hartford Fire & Ins. Co. v Young, 132 SC 34, 129 SE 129 (1925), where neither the application for a fire insurance policy or the notes for premiums stated the terms and conditions upon which the policy to be issued might be cancelled, parol evidence was admissible to prove the actual agreement as to the terms of cancellation.

In Holliday v Pegram, 89 SC 73, 71 SE 367 (1911), the Court held that where a written lease makes no reference to repairs, the lessee is not precluded from introducing parol testimony to show, that, as part of the consideration of the agreement to pay rent, the lessor promised to make repairs.

The line drawn between inadmissible parol evidence which would alter or vary the terms of written agreement, and the admission of evidence to supplement an agreement with respect to matters on which the written instrument is silent, was explained in the following excerpt from Etiwan Fertilizer Co. v John’s, 208 SC 428, 38 SE2d 387 (1946).

There is a great deal of difference in offering evidence, either oral or written or partly oral and partly written, to change the mode of payment or the amount of payment expressed in the written instrument and in offering evidence in support of a credit or counterclaim as offsetting the obligation of the instrument; yet the distinction between the two may be difficult to draw. The difference lies in that in the first instance the parties have expressly dealt with those matters in the instrument itself and any testimony offered to vary the terms would be inadmissible, while in the latter instance it would be a separate transaction and therefore valid. Moreover, the doctrine of set off is more flexible and would seem to be particularly appropriate of application in the instant case where a credit for agent’s commissions and discounts is admissible by the plaintiff but a greater amount is claimed by the defendants.

From this sampling of the many cases dealing with the parol evidence rule in South Carolina, it can be seen that the South Carolina court will permit parol evidence to supplement a written agreement to show the entire agreement between the parties, but not to alter or contradict any of the expressed terms. When there is an integrated contract, the South Carolina case law and this Code section prohibit proof of additional terms. When the paper writing is incomplete as to all the terms, the South Carolina case law and this Code section permit additional evidence to show the complete agreement. The crucial question is when is the writing intended as a final expression of the entire agreement? Does the fact that it is a writing which does not show on its face an incompleteness establish the intent that this is the entire agreement between the parties thus precluding evidence of additional terms? In Gladden v Keistler, 141 SC 524, 140 SE 161 (1927) the majority of the court refused the admission of parol evidence to show that the parties to a written contract of sale of a business orally agreed that a part of the proceeds of insurance which might become payable for the damage to some of the merchandise would be paid over as part of the consideration. The basis of the decisions seems to be the conclusive presumption of completeness arising from the fact that the parties reduce their agreement to writing which upon its face appeared to be a complete expression of the whole agreement, and thus adding a term by parol on which the contract was silent would vary the terms. In a lengthy and vigorous dissent, Justice Cothran would have admitted the parol evidence on the ground that the court may look outside of the writing and find that it was not intended to cover all of the terms of the oral agreement and also, since it appears that the writing was intended to cover only a particular feature of the agreement.

A similar division among the members of the South Carolina Supreme Court is found in Massillon Sign & Poster Co. v Buffalo Lick Springs Co., 81 SC 114, 61 SE 1098 (1908). The plaintiff sought to recover the purchase price for the sale of advertising posters under a written contract. The defendant asserted a breach and introduced parol evidence to show alleged specifications not contained in the writing. The majority of the court held that it was error for the trial judge to admit such evidence. Justice Woods dissented on the ground that the writing did not contain the entire agreement and the other portion of the contract not covered by the writing and not inconsistent with it, could be shown by parol testimony.

As stated in the official comments, this Commercial Code section rejects “any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all matters agreed upon.” Thus this Code section would seem to contemplate a more liberal use of parol evidence to supplement an unambiguous written contract for the sale of goods than would be allowed under the doctrine of the Gladden or Massillon Sign & Poster Co., cases—a point of view which presumably Justices Cothran and Woods would approve of.

While the general statement of this Code section is not expressly so qualified, the usual case law exceptions which permit parol evidence where there is fraud, Continental Jewelry Co. v Kerhulas, 136 SC 496, 134 SE 505 (1926), or mistake in a written instrument, Henderson v Rice, 160 SC 307, 158 SE 258 (1931), would undoubtedly be continued. Furthermore, this section would not disturb the line of decisions in this state which hold that parties to a contract may supersede a written agreement by an oral one which would dissolve it altogether, or vary or qualify its terms. E.g., Evatt v Campbell, 234 SC 1, 106 SE2d 447 (1959); Mebane v Taylor, 164 SC 87, 162 SE 65 (1931) (See Commercial Code Section 2‑209 on modification of a sales contract).

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 6, in paragraph (a), substituted “performance, course of dealing, or usage of trade (Section 36‑1‑303)” for “dealing or usage of trade (Section 36‑1‑205) or by course of performance (Section 36‑2‑208)”.

CROSS REFERENCES

Evidence generally, see Title 19.

“Or return” term of contract for sale as separate contract for sale within statute of frauds, see Section 36‑2‑326.

Unconscionable contract or clause, see Section 36‑2‑302.

LIBRARY REFERENCES

Evidence 384 to 469.

Westlaw Key Number Searches: 157k384 to 157k469.

C.J.S. Evidence Sections 1132 to 1298.

NOTES OF DECISIONS

In general 1

Fraud 2

1. In general

In an action brought by a farmer against a manufacturer of an agricultural herbicide alleging breach of warranty and seeking compensation for crop damages, oral representations made by a sales person for the manufacturer did not amount to a warranty binding upon the manufacturer where there appeared on the product’s label an express disclaimer of any express or implied warranties other than those expressed on the label, and any oral statements could not, under Section 36‑2‑202, be allowed to vary the terms of the conditions of sale and warranty on the product label. Furthermore, the court improperly allowed the jury to award consequential damages in the face of the express limitation of remedies on the label since those limitations were not determined to be unconscionable, exclusively intended, or to have failed of their essential purpose. Hill v. BASF Wyandotte Corp. (C.A.4 (S.C.) 1982) 696 F.2d 287.

In breach‑of‑warranty action by buyer of herbicide for product’s failure to control weed problem, court held (1) that under UCC Section 2‑313(2), oral statement of seller’s salesman that herbicide would control weed problem was simply seller’s opinion and did not create any warranty; (2) that buyer was bound by printed disclaimer on herbicide’s label, which buyer had read, of all warranties except those expressly stated in disclaimer (see UCC Section 2‑316(1) and (2)); (3) that under UCC Section 2‑202, salesman’s oral statement could not vary terms of conditions of sale and warranty on product’s label; (4) that seller’s limitation‑of‑remedies clause, which was printed on product’s label, was authorized by UCC Section 2‑719; (5) that such limitation was intended to be buyer’s exclusive remedy (UCC Section 2‑719(1)(b)); and (6) that such remedy did not fail in its essential purpose within meaning of UCC Section 2‑719(2). Hill v. BASF Wyandotte Corp. (C.A.4 (S.C.) 1982) 696 F.2d 287.

2. Fraud

While contracting parties may waive contractual right and disclaim or limit certain liabilities, false representation of material fact, constituting inducement to contract, on which purchaser had right to rely, is always ground for rescission of contract by court of equity; fraud in inducement is also ground for action for damages in court of law, and parol evidence tending to prove fraud in procurement is admissible; when party or his agent drafts written document, party is not estopped to show that its terms were induced by other party’s fraud. George Robberecht Seafood, Inc. v. Maitland Bros. Co., Inc., 1979, 220 Va. 109, 255 S.E.2d 682. Contracts 94(1)

**SECTION 36‑2‑203.** Seals inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

HISTORY: 1962 Code Section 10.2‑203; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 3, Uniform Sales Act.

Changes: Portion pertaining to “seals” rewritten.

Purposes of changes:

1. This section makes it clear that every effect of the seal which relates to “sealed instruments” as such is wiped out insofar as contracts for sale are concerned. However, the substantial effects of a seal, except extension of the period of limitations may be had by appropriate drafting as in the case of firm offers (see Section 2‑205).

2. This section leaves untouched any aspects of a seal which relate merely to signatures or to authentication of execution and the like. Thus, a statute providing that a purported signature gives prima facie evidence of its own authenticity or that a signature gives prima facie evidence of consideration is still applicable to sales transactions even though a seal may be held to be a signature within the meaning of such a statute. Similarly, the authorized affixing of a corporate seal bearing the corporate name to a contractual writing purporting to be made by the corporation may have effect as a signature without any reference to the law of sealed instruments.

Cross References:

Point 1: Section 2‑205.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Writing” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Under SC Code Section 10‑142(2), the statute of limitations for an action on a sealed instrument other than for the payment of money only is twenty years while under SC Code Section 10‑143(1) the period for a contract not under seal is six years. Furthermore, a seal imports a consideration so that it may not be shown that the contract was without consideration. Bank of Charleston v Oates, 160 SC 188, 158 SE 272 (1930).

Section 2‑203 removes these effects of sealed instruments with respect to contracts for sale. The practical impact of this section is modest, however, so far as South Carolina law is concerned. In the first place, sealed sales contracts are little used today. Furthermore, Article 2 provides for a four year statute of limitations for all sales contracts (Commercial Code section 2‑725) which would render SC Code Section 10‑142 inapplicable.

As pointed out in the official comments, this section should not affect aspects of a seal relating to signatures and authentication. For example, a corporation may continue to make use of its seal in connection with contract obligations. See SC Code Section 12‑12.2(a)(3) (Supp 1962).

CROSS REFERENCES

Supplementary general principles of law applicable, see Section 36‑1‑103.

Unconscionable contract or clause, see Section 36‑2‑302.

What are considered sealed instruments, see Section 19‑1‑160.

LIBRARY REFERENCES

Sales 28.

Seals 1.

Westlaw Key Number Searches: 343k28; 347k1.

C.J.S. Sales Sections 68 to 73.

C.J.S. Seals Sections 2 to 3.

**SECTION 36‑2‑204.** Formation in general.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

HISTORY: 1962 Code Section 10.2‑204; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 1 and 3, Uniform Sales Act.

Changes: Completely rewritten by this and other sections of this Article.

Purposes of changes:

Subsection (1) continues without change the basic policy of recognizing any manner of expression of agreement, oral, written or otherwise. The legal effect of such an agreement is, of course, qualified by other provisions of this Article.

Under subsection (1) appropriate conduct by the parties may be sufficient to establish an agreement. Subsection (2) is directed primarily to the situation where the interchanged correspondence does not disclose the exact point at which the deal was closed, but the actions of the parties indicate that a binding obligation has been undertaken.

Subsection (3) states the principle as to “open terms” underlying later sections of the Article. If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of “indefiniteness” are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies and the like.

The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions.

Cross References:

Subsection (1): Sections 1‑103, 2‑201 and 2‑302.

Subsection (2): Sections 2‑205 through 2‑209.

Subsection (3): See Part 3.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Agreement” | Section 1‑201. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Remedy” | Section 1‑201. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑204(1) seems to be in accord with the general contract principle that a mutually manifested intent to create a contract relationship is vital but the form which this takes is not significant. In accord with the statement that “conduct of both parties which recognizes the existence of a contract”, Shealy v Fowler, 182 SC 81, 188 SE 499 (1936), where the court found such conduct sufficient to show an assent to an offer which need not be expressed. Also, Dowling v Charleston & W. C. Ry. Co., 105 SC 475, 478, 81 SE 313 (1912), where it was said: “The law implies a contract between persons where the ordinary course of dealings between them, considered in the light of all circumstances, reasonably warrants the inference that they mutually intended to contract.”

Section 2‑204(2) is intended to apply to a situation where it is clear from the actions of the parties that they intended a binding contract although the exact point in time may not be determined. While there is no direct South Carolina authority on this point, it seems to be in accord with general contract principles and the spirit of subsection (1).

Section 2‑204(3) would seem to relax the contract requirement of definiteness where some of the terms are left open as long as the parties intended a contract and there is a reasonably certain basis for giving an appropriate remedy. This principle would modify such cases in South Carolina as McLaurin v Hamer, 165 SC 411, 164 SE 2 (1931), where it was said that, “in order to be final the agreement must extend to all of the terms which the parties intend to introduce and material terms cannot be left for future settlement.” To the same effect see International Shoe Co. v Herndon, 135 SC 138, 133 SE 202 (1926) (no mutuality where terms are indefinite as to time, quantity and terms).

It is not certain whether all of these South Carolina cases would reach different results under subsection (3) since the Code still requires a mutual intent to make a contract which involves something more than an “agreement to agree” in the future. It does seem that the Code intends that fewer contracts for sale should fail for indefiniteness than is presently the case.

(More specific applications of the principle of this subsection are found in Commercial Code Sections 2‑305 (open price terms); 2‑306 (Output and requirement contracts); 2‑307 (mode of delivery); 2‑308 (place of delivery); 2‑309 (time for performance); 2‑310 (credit terms); 2‑311 (Options in performance).).

LIBRARY REFERENCES

Sales 1, 22, 23.

Westlaw Key Number Searches: 343k1; 343k22; 343k23.

C.J.S. Sales Sections 2, 29 to 31, 33.

NOTES OF DECISIONS

In general 1

Delivery 2

Intention of parties 3

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Price 4

Subsequent action of parties 6

Uncertainty as to provisions of contract 5

Verbal contracts 8

1. In general

Agreements to agree do not amount to a contract in South Carolina. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Contracts 25

A sale of personal property is complete and change of title takes place when the bargain is struck. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330.

2. Delivery

A delivery to the buyer with authority to use the goods immediately should be conclusive evidence of transfer of the property in the absence of clear evidence showing an intention to reserve the title. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330.

3. Intention of parties

The cardinal factor upon which the passing of title between a seller and buyer depends is the intention of the parties. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330.

Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred, and for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330.

Delivery of possession is strong, if not conclusive, evidence of intention. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330. Sales 1133

The actual delivery of goods is of the greatest importance as evincing an intention to pass title. If unaccompanied by an explanation or the specification of any condition, the buyer generally has a right to regard it as passing title. A fortiori, if there is an accompanying declaration showing an intention to pass the property to the buyer immediately and not at some future time, the fact of delivery, as evidence of intention, becomes manifestly the most cogent of all legal proofs, where the good faith of the transaction is not impugned for fraud. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330.

If it clearly appears to have been the intention of the parties that the property should be deemed to be delivered, and the title to have passed, and especially if their acts be inconsistent with any other view, the mere fact that something remains to be done will not govern such intention. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330.

Whether a bargain has been struck and passage of title had is a matter of intention of the parties. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330.

If the intention to contract, to make a trade, to effect a completed sale is clear, such intent will not be frustrated by the fact that some calculations, especially if the formula for such calculation is understood, remain. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330. Sales 1123

4. Price

If a contract is silent on price, the agreement is not indefinite if a formula or method for ascertaining the price is understood and agreed upon. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330. Sales 707

5. Uncertainty as to provisions of contract

Under South Carolina law, certain terms, such as price, time, and place, are considered indispensable to a contract and must be set out with reasonable certainty, and where a contract does not fix a definite price, there must be a definite method for ascertaining it. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Contracts 9(1)

If the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330.

A contract will not fail for indefiniteness when the gaps that the parties have left may be implied from custom and usual forms and former course of dealing. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330. Contracts 9(1)

It is only when the “gaps” are intended to be the subjects of future negotiations and the intention of the parties is that a completed contract shall await the completion of such negotiations that the contract will fail for indefiniteness; otherwise, the courts will apply the rule of custom and reason in filling in the “gaps.” Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330. Contracts 9(1)

The law does not favor, but leans against, the destruction of contracts because of uncertainty. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330. Contracts 9(1)

6. Subsequent action of parties

The subsequent action of the parties, such, particularly, as the acceptance of the “gaps” as expressed by the other party, may give the required definiteness to the agreement and establish sufficiently the intention of the parties. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330. Contracts 9(1)

7. Noncompliance with title certificate law

The mere fact that a delivery was not accompanied by compliance with the South Carolina title certificate law cannot alter the result or prevent the passage of title. Southern Fire & Cas. Co. v. Teal (D.C.S.C. 1968) 287 F.Supp. 617, affirmed 406 F.2d 1330.

8. Verbal contracts

Subcontractor failed to show that it entered into verbal contract with general contractor under South Carolina law, although general contractor agreed that it would award subcontract to subcontractor if general contractor was awarded prime contract, and later general contractor was awarded the prime contract; general contractor never agreed to accept any particular proposal submitted by subcontractor and parties never agreed on price for alleged subcontract. Trident Const. Co., Inc. v. Austin Co., 2003, 272 F.Supp.2d 566, affirmed 93 Fed.Appx. 509, 2004 WL 614642. Contracts 25

**SECTION 36‑2‑205.** Firm offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

HISTORY: 1962 Code Section 10.2‑205; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 1 and 3, Uniform Sales Act.

Changes: Completely rewritten by this and other sections of this Article.

Purposes of changes:

1. This section is intended to modify the former rule which required that “firm offers” be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed writings.

2. The primary purpose of this section is to give effect to the deliberate intention of a merchant to make a current firm offer binding. The deliberation is shown in the case of an individualized document by the merchant’s signature to the offer, and in the case of an offer included on a form supplied by the other party to the transaction by the separate signing of the particular clause which contains the offer. “Signed” here also includes authentication but the reasonableness of the authentication herein allowed must be determined in the light of the purpose of the section. The circumstances surrounding the signing may justify something less than a formal signature or initialing but typically the kind of authentication involved here would consist of a minimum of initialing of the clause involved. A handwritten memorandum on the writer’s letterhead purporting in its terms to “confirm” a firm offer already made would be enough to satisfy this section, although not subscribed, since under the circumstances it could not be considered a memorandum of mere negotiation and it would adequately show its own authenticity. Similarly, an authorized telegram will suffice, and this is true even though the original draft contained only a typewritten signature. However, despite settled courses of dealing or usages of the trade whereby firm offers are made by oral communication and relied upon without more evidence, such offers remain revocable under this Article since authentication by a writing is the essence of this section.

3. This section is intended to apply to current “firm” offers and not to long term options, and an outside time limit of three months during which such offers remain irrevocable has been set. The three month period during which firm offers remain irrevocable under this section need not be stated by days or by date. If the offer states that it is “guaranteed” or “firm” until the happening of a contingency which will occur within the three month period, it will remain irrevocable until that event. A promise made for a longer period will operate under this section to bind the offeror only for the first three months of the period but may of course be renewed. If supported by consideration it may continue for as long as the parties specify. This section deals only with the offer which is not supported by consideration.

4. Protection is afforded against the inadvertent signing of a firm offer when contained in a form prepared by the offeree by requiring that such a clause be separately authenticated. If the offer clause is called to the offeror’s attention and he separately authenticates it, he will be bound; Section 2‑302 may operate, however, to prevent an unconscionable result which otherwise would flow from other terms appearing in the form.

5. Safeguards are provided to offer relief in the case of material mistake by virtue of the requirement of good faith and the general law of mistake.

Cross References:

Point 1: Section 1‑102.

Point 2: Section 1‑102.

Point 3: Section 2‑201.

Point 5: Section 2‑302.

Definitional Cross References:

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|  |  |
| “Goods” | Section 2‑105. |
| “Merchant” | Section 2‑104. |
| “Signed” | Section 1‑201. |
| “Writing” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

The usual contract rule, with no special exceptions, provided for sales contracts, is that an offer unsupported by consideration need not be kept open even if the offeree was told that the offer would remain open for a period of time. Connor v Renneker, 25 SC 514 (1886); Moneyweight Scale Co. v Gordon Mercantile Co., 102 SC 419, 86 SE 1060 (1915). Under existing law it is only after the contract has become at least executory by acceptance of an order for goods that the offer may not be revoked prior to execution by delivery. Oxweld Acetylene Co. v Davis, 115 SC 426, 106 SE 157 (1920). (While it has never been so held in South Carolina, promissory estoppel may be employed to avoid this result where the offeree has changed his position in reliance on the offeror’s assurance that the offer would be held open. Restatement, Contracts 90 (1932).).

Section 2‑205 would change this rule of South Carolina contract law as it applies to a written signed “firm” offer made by a merchant to buy or sell goods. This is one of several instances where the Code drafters felt that the absence of consideration should not be used as an opportunity to give the offeror an unjust advantage by revoking an offer prior to the time within which he agreed to leave it open.

Note the safeguards in this section: it applies only to businessmen who are not likely to inadvertently make a firm offer; in no event does the offer remain open for more than three months; the offer must be in writing and signed by the offeror; if the offer is on a form supplied by the offeree, it must be separately signed by the offeror.

CROSS REFERENCES

Purposes of Code and rules of construction, see Section 36‑1‑103.

Unconscionable contract or clause, see Section 36‑2‑302.

LIBRARY REFERENCES

Sales 22(2, 5), 23(2, 5).

Westlaw Key Number Searches: 343k22(2); 343k22(5); 343k23(2); 343k23(5).

C.J.S. Sales Sections 32, 34.

**SECTION 36‑2‑206.** Offer and acceptance in formation of contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

HISTORY: 1962 Code Section 10.2‑206; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 1 and 3, Uniform Sales Act.

Changes: Completely rewritten in this and other sections of this Article.

Purposes of changes:

To make it clear that:

1. Any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite clear that it will not be acceptable. Former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc., are rejected and a criterion that the acceptance be “in any manner and by any medium reasonable under the circumstances,” is substituted. This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as the more time‑saving present day media come into general use.

2. Either shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment. In accordance with ordinary commercial understanding the section interprets an order looking to current shipment as allowing acceptance either by actual shipment or by a prompt promise to ship and rejects the artificial theory that only a single mode of acceptance is normally envisaged by an offer. This is true even though the language of the offer happens to be “ship at once” or the like.

“Shipment” is here used in the same sense as in Section 2‑504; it does not include the beginning of delivery by the seller’s own truck or by messenger. But loading on the seller’s own truck might be a beginning of performance under subsection (2).

3. The beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to the offeror. Such a beginning of performance must unambiguously express the offeree’s intention to engage himself. For the protection of both parties it is essential that notice follow in due course to constitute acceptance. Nothing in this section however bars the possibility that under the common law performance begun may have an intermediate effect of temporarily barring revocation of the offer, or at the offeror’s option, final effect in constituting acceptance.

4. Subsection (1)(b) deals with the situation where a shipment made following an order is shown by a notification of shipment to be referable to that order but has a defect. Such a non‑conforming shipment is normally to be understood as intended to close the bargain, even though it proves to have been at the same time a breach. However, the seller by stating that the shipment is non‑conforming and is offered only as an accommodation to the buyer keeps the shipment or notification from operating as an acceptance.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Conforming” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Notifies” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑206(1)(a), in accord with the principle of Commercial Code Section 2‑204(1) that a contract is formed when the parties manifest an intention to be bound, removes the basis for any technical argument that an offer must be accepted by some medium not expressed in the offer. Any ambiguity in the offer as to the means of acceptance would be resolved against the offeror and in favor of a proper acceptance. This rule is consistent with the cases in South Carolina which hold that the mailing of a letter containing an acceptance of an order for goods completes the contract as of the time of mailing. E.g., Rowland v Pruitt, 123 SC 244, 116 SE 456 (1922).

Section 2‑206(1)(b) confirms the case decisions in South Carolina that an order or offer to buy goods is accepted by a shipment of the goods with the effect that the order may not be rescinded after goods are shipped. Coates & Sons v Early, 46 SC 220, 24 SE 305 (1895). Such a contract offer is accepted when the goods are delivered to the carrier. Oxweld Acetylene Co. v Davis, 115 SC 426, 103 SE 157 (1920). The official comments to the Code point out that this does not include the beginning of delivery by the seller’s own truck which is probably in accord with existing law. That the order may be alternatively accepted by a “prompt promise to ship” seems to be in accord with South Carolina case law on the theory that the order may be considered as a bilateral or unilateral contract offer at the option of the offeree. See Moneyweight Scale Co. v Gordon Mercantile Co., 102 SC 419, 86 SE 1060 (1915). To the same effect see Oxweld Acetylene Co. v Davis, cited above, where the Court found the expressed acceptance of an order created an executory contract which did not become executed until the goods are delivered, such distinction being significant with respect to whether the plaintiff could maintain an action for the price or for damages for breach.

Where the seller responds to the order for goods by shipping non‑conforming goods, this Code subsection provides that this is an acceptance and a contract is created. This rule is aimed at the “unilateral contract trick” (see Hawkland, Sales and Bulk Sales Under The Uniform Commercial Code, 3 (1958)), whereby in a suit by a buyer for breach of sales contract, the seller contends there is no contract on which to maintain the action, since the non‑conforming shipment did not constitute an acceptance. While there is no case directly on this point in South Carolina, such a shipment of non‑conforming goods is a deviation from the offer and thus would be treated as a counter‑offer (see Sossaman v Littlejohn, 241 SC 478, 129 SE2d 124 (1963)), unless the offeror‑buyer accepted the goods (Franklin Sugar Refining Co. v Sullivan, 34 SC 301, 13 SE 539 (1890)). In changing this result, Commercial Code Section 2‑206(1)(b) would treat the shipment of non‑conforming goods as an acceptance creating a contract and a breach thereof on which an action for damages could be maintained. Note that the seller may avoid this result by notifying the buyer that the non‑conforming shipment is offered as an accommodation and not an acceptance in which case it acts as a counter‑offer.

Section 2‑206(2) contemplates an offer for a unilateral contract where the offeree begins performance. Modern common law contract cases protect the offeree who has begun performance by barring the offeror’s power of revocation. Rest., Contracts 45. Such beginning of performance does not, however, constitute an acceptance creating a contract so that the offeree is free to reject the offer at any time prior to final performance. In the sales contract context, the offeree‑seller may watch the market during his course of performance and reject at any time up to final completion.

Subsection (2) is aimed at this imbalance by requiring an offeree in such a position to give notice of acceptance within a reasonable time or otherwise the offeror may treat his offer as rejected. This rule would not change existing law which precludes a revocation of an offer after the offeree begins performance, but it would limit the time within which the offeree must commit himself to acceptance or rejection.

CROSS REFERENCES

Ratification of minors’ contracts, see Section 63‑5‑310.

LIBRARY REFERENCES

Sales 22, 23.

Westlaw Key Number Searches: 343k22; 343k23.

C.J.S. Sales Sections 29 to 31, 33.

**SECTION 36‑2‑207.** Additional terms in acceptance or confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

HISTORY: 1962 Code Section 10.2‑207; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 1 and 3, Uniform Sales Act.

Changes: Completely rewritten by this and other sections of this Article.

Purposes of changes:

1. This section is intended to deal with two typical situations. The one is where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal acknowledgments or memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is one in which a wire or letter expressed and intended as the closing or confirmation of an agreement adds further minor suggestions or proposals such as “ship by Tuesday,” “rush,” “ship draft against bill of lading inspection allowed,” or the like.

2. Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained either in the writing intended to close the deal or in a later confirmation falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional terms.

3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

4. Examples of typical clauses which would normally “materially alter” the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer’s failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

5. Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller’s exemption due to supervening causes beyond his control, similar to those covered by the provision of this Article on merchant’s excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub‑sale, providing for inspection by the sub‑purchaser; a clause providing for interest on overdue invoices or fixing the seller’s standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance “with adjustment” or otherwise limiting remedy in a reasonable manner (see Sections 2‑718 and 2‑719).

6. If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection (2).

Cross References:

See generally Section 2‑302.

Point 5: Sections 2‑513, 2‑602, 2‑607, 2‑609, 2‑612, 2‑614, 2‑615, 2‑616, 2‑718 and 2‑719.

Point 6: Sections 1‑102 and 2‑104.

Definitional Cross References:

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| “Between merchants” | Section 2‑104. |
| “Contract” | Section 1‑201. |
| “Notification” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Seasonably” | Section 1‑204. |
| “Send” | Section 1‑201. |
| “Term” | Section 1‑201. |
| “Written” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

As expressed in the Rest., Contracts 59, “an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested.” This view was most recently upheld in Sossamon v Littlejohn, 241 SC 478, 129 SE2d 124 (1963), when the South Carolina Supreme Court held that an attempted acceptance of an offer containing additional or different terms amounts to a counter‑offer which in turn must be accepted by the original offeror before a contract is formed. In negotiations for sales contracts, this rule has resulted in the frustration of the intentions and expectations of the parties where, for example, an offer is made to buy goods by sending an order form and the offeree responds by returning his acceptance form. Frequently, there is some minor addition or variance in the supposed acceptance which gives either party an opportunity to avoid a supposed contract commitment when it no longer appears favorable to him.

Section 2‑207(1) is designed to change this result so that an expression of acceptance of an offer creates a contract on the offered terms despite additional or different terms contained in the acceptance. Note that this rule does not apply under the Code where the acceptance is expressly made conditional on assent to the additional or different terms.

Section 2‑207(2) treats the additional terms contained in acceptance as counter‑offers to modify the contract which was created by the acceptance. Such terms will become part of the contract between merchants if they do not materially alter the contract and there is no objection from the original offeror within a reasonable time after receipt. There are South Carolina cases holding that there may be an acceptance by failure to reply to an offeror to buy goods under certain circumstances where prior dealings between the parties gives rise to a duty to reject. E.g., Franklin Sugar Refining Co. v Merchants Grocery Co., 133 SC 274, 130 SE 886 (1925); Andrew Mitchell & Co. v McBee & Irvin, 1 McMul 267 (1841). This Commercial Code rule, however, probably goes beyond existing law as to the circumstances when there can be acceptance by silence.

Section 2‑207(3) with respect to the creation of a contract by conduct of the parties is similar to the Commercial Code Section 2‑204(1) and the South Carolina cases cited in South Carolina Reporter’s Comments thereto. The terms of the contract would be found from the writings exchanged between the parties and supplemented by such evidence as is authorized in other sections of Article 2 (e.g., Section 2‑305 on price terms).

The language of subsection (1) would seem to indicate that an acceptance by an offeree which adds terms materially altering the offer creates a contract (although such additional terms would not become part of the contract under subsection (2) unless accepted by the offeror). This conclusion is buttressed by subsection (3) under which a contract is created on the terms on which the writing of the parties agree. This analysis was apparently not followed, however, in Roto‑Lith, Ltd. v F. B. Bartlett & Co., 297 F2d 497 (1st Cir 1962), the first case to construe this Commercial Code section. There the acceptance of an order for emulsion contained a disclaimer of all warranties which the court correctly found to be an additional term which would materially alter the contract (see Official Comment No. 4). But instead of holding that a contract was formed on terms not including the additional terms, the court held that the acceptance does not become effective until the offeror assents to the additional terms which would materially alter the contract. This reasoning is difficult to reconcile with the literal interpretation of subsection (1).

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

CROSS REFERENCES

Breach of “installment contract”, see Section 36‑2‑612.

Buyer’s right to inspection of goods, see Section 36‑2‑513.

Contractual modification or limitation of remedy, see Section 36‑2‑719.

Delay in delivery or non‑delivery, excuse, see Sections 36‑2‑615, 36‑2‑616.

Effect of acceptance of goods by buyer, see Section 36‑2‑607.

Liquidation or limitation of damages for breach, see Section 36‑2‑718.

Purposes of Code and rules of construction, see Section 36‑1‑103.

Rejection of goods, see Section 36‑2‑602.

Right to adequate assurance of performance, see Section 36‑2‑609.

Substituted performance, see Section 36‑2‑614.

Unconscionable contract or clause, see Section 36‑2‑302.

LIBRARY REFERENCES

Sales 22(4), 23(4).

Westlaw Key Number Searches: 343k22(4); 343k23(4).

C.J.S. Sales Sections 35 to 40, 223.

RESEARCH REFERENCES

ALR Library

20 ALR 7th 1 , Sale of Business as Subject to Article 2 of Uniform Commercial Code.

Treatises and Practice Aids

24 Causes of Action 575, Cause of Action Under UCC S2‑207 to Establish Terms of Contract Where Divergent Terms Are Contained in Written Offer, Acceptance, or Confirmation.

LAW REVIEW AND JOURNAL COMMENTARIES

Accord and Satisfaction. 26 S.C. L. Rev. 175.

NOTES OF DECISIONS

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1. In general

In an action brought under Section 36‑2‑709(1), the full price of the goods was due the seller within 12 months on a release program where (1) 12 months was both the industry standard, per Section 36‑1‑205(3), and the common course of dealing between the parties, per Section 36‑1‑208(1), (2) the purchaser did not object within a reasonable time to the express provision of 12 months in the contract, and (3) the imposition of a 12 month limit would not have been a material alteration to the agreement since it conformed to trade usage and the parties’ prior dealings. Weisz Graphics Div. of Fred B. Johnson Co., Inc. v. Peck Industries, Inc. (S.C.App. 1991) 304 S.C. 101, 403 S.E.2d 146.

The fact that a buyer followed through with a purchase even though the seller, in its acknowledgment of receipt of the buyer’s purchase order, expressly rejected two provisions contained on the reverse of the purchase order, amply demonstrated that the buyer was willing to proceed with the purchase even though the seller did not assent to all the terms contained in the purchase order. Mace Industries, Inc. v. Paddock Pool Equipment Co., Inc. (S.C.App. 1986) 288 S.C. 65, 339 S.E.2d 527. Sales 725(3)

2. Construction and application

Uniform Commercial Code provision, governing acceptance of offer varying its terms, was not applicable to contract for sale of automobile dealership, on which buyer had purported to change definition of what constituted new cars it was required to buy; statute was designed to cover exchange of printed “boilerplate” provisions, and contract in present case had been thoroughly negotiated and contained contract amendment procedure different from that specified in statute, leaving resolution of dispute whether contract was formed to common‑law rules governing meeting of minds as to essential terms. Columbia Hyundai, Inc. v. Carll Hyundai, Inc. (S.C. 1997) 326 S.C. 78, 484 S.E.2d 468. Corporations And Business Organizations 2707

3. Acceptance

An expression of acceptance of an offer, under Section 36‑2‑207, creates a contract on the offered terms despite additional or different terms contained in the acceptance unless the acceptance is expressly made conditional on assent to the additional or different terms. Mace Industries, Inc. v. Paddock Pool Equipment Co., Inc. (S.C.App. 1986) 288 S.C. 65, 339 S.E.2d 527. Contracts 22(1); Contracts 23

4. Additional terms

Where a buyer responded to a seller’s written sales agreement with a purchase order containing additional terms, the additional terms became a part of the contract between the parties since (1) both parties were merchants, (2) the buyer’s offer did not expressly limit acceptance to the terms of its offer, and (3) the additional terms did not materially alter the proposed contract between the parties. Mace Industries, Inc. v. Paddock Pool Equipment Co., Inc. (S.C.App. 1986) 288 S.C. 65, 339 S.E.2d 527. Sales 725(2)

5. Material alteration of contract

Invoice price was not binding on buyer because of buyer’s failure to object, as several thousand dollar difference between invoice price and price that was originally quoted “materially alters” contract, and this material alteration in price therefore does not become part of contract. Hinson‑Barr, Inc. v. Pinckard (S.C. 1987) 292 S.C. 267, 356 S.E.2d 115.

6. Counter‑offers

To convert an acceptance into a counteroffer under Section 36‑2‑207, the conditional nature of the acceptance must be clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract. Mace Industries, Inc. v. Paddock Pool Equipment Co., Inc. (S.C.App. 1986) 288 S.C. 65, 339 S.E.2d 527. Contracts 24

7. Implied warranties

Purchase orders and other subsequent writings which contain terms which, if given effect, would materially alter limited warranty and distributorship agreement between parties do not negate specific disclaimer of implied warranties of fitness and merchantability in agreement. Valtrol, Inc. v. General Connectors Corp. (C.A.4 (S.C.) 1989) 884 F.2d 149, rehearing denied.

A manufacturer of interior insulation was not liable on an implied warranty of fitness for a particular purpose where (1) the plaintiff, who used the insulation for exterior purposes, purchased the insulation from a store’s existing stock, and (2) the manufacturer’s acknowledgment, which became part of the contract of sale to the store, required the store to restrict the sale of the product to the uses for which it was manufactured. Hite v. Ed Smith Lumber Mill, Inc. (S.C.App. 1992) 309 S.C. 185, 420 S.E.2d 860.

**SECTION 36‑2‑208.** Repealed by 2014 Act No. 213, Section 46, eff October 1, 2014.

Editor’s Note

Former Section 36‑2‑208 was titled Course of performance or practical construction and was derived from 1962 Code Section 10.2‑208; 1966 (54) 2716.

**SECTION 36‑2‑209.** Modification, rescission and waiver.

(1) An agreement modifying a contract within this chapter needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this chapter (Section 36‑2‑201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

HISTORY: 1962 Code Section 10.2‑209; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Subsection (1)—Compare Section 1, Uniform Written Obligations Act; Subsections (2) to (5)—none.

Purposes of changes and new matter:

1. This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.

2. Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding.

However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a “modification” without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of “good faith” between merchants or as against merchants includes “observance of reasonable commercial standards of fair dealing in the trade” (Section 2‑103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2‑615 and 2‑616.

3. Subsections (2) and (3) are intended to protect against false allegations of oral modifications. “Modification or rescission” includes abandonment or other change by mutual consent, contrary to the decision in Green v Doniger, 300 NY 238, 90 NE2d 56 (1949); it does not include unilateral “termination” or “cancellation” as defined in Section 2‑106.

The Statute of Frauds provisions of this Article are expressly applied to modifications by subsection (3). Under those provisions the “delivery and acceptance” test is limited to the goods which have been accepted, that is, to the past. “Modification” for the future cannot therefore be conjured up by oral testimony if the price involved is $500.00 or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to the quantity of goods set forth in it there is safeguard against oral evidence.

Subsection (2) permits the parties in effect to make their own Statute of Frauds as regards any future modification of the contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by signed writing. But note that if a consumer is to be held to such a clause on a form supplied by a merchant it must be separately signed.

4. Subsection (4) is intended, despite the provisions of subsections (2) and (3), to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties’ actual later conduct. The effect of such conduct as a waiver is further regulated in subsection (5).

Cross References:

Point 1: Section 1‑203.

Point 2: Sections 1‑201, 1‑203, 2‑615 and 2‑616.

Point 3: Sections 2‑106, 2‑201 and 2‑202.

Point 4: Sections 2‑202 and 2‑208.

Definitional Cross References:

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| “Agreement” | Section 1‑201. |
| “Between merchants” | Section 2‑104. |
| “Contract” | Section 1‑201. |
| “Notification” | Section 1‑201. |
| “Signed” | Section 1‑201. |
| “Term” | Section 1‑201. |
| “Writing” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

The usual rule of contract law is that while a contract of sale may be modified by agreement of the parties, an attempt to modify an existing contract is invalid if not supported by consideration. Thus where there already exists a contractual duty to perform, an express unilateral agreement to modify is of no effect since an agreement to do that which one is legally required to do is not sufficient consideration to support a new contract. T. H. Colcock & Co. v Louisville C. & C. Ry., 1 Strob 329 (1847); Rabon v State Finance Corp., 203 SC 183, 26 SE2d 501 (1943).

The application of this rule to sales contracts is thought to create a harsh and uncommercial result where one party agrees to modify the terms of an existing contract for the sale of goods. Thus, Commercial Code Section 2‑209(1) would change existing law by removing the requirement of consideration for the enforceability of a good faith modification of a sales contract. It should be noted that Commercial Code Section 2‑103 generally imposes “good faith” duty which should be read into this rule. Thus, some legitimate commercial reason must be found to have induced the agreement as where there is a sudden change in the market conditions whereby one party voluntarily agrees to modify the price terms of the contract. The section would clearly not apply where a party threatens non‑performance for no commercially justified reason if the other does not agree to a price modification, this being bad faith.

Section 2‑209(2) would seem to change a principle of general contract law which permits an oral modification of a written contract (when supported by consideration) even though it contains a provision that the contract can be modified only by a writing. See Fass v South Atlantic Life Ins. Co., 105 SC 107, 89 SE 558 (1916). See also Williston, Contracts Section 1828 (Rev ed 1936). With the removal of the requirement of consideration for an effective modification by subsection (1), subsection (2) would afford protection against false allegations of oral modification where a written contract expressly requires any modification to be in writing.

Section 2‑209(3) provides an additional safeguard against false allegations of oral modifications by requiring a writing if the contract as modified would fall within the Statute of Frauds (Commercial Code Section 2‑201). Probably in accord by analogy from sale of land cases in South Carolina: Doar v Gibbes, Bailey Eq. 371 (1831); Williams v Bruce, 110 SC 421, 96 SE 905 (1918). But see, Searles v Auld, 118 SC 430, 111 SE 785 (1921) where the court enforced an oral modification of the contract for a sale of land which could be reconciled on the ground that the oral modification had been acted upon.

Since this subsection deals only with modification it would not seem to disturb the cases in South Carolina which hold that there may be an oral rescission of a contract falling within the Statute of Frauds. Midland Roofing Co. v Pickens, 96 SC 286, 80 SE 484 (1913)(chattel); Moseley v Witt, 79 SC 141, 60 SE 520 (1907).

Section 2‑209(4) states an exception to the rule of subsections (2) or (3) with respect to the requirement of a writing by waiver. This is in accord with Florence Printing Co. v Parnell, 178 SC 119, 182 SE 313 (1934) which refused to apply the Statute of Frauds where the party had relied on an oral extension of time and thus did not insist on the time specified by the written contract.

Section 2‑209(5) would operate as a limitation on subsection (4) by preventing a waiver of the requirement of the writing by sending notice of retraction of the modification before it is acted on to the detriment of the other party. While there are no South Carolina cases directly in point, this is the view of the Restatement, Contracts Section 297 (1932).

CROSS REFERENCES

Definitions of “termination” and “cancellation”, see Section 36‑2‑106.

Excuse for delay in delivery or nondelivery, see Sections 36‑2‑615, 36‑2‑616.

Obligation of good faith, see Section 36‑1‑304.

LIBRARY REFERENCES

Frauds, Statute of 131(1).

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C.J.S. Sales Sections 109 to 114, 117.

LAW REVIEW AND JOURNAL COMMENTARIES

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Annual Survey of South Carolina Law: Contract Law. 38 S.C. L. Rev. 35 (Autumn 1986).

Contract Modification Under Duress. 33 S.C. L. Rev. 615 (May 1982).

NOTES OF DECISIONS

Agreement 1

Disclaimers 3

Good faith 2

1. Agreement

An agreement to modify a contract under Section 36‑2‑209 can be found only if the evidence reveals that the buyer acquired knowledge of the offered modification and had an opportunity to object to it. Gold Kist, Inc. v. Citizens and Southern Nat. Bank of South Carolina (S.C.App. 1985) 286 S.C. 272, 333 S.E.2d 67. Sales 1771

2. Good faith

As specified in original contract, seller of goods is responsible for shipping charges and risk of delay, notwithstanding seller’s contention that buyer is liable for air freight charges because it agreed to pay them in modifications of contract, where seller acted in bad faith because it had no legitimate commercial reason for seeking modifications. T & S Brass and Bronze Works, Inc. v. Pic‑Air, Inc. (C.A.4 (S.C.) 1986) 790 F.2d 1098.

3. Disclaimers

In action by seller on open account against buyer to recover amount due for farming products, including corn seed sold to buyer, seller’s limitation of its liability (see UCC Section 36‑2‑719(1)(a)) for defective seed to seed’s purchase price, which limitation was contained in express‑and‑implied‑warranty disclaimer printed on seed bags delivered to buyer, was ineffective because (1) it was not brought to buyer’s attention at time sale contract was entered into, and (2) parties did not subsequently modify sale contract under UCC Section 36‑2‑209(1) to include disclaimer among its provisions. Gold Kist, Inc. v. Citizens and Southern Nat. Bank of South Carolina (S.C.App. 1985) 286 S.C. 272, 333 S.E.2d 67.

**SECTION 36‑2‑210.** Delegation of performance; assignment of rights.

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor’s due performance of his entire obligation can be assigned despite agreement otherwise.

(3) Unless the circumstances indicate the contrary a prohibition of assignment of “the contract” is to be construed as barring only the delegation to the assignee of the assignor’s performance.

(4) An assignment of “the contract” or of “all my rights under the contract” or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 36‑2‑609).

HISTORY: 1962 Code Section 10.2‑210; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Generally, this section recognizes both delegation of performance and assignability as normal and permissible incidents of a contract for the sale of goods.

2. Delegation of performance, either in conjunction with an assignment or otherwise, is provided for by subsection (1) where no substantial reason can be shown as to why the delegated performance will not be as satisfactory as personal performance.

3. Under subsection (2) rights which are no longer executory such as a right to damages for breach or a right to payment of an “account” as defined in the Article on Secured Transactions (Article 9) may be assigned although the agreement prohibits assignment. In such cases no question of delegation of any performance is involved. The assignment of a “contract right” as defined in the Article on Secured Transactions (Article 9) is not covered by this subsection.

4. The nature of the contract or the circumstances of the case, however, may bar assignment of the contract even where delegation of performance is not involved. This Article and this section are intended to clarify this problem, particularly in cases dealing with output requirement and exclusive dealing contracts. In the first place the section on requirements and exclusive dealing removes from the construction of the original contract most of the “personal discretion element” by substituting the reasonably objective standard of good faith operation of the plant or business to be supplied. Secondly, the section on insecurity and assurances, which is specifically referred to in subsection (5) of this section, frees the other party from the doubts and uncertainty which may afflict him under an assignment of the character in question by permitting him to demand adequate assurance of due performance without which he may suspend his own performance. Subsection (5) is not in any way intended to limit the effect of the section on insecurity and assurances and the word “performance” includes the giving of orders under a requirements contract. Of course, in any case where a material personal discretion is sought to be transferred, effective assignment is barred by subsection (2).

5. Subsection (4) lays down a general rule of construction distinguishing between a normal commercial assignment, which substitutes the assignee for the assignor both as to rights and duties, and a financing assignment in which only the assignor’s rights are transferred.

This Article takes no position on the possibility of extending some recognition or power to the original parties to work out normal commercial readjustments of the contract in the case of financing assignments even after the original obligor had been notified of the assignment. This question is dealt with in the Article on Secured Transactions (Article 9).

6. Subsection (5) recognizes that the non‑assigning original party has a stake in the reliability of the person with whom he has closed the original contract, and is, therefore, entitled to due assurance that any delegated performance will be properly forthcoming.

7. This section is not intended as a complete statement of the law of delegation and assignment but is limited to clarifying a few points doubtful under the case law. Particularly, neither this section nor this Article touches directly on such questions as the need or effect of notice of the assignment, the rights of successive assignees, or any question of the form of an assignment, either as between the parties or as against any third parties. Some of these questions are dealt with in Article 9.

Cross References:

Point 3: Articles 5 and 9.

Point 4: Sections 2‑306 and 2‑609.

Point 5: Article 9, Sections 9‑402, 9‑404, 9‑405, and 9‑406.

Point 7: Article 9.

Definitional Cross References:

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| “Agreement” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Rights” | Section 1‑201. |
| “Seller” | Section 2‑103. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑210(1) recognizes that performance under an executory contract may be delegated where the duties are not personal in character. Unless there is a novation, the original promisor remains liable for any breach of the contract. See Columbia Water Power Co. v Columbia, 5 SC 225 (1873).

Section 2‑210(2) recognizes the general rule that contracts for the sale and purchase of goods are assignable. While the early common law of this state was that a non‑negotiable contract right was non‑assignable at law, subsequent legislative action and case decisions have come to recognize the assignability of such contract rights as are not personal in nature. Taublefield v Heyward, 111 SC 293, 97 SE 767 (1919); Welling v Crosland, 129 SC 121, 123 SE 776 (1923) (option to purchase real estate assignable); (SC Code Section 10‑207 gives an assignee the right to maintain an action in his own name as a real party in interest as he could do in equity prior to the statute).

In accord that personal contracts are not assignable. Green v Camlin, 229 SC 129, 92 SE2d 125 (1956) (auto sales agency); Stokes v Liverpool & London & Globe Ins. Co., 130 SC 521, 126 SE 649 (1924) (fire insurance contract non‑assignable). The last sentence of this subsection singles out a right to damages and a right arising out of the assignor’s due performance which, despite agreement to the contrary, can be assigned. There are no South Carolina cases directly in point, but this is the probable result based on the analogy of the assignment of the right to collect a debt arising out of an executed contract (see SC Code Sections 45‑201 to 45‑211 dealing with assignments of accounts‑receivable) and the assignability of a judgment (see Miller v Newell, 20 SC 123 (1883)). Thus even though a contract right may be non‑assignable because of its personal nature or a provision in the contract prohibiting assignment, after an event which gives rise to a liability on the contract, the cause of action is assignable, despite agreement to the contrary.

Section 2‑210(3) states a rule of construction where the parties agree that the contract is not assignable which has the effect of barring only the delegation of the assignor’s performance. While the parties may not be willing to permit performance to be delegated, there is no justifiable commercial reason for not permitting rights to be assigned. This rule is consistent with subsection (2) above.

The rule of subsection (4) that a general assignment imposes on the assignee the duties of performance as well as assignment of rights is in accord with the Restatement of Contracts Section 164 and probably South Carolina case law (see Welling v Crosland, 129 SC 127, 123 SE 776 (1923)), unless the language in the contract indicated otherwise (see Breedin v Smith, 126 SC 346, 120 SE 64 (1923)). The subsection also recognizes that in a financing assignment made as security, only the assignor’s rights are transferred.

As will be discussed in more detail under that section, Commercial Code Section 2‑609 gives a party to an executory contract the right to assurance of performance under certain circumstances. Where there has been a delegation of performance of an executory sales contract as authorized by Commercial Code Section 2‑210(1), the other party may so demand such assurance of performance from the assignee under subsection (5).

CROSS REFERENCES

Letters of credit, see Sections 36‑5‑101 et seq.

Output, requirements, and exclusive dealings, see Section 36‑2‑306.

Right to adequate assurance of performance, see Section 36‑2‑609.

Secured transactions, see Sections 36‑9‑101 et seq.

LIBRARY REFERENCES

Sales 86, 220.

Westlaw Key Number Searches: 343k86; 343k220.

C.J.S. Sales Sections 88 to 89, 230.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Assignments Section 11, Commercial Sale of Goods.

Notes of Decisions

Limitation of actions 1

1. Limitation of actions

Six‑year statute of limitations in Article 2 of Uniform Commercial Code (UCC), rather than general three‑year statute of limitations, applied to breach of contract action brought by assignee of automobile financing contract against borrower to collect debt after assignee repossessed and sold automobile; even though assignee exercised its right to repossess under UCC Article 9, assignee had right to sue borrower for breach of contract, and assignee was entitled to exercise rights under both Article 2 and Article 9 simultaneously, so long as it did not obtain double recovery. Coastal Federal Credit Union v. Brown (S.C.App. 2016) 417 S.C. 544, 790 S.E.2d 417, rehearing denied. Sales 516; Secured Transactions 240

Part 3

General Obligation and Construction of Contract

**SECTION 36‑2‑301.** General obligations of parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

HISTORY: 1962 Code Section 10.2‑301; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 11 and 41, Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

This section uses the term “obligation” in contrast to the term “duty” in order to provide for the “condition” aspects of delivery and payment insofar as they are not modified by other sections of this Article such as those on cure of tender. It thus replaces not only the general provisions of the Uniform Sales Act on the parties’ duties, but also the general provisions of that Act on the effect of conditions. In order to determine what is “in accordance with the contract” under this Article usage of trade, course of dealing and performance, and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words used to define the scope of the conditions and duties.

Cross References:

Section 1‑106. See also Sections 1‑205, 2‑208, 2‑209, 2‑508 and 2‑612.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑301 states the basic duty of a seller to transfer and deliver the goods (in accord, Green v Camlin, 229 SC 129, 92 SE2d 125 (1956)), and of the buyer to accept and pay for the goods (in accord, Clinton Oil & Mfg. Co. v Carpenter, 113 SC 10, 101 SE 47 (1919)); Moore v W. R. Grace & Co., 287 Fed 103 (4th Cir 1923).

CROSS REFERENCES

Assurance of due performance, see Section 36‑2‑609.

Breach, repudiation, and excuse for nonperformance, see Sections 36‑2‑601 et seq.

Breach of “installment contracts”, see Section 36‑2‑612.

Course of dealing and usage of trade, see Section 36‑1‑303.

Cure by seller of improper tender or delivery, see Section 36‑2‑508.

Modification, rescission, and waiver, see Section 36‑2‑209.

Performance generally, see Sections 36‑2‑501 et seq.

Remedies for breach of obligations of seller or buyer, see Sections 36‑2‑701 et seq.

Remedies to be liberally administered, see Section 36‑1‑305.

LIBRARY REFERENCES

Sales 150, 177, 183.

Westlaw Key Number Searches: 343k150; 343k177; 343k183.

C.J.S. Sales Sections 151, 162, 167, 189, 194, 197 to 198, 208 to 209.

**SECTION 36‑2‑302.** Unconscionable contract or clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

HISTORY: 1962 Code Section 10.2‑302; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one‑sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. Campbell Soup Co. v Wentz, 172 F2d 80, 3d Cir 1948) and not of disturbance of allocation of risks because of superior bargaining power. The underlying basis of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v Weber Packing Corporation, 93 Utah 414, 73 P2d 1272 (1937), where a clause limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis; Hardy v General Motors Acceptance Corporation, 38 Ga App 463, 144 SE 327 (1928), holding that a disclaimer of warranty clause applied only to express warranties, thus letting in a fair implied warranty; Andrews Bros. v Singer & Co. (1934 CA) 1 KB 17, holding that where a car with substantial mileage was delivered instead of a “new” car, a disclaimer of warranties, including those “implied,” left unaffected an “express obligation” on the description, even though the Sale of Goods Act called such an implied warranty; New Prague Flouring Mill Co. v G. A. Spears, 194 Iowa 417, 189 NW 815 (1922), holding that a clause permitting the seller, upon the buyer’s failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer’s breach, to the seller’s advantage; and Kansas Flour Mills Co. v Dirks, 100 Kan 376, 164 Pac 273 (1917), where under a similar clause in a rising market the court permitted the buyer to measure his damages for nondelivery at the end of only one 30 day postponement; Green v Arcos, Ltd. (1931 CA) 47 TLR 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations; Meyer v Packard Cleveland Motor Co., 106 Ohio St 328, 140 NE 118 (1922), in which the court held that a “waiver” of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as a dump truck; Austin Co. v J. H. Tillman Co., 104 Or 541, 209 Pac 131 (1922), where a clause limiting the buyer’s remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description; Bekkevold v Potts, 173 Minn 87, 216 NW 790, 59 ALR 1164 (1927), refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties “made” by the seller; Robert A. Munroe & Co. v Meyer (1930) 2 KB 312, holding that the warranty of description overrides a clause reading “with all faults and defects” where adulterated meat not up to the contract description was delivered.

2. Under this section the court in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court’s consideration, not the jury’s. Only the agreement which results from the court’s action on these matters is to be submitted to the general triers of the facts.

Definitional Cross References:

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| “Contract” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

The equity courts have frequently refused to decree specific performance of contracts found to be “unconscionable”. For example, Marthinson v McCutchen, 84 SC 256, 66 SE 120 (1909), where specific performance of a contract for sale of timber was denied on the ground that it was “unconscionable”; Anthony v Eve, 109 SC 255, 95 SE 513 (1917), the equity court refused to decree specific performance unless the contract is “fair, just and equitable.” While this judicial investigation of contracts is said to be limited to actions in equity, the South Carolina Court seems to have reached similar results in actions at law. See Philadelphia Storage Battery Co. v Mutual Tire Stores, 161 SC 487, 159 SE 825 (1931) and Gaines W. Harrison & Sons, Inc. v J. I. Case Co., 180 F Supp 243 (1960) both to the effect that despite broad termination rights in a contract, legal action will lie against one who terminates relationship “against equity and good conscience.” This tendency on the part of courts to refuse enforcement of a contract term found to be unconscionable in a legal action is most pronounced where a contractual disclaimer of warranties is involved. In several cases, the South Carolina Court has refused to enforce such disclaimers, especially where it is inserted in fine print in a contract of “adhesion,” and not specifically brought to the attention of the buyer. Reliance Varnish Co. v Mullins Lumber Co., 213 SC 84, 48 SE2d 653 (1948); Durant v Palmetto Chevrolet Co., 241 SC 508, 129 SE2d 323 (1963). (The New Jersey Court refused to apply a disclaimer of warranty clause in the sale of an automobile on the ground that it was “unconscionable.” Even though the Code had not been enacted in New Jersey at that time, the Court cited this section as persuasive. Hemmingsen v Bloomfield Motors, Inc. and Chrysler Corp., 32 NJ 358, 161 A2d 69, 75 ALR2d 1 (1959).) Similarly, a clear contract term excluding all warranties was held not to exclude implied warranty of seller’s title. Smith v Russ Mfg. Co., 167 SC 464, 166 SE 607 (1932). (See Commercial Code Section 2‑316 and South Carolina Reporter’s Comments thereto for special treatment of exclusion and modification of warranties.).

In providing that a court may refuse to enforce a contract found to be “unconscionable,” Commercial Code Section 2‑302 would seem to make a major change in the power of a court of law to police contracts. In the absence of actual fraud, the principle of freedom of contracts is said to preclude courts from interfering with the agreement of the parties. When compared with the results in many cases in this and other jurisdictions, however—the law as it is actually applied—the change would appear to be more modest. Indeed, as stated in the official comments to this Commercial Code section, the purpose is to authorize the courts to do directly what they have been doing indirectly in policing contracts which are thought to be unfair. This is sometimes done by a manipulation of contract concepts of offer and acceptance or by adversely construing the language of the contract. As put by one leading legal scholar: “There is sufficient flexibility in the concepts of fraud, duress, misrepresentation, and undue influence, not to mention differences in economic bargaining power, to enable the courts to avoid enforcement of unconscionable provisions in long printed standardized contracts.” 1 Corbin, Contracts Section 128 (1950).

It should be noted that this section only applies where the contract is found to be unconscionable at the time it was made so that even extreme disadvantage felt by one of the parties due to changed market conditions between the time of contract and the time of performance would afford no grounds for relief. Furthermore, a legitimate contractual allocation of risk which may be one‑sided through superior bargaining power, should not be affected by this Commercial Code section. (See Commercial Code Section 2‑303.) Beyond this, it cannot be stated with certainty where the line will be drawn under a given set of facts whereby a contract or clauses are so oppressive or where the terms come as a surprise to one of the parties as to be unconscionable. (A Pennsylvania court has applied this section in refusing to enforce a contract which would allow “unreasonably large liquidated damages.” Denkin v Sterner, 10 Pa D & C2d 203 (1956).) When this line must be drawn by litigation, subsection (1) of this Code section makes unconscionability a question of law for the court and not for the jury. This should reduce the danger that a jury might be more sympathetic toward the party in the inferior bargaining position. Also, the parties would be given an opportunity to present commercial evidence to the court on the issue of unconscionability under subsection (2).

LIBRARY REFERENCES

Sales 1(1).

Specific Performance 51.

Westlaw Key Number Searches: 343k1(1); 358k51.

C.J.S. Sales Sections 2, 9, 29, 48.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Products Liability Section 50, Economic Loss Doctrine.

Treatises and Practice Aids

American Law of Products Liability 3d Section 22:5, Requirement of Conscionability‑State Statutes Adopting U.C.C. S2‑302.

Bruner and O’Connor on Construction Law Section 21:139, Applying the Concept of Procedural Unconscionability to Arbitration Agreements.

LAW REVIEW AND JOURNAL COMMENTARIES

Contract Modification Under Duress. 33 S.C. L. Rev. 615 (May 1982).

Internet solutions to consumer protection problems. 49 S.C. L. Rev. 887 (Summer 1998).

NOTES OF DECISIONS

In general 1

Allocated risks 3

Applicable law 2

Arbitration clause 5

Implied warranties 4

1. In general

In an action brought by a lessor against the lessee for breach of two automobile leases, the trial judge properly found that the lease agreements were not unconscionable within the meaning of Section 36‑2‑302 where the lease provisions were not so oppressive, unreasonable, or one‑sided as to have been unconscionable under the circumstances existing when they were executed; even if certain provisions were unconscionable, the remainder of the contract would have been enforceable or the unconscionable provisions could have been limited to avoid an unconscionable result. Jones Leasing, Inc. v. Gene Phillips & Associates (S.C.App. 1984) 282 S.C. 327, 318 S.E.2d 31. Bailment 3

2. Applicable law

Any public policy exception to economic loss doctrine did not apply under state law to permit tort recovery for cleanup costs and litigation expenses. Fact that state statutes required buyer to clean up spill did not operate to impose liability on seller who manufactured failed part. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Products Liability 156; Products Liability 235

3. Allocated risks

Other property exception to economic loss doctrine did not apply so as to permit buyer of component part to secure tort recovery for litigation expenses and cleanup costs incurred when part failed and damage was caused to government property. Damage to other property was contemplated risk which was allocated to buyer by contract. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Products Liability 156; Products Liability 235

4. Implied warranties

A repair clause in a contract for the sale of goods which provided that lessee/purchaser should effect and bear the expense of all necessary repairs, maintenance, operation and replacements, was not sufficient to exclude the implied warranty of fitness by the seller. Mid‑Continent Refrigerator Co. v. Way (S.C. 1974) 263 S.C. 101, 208 S.E.2d 31.

5. Arbitration clause

Mandatory arbitration provision in warranties and dispute resolution section of a purchase agreement between homeowner and contractor was not severable from other unconscionable provisions in the section, where the warranties and dispute resolution section contained numerous unconscionable provisions, including an attempt to waive liability for “monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.” Smith v. D.R. Horton, Inc. (S.C.App. 2013) 403 S.C. 10, 742 S.E.2d 37, affirmed 417 S.C. 42, 790 S.E.2d 1, rehearing denied. Alternative Dispute Resolution 140

Trial court’s consideration of parties’ memoranda on the unconscionability of an arbitration clause in sales contract between customer and automobile dealership, which consideration was conducted without a hearing, did not deprive dealership of a reasonable opportunity to present evidence as to the commercial setting, purpose, and effect of the arbitration clause, as statutorily required upon a claim of a contract’s unconscionability, where the dealership had four months between customer’s motion alleging unconscionability and the time dealership filed a response. Simpson v. MSA of Myrtle Beach, Inc. (S.C. 2007) 373 S.C. 14, 644 S.E.2d 663, rehearing denied, certiorari denied, certiorari denied 128 S.Ct. 493, 552 U.S. 990, 169 L.Ed.2d 340. Alternative Dispute Resolution 211

**SECTION 36‑2‑303.** Allocation or division of risks.

Where this chapter allocates a risk or a burden as between the parties “unless otherwise agreed,” the agreement may not only shift the allocation but may also divide the risk or burden.

HISTORY: 1962 Code Section 10.2‑303; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. This section is intended to make it clear that the parties may modify or allocate “unless otherwise agreed” risks or burdens imposed by this Article as they desire, always subject, of course, to the provisions on unconscionability.

Compare Section 1‑102(4).

2. The risk or burden may be divided by the express terms of the agreement or by the attending circumstances, since under the definition of “agreement” in this Act the circumstances surrounding the transaction as well as the express language used by the parties enter into the meaning and substance of the agreement.

Cross References:

Point 1: Sections 1‑102, 2‑302.

Point 2: Section 1‑201.

Definitional Cross References:

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|  |  |
| “Agreements” | Section 1‑201. |
| “Party” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑303 states a general principle of freedom of contract that the parties may expressly contract with respect to allocation or division of risk of loss. Commercial Code Section 1‑102(3) and (4) which generally permits variations by agreement with certain exceptions should be read with this section.

CROSS REFERENCES

Implication arising where “unless otherwise agreed to” present in code provisions, see Section 36‑1‑302.

LIBRARY REFERENCES

Sales 217.

Westlaw Key Number Search: 343k217.

**SECTION 36‑2‑304.** Price payable in money, goods, realty, or otherwise.

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller’s obligations with reference to them are subject to this chapter, but not the transfer of the interest in realty or the transferor’s obligations in connection therewith.

HISTORY: 1962 Code Section 10.2‑304; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Subsections (2) and (3) of Section 9, Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

1. This section corrects the phrasing of the Uniform Sales Act so as to avoid misconstruction and produce greater accuracy in commercial result. While it continues the essential intent and purpose of the Uniform Sales Act it rejects any purely verbalistic construction in disregard of the underlying reason of the provisions.

2. Under subsection (1) the provisions of this Article are applicable to transactions where the “price” of goods is payable in something other than money. This does not mean, however, that this whole Article applies automatically and in its entirety simply because an agreed transfer of title to goods is not a gift. The basic purposes and reasons of the Article must always be considered in determining the applicability of any of its provisions.

3. Subsection (2) lays down the general principle that when goods are to be exchanged for realty, the provisions of this Article apply only to those aspects of the transaction which concern the transfer of title to goods but do not affect the transfer of the realty since the detailed regulation of various particular contracts which fall outside the scope of this Article is left to the courts and other legislation. However, the complexities of these situations may be such that each must be analyzed in the light of the underlying reasons in order to determine the applicable principles. Local statutes dealing with realty are not to be lightly disregarded or altered by language of this Article. In contrast, this Article declares definite policies in regard to certain matters legitimately within its scope though concerned with real property situations, and in those instances the provisions of this Article control.

Cross References:

Point 1: Section 1‑102.

Point 3: Sections 1‑102, 1‑103, 1‑104 and 2‑107.

Definitional Cross References:

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| “Goods” | Section 2‑105. |
| “Money” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑304(1) extends the scope of coverage of Article 2 to reach situations where the price is made payable in other than money. This principle is recognized by the case law of South Carolina in Mauldin v Milford, 127 SC 508, 121 SE 547 (1923) which held that an exchange of property is a double sale and sales law implied warranty of title applied. In accord, Rivers v Grugett, 1 McCord 100 (1821). This Commercial Code section would seem to extend coverage of a sales transaction beyond such exchanges of property to include the transfer of goods for any consideration. Apparently this would include consideration of personal services which would then, for example, come within the statute of frauds provisions of the Commercial Code.

Section 2‑304(2) also extends the coverage of Article 2 to exchanges of property for realty but limits its operation to the transfer of the goods. Thus the existing statutory and common law rules governing real property transfers would continue to be applicable.

CROSS REFERENCES

Construction against implicit repeal, see Section 36‑1‑104.

Recovery of price by seller, see Section 36‑2‑709.

Rules of construction, see Section 36‑1‑103.

Supplementary general principles of law applicable, see Section 36‑1‑103.

LIBRARY REFERENCES

Sales 189.

Westlaw Key Number Search: 343k189.

C.J.S. Sales Section 208.

**SECTION 36‑2‑305.** Open price term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

HISTORY: 1962 Code Section 10.2‑305; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 9 and 10, Uniform Sales Act.

Changes: Completely rewritten.

Purposes of changes:

1. This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement. This Article rejects in these instances the formula that “an agreement to agree is unenforceable” if the case falls within subsection (1) of this section, and rejects also defeating such agreements on the ground of “indefiniteness”. Instead this Article recognizes the dominant intention of the parties to have the deal continue to be binding upon both. As to future performance, since this Article recognizes remedies such as cover (Section 2‑712), resale (Section 2‑706) and specific performance (Section 2‑716) which go beyond any mere arithmetic as between contract price and market price, there is usually a “reasonably certain basis for granting an appropriate remedy for breach” so that the contract need not fail for indefiniteness.

2. Under some circumstances the postponement of agreement on price will mean that no deal has really been concluded, and this is made express in the preamble of subsection (1) (“The parties if they so intend”) and in subsection (4). Whether or not this is so is, in most cases, a question to be determined by the trier of fact.

3. Subsection (2), dealing with the situation where the price is to be fixed by one party rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish by the express qualification that the price so fixed must be fixed in good faith. Good faith includes observance of reasonable commercial standards of fair dealing in the trade if the party is a merchant. (Section 2‑103.) But in the normal case a “posted price” or a future seller’s or buyer’s “given price,” “price in effect,” “market price,” or the like satisfies the good faith requirement.

4. The section recognizes that there may be cases in which a particular person’s judgment is not chosen merely as a barometer or index of a fair price but is an essential condition to the parties’ intent to make any contract at all. For example, the case where a known and trusted expert is to “value” a particular painting for which there is no market standard differs sharply from the situation where a named expert is to determine the grade of cotton, and the difference would support a finding that in the one the parties did not intend to make a binding agreement if that expert were unavailable whereas in the other they did so intend. Other circumstances would of course affect the validity of such a finding.

5. Under subsection (3), wrongful interference by one party with any agreed machinery for price fixing in the contract may be treated by the other party as a repudiation justifying cancellation, or merely as a failure to take cooperative action thus shifting to the aggrieved party the reasonable leeway in fixing the price.

6. Throughout the entire section, the purpose is to give effect to the agreement which has been made. That effect, however, is always conditioned by the requirement of good faith action which is made an inherent part of all contracts within this Act. (Section 1‑203.).

Cross References:

Point 1: Sections 2‑204(3), 2‑706, 2‑712 and 2‑716.

Point 3: Section 2‑103.

Point 5: Sections 2‑311 and 2‑610.

Point 6: Section 1‑203.

Definitional Cross References:

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| “Agreement” | Section 1‑201. |
| “Burden of establishing” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Cancellation” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Fault” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Receipt of goods” | Section 2‑103. |
| “Seller” | Section 2‑103. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

While the vast majority of sales contracts state the price to be paid for the goods sold, there are some commercial situations where the parties would not want to fix the price at the time of contracting. Typical of such a situation would be a contract to sell goods to be delivered over a long period of time, especially where the market value is subject to fluctuations. Despite the fact that the parties intend to be bound, the “indefiniteness of contract rule” has been applied by the courts to frustrate this intention.

Commercial Code Section 2‑204(3) states in general terms that an enforceable contract may be made if the parties so intend despite the fact that one or more terms are left open. This section would, of course, apply to the case where the price term is not settled at the time of contracting which is specifically provided by Commercial Code Section 2‑305. As discussed in South Carolina Reporter’s Comments to Commercial Code Section 2‑204(3), this is probably a modification of present South Carolina law which has refused to enforce contracts on the ground of lack of mutuality or definiteness where the terms were not fixed at time of contracting. International Shoe Co. v Herndon, 135 SC 138, 133 SE 202 (1926) (written contract silent as to time, quantity, price and terms); McLaurin v Hamer, 165 SC 412, 164 SE 2 (1931) (offer to buy land too indefinite as to terms); Anderson v Hall, 155 SC 320, 152 SE 521 (1929) (a purported lease in which both the amount of rent and the duration of the lease were to be fixed by arbitration). At least some of these cases could be based on the principle of lack of mutual intent to be bound—an “agreement to agree”—which is continued by subsection (4). There are decisions in this state, however, which have upheld the validity of open price agreements. Gray v Todd, 4 DeSaus Eq 399 (1813) (contract to pay the “Charleston price” for cotton); Rainwater v Hobieka, 208 SC 433, 38 SE2d 495 (1940) (lease in which all terms were agreed upon except the rent—distinguished Anderson v Hall, cited above, where both rent and time were left open). South Carolina cases have also permitted recovery in an action on quantum meruit even though the contract was too indefinite in not stating the price. Holliday v Pegram, 101 SC 378, 85 SE 908 (1915) (lease); Gantt v Morgan, 199 SC 138, 18 SE2d 672 (1942) (personal services). Furthermore, contracts have been enforced by the South Carolina court where the agreed price is subject to adjustment. Stono Mines v Southern States Phosphate & Fertilizer Co., 76 SC 327, 56 SE 982 (1907) (contract provided that if phosphate rock contains less then 58% bone phosphate of line, a proportionate adjustment in price would be allowed); Virginia Iron, Coal & Coke Co. v Woodside Cotton Mills Co., 6 F2d 442 (4th Cir 1925) (adjustment of price in accordance with mine wages).

Commercial Code Section 2‑305 removes the existing doubt as to the validity of open price agreements for the sale of goods and provides rules which establish a basis for relief. In the three factual situations described in Sections 2‑305(1)(a), (b) and (c), the standard is that of a “reasonable price at the time of delivery.” Once it has been established that a contract exists, this price standard of “reasonableness”, a jury question, is obviously the only practical means of fixing liability for breach. (See South Carolina cases cited above where in action of a quantum meruit the court applied the standard of reasonableness and fair value.) The most important test for reasonableness would obviously be the market price. Where there was no market price for the goods, the Pennsylvania court applied a “cost plus standard” under this Code section. Kuss Machine Tool & Die Co. v Eltronics, Inc., 393 Pa 353, 143 A2d 38 (1959).

Under subsection (2), even though the contract calls for one party to set the price, this would not give unfettered freedom in supplying the price term. Here again a jury fact question is involved as to the “good faith” setting of the price, which would be measured by its reasonableness.

Where one party wrongfully prevents a third party from fixing the price, the aggrieved party may either rescind or fix a reasonable price and seek enforcement under subsection (3).

Section 2‑305(4) recognizes that the above subsections apply only where the parties intend to be bound. If it appears that agreement as to price was intended as a condition precedent to the formation of a contract and there is no such agreement, the parties are returned to their former position. This is, of course, in accord with the basic contract principle that there must be a mutual intent to be bound before there can be an enforceable contract and is in accord with the South Carolina cases cited in the comments to subsection (1) above.

(Note: As an indication that businessmen are in favor of Commercial Code Section 2‑305, the following is an excerpt from the testimony of a representative of Bethlehem Steel Co. before the New York Law Revision Commission: “We like the provision that you can have a contract with an agreement that one party is to fix the price, because, in our industry, and it is true, I think, also, in a lot of other industries, the custom is to sell goods with what the parties regard as binding contracts but where the only reference to price is the seller’s price in effect at the time of shipment, for example. I think that there has always been a question under the present sales law whether you have a contract at all, but the practice in our industry and a lot of others is certainly to regard it as a contract, so we like very much that provision of the new Code (2‑305).” Legislative Document, State of New York (1954). No 65(B) 89.

CROSS REFERENCES

Anticipatory repudiation, see Section 36‑2‑610.

Buyer’s procurement of substitute goods, see Section 36‑2‑712.

Buyer’s right to specific performance or replevin, see Section 36‑2‑716.

Contract leaving open one or more terms, see Section 36‑2‑204.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Seller’s resale including contract for resale, see Section 36‑2‑706.

LIBRARY REFERENCES

Sales 1(3), 74.

Westlaw Key Number Searches: 343k1(3); 343k74.

C.J.S. Sales Sections 25 to 26, 94 to 96.

NOTES OF DECISIONS

In general 1

1. In general

Gasoline wholesaler did not charge unreasonable price to retailer within meaning of South Carolina’s implementation of Uniform Commercial Code (UCC) so as to breach contract, regardless of fact that some of retailer’s competitors were selling gasoline at retail prices lower than wholesaler’s rack price, where it was undisputed that wholesaler charged all its customers the same posted rack price, that wholesaler’s price was competitive with other wholesalers in area, and that wholesaler charged retailer that market price. Havird Oil Co., Inc. v. Marathon Oil Co., Inc. (C.A.4 (S.C.) 1998) 149 F.3d 283. Sales 1077

**SECTION 36‑2‑306.** Output, requirements and exclusive dealings.

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

HISTORY: 1962 Code Section 10.2‑306; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Subsection (1) of this section, in regard to output and requirements, applies to this specific problem the general approach of this Act which requires the reading of commercial background and intent into the language of any agreement and demands good faith in the performance of that agreement. It applies to such contracts of nonproducing establishments such as dealers or distributors as well as to manufacturing concerns.

2. Under this Article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure. Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. A shutdown by a requirements buyer for lack of orders might be permissible when a shutdown merely to curtail losses would not. The essential test is whether the party is acting in good faith. Similarly, a sudden expansion of the plant by which requirements are to be measured would not be included within the scope of the contract as made but normal expansion undertaken in good faith would be within the scope of this section. One of the factors in an expansion situation would be whether the market price had risen greatly in a case in which the requirements contract contained a fixed price. Reasonable variation of an extreme sort is exemplified in Southwest Natural Gas Co. v Oklahoma Portland Cement Co., 102 F2d 630 (CCA 10, 1939). This Article takes no position as to whether a requirements contract is a provable claim in bankruptcy.

3. If an estimate of output or requirements is included in the agreement, no quantity unreasonably disproportionate to it may be tendered or demanded. Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur.

4. When an enterprise is sold, the question may arise whether the buyer is bound by an existing output or requirements contract. That question is outside the scope of this Article, and is to be determined on other principles of law. Assuming that the contract continues, the output or requirements in the hands of the new owner continue to be measured by the actual good faith output or requirements under the normal operation of the enterprise prior to sale. The sale itself is not grounds for sudden expansion or decrease.

5. Subsection (2), on exclusive dealing, makes explicit the commercial rule embodied in this Act under which the parties to such contracts are held to have impliedly, even when not expressly, bound themselves to use reasonable diligence as well as good faith in their performance of the contract. Under such contracts the exclusive agent is required, although no express commitment has been made, to use reasonable effort and due diligence in the expansion of the market or the promotion of the product, as the case may be. The principal is expected under such a contract to refrain from supplying any other dealer or agent within the exclusive territory. An exclusive dealing agreement brings into play all of the good faith aspects of the output and requirement problems of subsection (1). It also raises questions of insecurity and right to adequate assurance under this Article.

Cross References:

Point 4: Section 2‑210.

Point 5: Sections 1‑203 and 2‑609.

Definitional Cross References:

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|  |  |
| “Agreement” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract for sale” | Section 2‑106. |
| “Good faith” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Term” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Under some market conditions it is commercially desirable for the parties to contract for the sale of all of the seller’s output or for the purchase of all of the buyer’s requirements. Since the exact amount of goods to be sold is not set out, the validity of such an agreement may be questioned on the ground of lack of definiteness. Furthermore, general contract law requirements of mutuality of obligation may be violated since the seller may control his output or the buyer his requirements.

Section 2‑306(1) validates such output and requirements contracts and eliminates the objection of lack of mutuality by the provision that quantity shall be determined in good faith. This removes the assumption that the parties are free to fix the price of their output or requirements on which the lack of mutuality conclusion is based. In accord, Kenen, McKay & Spier v Yorkville Cotton Oil Co., 109 SC 462, 96 SE 524 (1917) which recognized the validity of a contract to supply “season’s output.” The court also stated, by way of dictum, that the seller could not lawfully shelter itself from liability behind an act of bad faith in refusing to operate its plant.

Subsection (1) extends the good faith requirement to preclude a demand for an abnormal quantity which seems to be implicit in the general good faith requirement of the above case. A similar result was reached in Allis‑Chalmers Mfg. Co. v Green, 173 F2d 818 (4th Cir 1949), where the court refused damages to a dealer for alleged breach of contract who had submitted an unprecedented large order to the manufacturer on the ground that it was not made in good faith and exceeded the allocation system for distribution of the goods which had been made to the dealer. This Code section also provides that if an estimate of quantity is stated in the contract, demand for performance is limited to an amount not “unreasonably disproportionate” to such an estimate. In the Yorkville Cotton Oil Co. case, cited above, the contract stated: “Amount—Season’s output of cotton linters for season 1915‑1916, about four hundred bales—”. The defendant‑seller stopped production due to economic necessity after it had produced 244 bales and the plaintiff sued for the failure to supply the other 200 bales. In holding for the defendant the court said that the more specific term, “season’s output” would govern and not the estimate. The Commercial Code rule where an estimate is stated would probably not change the result of the South Carolina case on this point of contract construction where the curtailment of output falling substantially below the estimate was due to a good faith commercial reason. One court has held under this Code section that a seller did not breach an output contract when it terminated its operations when it became no longer profitable. Neofatistos v Harvard Brewing Co., 34 Mass 684, 171 NE2d 865 (1961).

Similar in principle to the output and requirements contract is the exclusive dealing contract, the validity of which is recognized by subsection (2) and existing South Carolina case law. Green v Camlin, 229 SC 129, 92 SE2d 175 (1956). The implied obligation of a seller to supply and the buyer to promote the sale, seems to be a logical extension of the basic requirement of good faith. The principle seems to have been recognized by way of dicta in Allis‑Chalmers Mfg. Co. v Green, 173 F2d 818 (4th Cir 1949) which said that a franchised dealer was under an obligation to buy and meet the requirements of his territory and that the manufacturer was under an obligation to fill orders in good faith and to give the dealer a fair share of the merchandise.

CROSS REFERENCES

Assignment of rights, see Section 36‑2‑210.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Right to adequate assurance of performance, see Section 36‑2‑609.

LIBRARY REFERENCES

Sales 71(4).

Westlaw Key Number Search: 343k71(4).

C.J.S. Sales Sections 178 to 180.

**SECTION 36‑2‑307.** Delivery in single lot or several lots.

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

HISTORY: 1962 Code Section 10.2‑307; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 45(1), Uniform Sales Act.

Changes: Rewritten and expanded.

Purposes of changes:

1. This section applies where the parties have not specifically agreed whether delivery and payment are to be by lots and generally continues the essential intent of original Act, Section 45(1) by assuming that the parties intended delivery to be in a single lot.

2. Where the actual agreement or the circumstances do not indicate otherwise, delivery in lots is not permitted under this section and the buyer is properly entitled to reject for a deficiency in the tender, subject to any privilege in the seller to cure the tender.

3. The “but” clause of this section goes to the case in which it is not commercially feasible to deliver or to receive the goods in a single lot as for example, where a contract calls for the shipment of ten carloads of coal and only three cars are available at a given time. Similarly, in a contract involving brick necessary to build a building the buyer’s storage space may be limited so that it would be impossible to receive the entire amount of brick at once, or it may be necessary to assemble the goods as in the case of cattle on the range, or to mine them.

In such cases, a partial delivery is not subject to rejection for the defect in quantity alone, if the circumstances do not indicate a repudiation or default by the seller as to the expected balance or do not give the buyer ground for suspending his performance because of insecurity under the provisions of Section 2‑609. However, in such cases the undelivered balance of goods under the contract must be forthcoming within a reasonable time and in a reasonable manner according to the policy of Section 2‑503 on manner of tender of delivery. This is reinforced by the express provisions of Section 2‑608 that if a lot has been accepted on the reasonable assumption that its nonconformity will be cured, the acceptance may be revoked if the cure does not seasonably occur. The section rejects the rule of Kelly Construction Co. v Hackensack Brick Co., 91 NJL 585, 103 Atl 417, 2 ALR 685 (1918) and approves the result in Lynn M. Ranger, Inc. v Gildersleeve, 106 Conn 372, 138 Atl 142 (1927) in which a contract was made for six carloads of coal then rolling from the mines and consigned to the seller but the seller agreed to divert the carloads to the buyer as soon as the car numbers became known to him. He arranged a diversion of two cars and then notified the buyer who then repudiated the contract. The seller was held to be entitled to his full remedy for the two cars diverted because simultaneous delivery of all of the cars was not contemplated by either party.

4. Where the circumstances indicate that a party has a right to delivery in lots, the price may be demanded for each lot if it is apportionable.

Cross References:

Point 1: Section 1‑201.

Point 2: Sections 2‑508 and 2‑601.

Point 3: Sections 2‑503, 2‑608 and 2‑609.

Definitional Cross References:

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|  |  |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Lot” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Rights” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

In accordance with usual commercial understanding, Commercial Code Section 2‑307 creates a presumptive rule that a sales contract calls for a single lot delivery and not in separate lots where the agreement or the circumstances do not indicate otherwise. In accord, Walter Pratt & Co. v Frasier & Co., 72 SC 368, 51 SE 983 (1905) holding that the failure of the seller to ship an essential article in an “entire contract” vitiates the contract giving the buyer the right to rescind.

In addition to the obvious rule that the parties may expressly contract for delivery in lots, this section also recognizes that where single lot delivery is not commercially feasible, the parties do not contemplate simultaneous delivery and it will therefore not be required. An example of such situations set out in the official comments to this section is where it is understood that shipping facilities of the seller or storage space of the buyer are inadequate to handle all of the goods sold at once. In such case, the price is due for each lot as delivered if it is apportionable. While there are no South Carolina cases in point, this provision with respect to payment due would change the law in some other states which have held that payment is not required until all deliveries are made even if the contract or circumstances permit or require the seller to make delivery in lots. 2 Williston, Sales Section 466 (Rev ed, 1948). Also, this Commercial Code provision that circumstances may indicate that the parties intended delivery in separate lots, clarifies the doubt arising in states which have enacted the Uniform Sales Act by the language of section 45, “unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.” See, 2 Williston, Sales Section 465 a (Rev ed, 1948).

CROSS REFERENCES

Buyer’s options where goods or tender of delivery fail to conform to contract, see Section 36‑2‑601.

Manner, time and place of tender of delivery, see Section 36‑2‑503.

Rejection of tender or delivery because nonconforming, see Section 36‑2‑508.

Revocation of acceptance of lot or commercial unit, see Section 36‑2‑608.

Right to adequate assurance of performance, see Section 36‑2‑609.

LIBRARY REFERENCES

Sales 163.

Westlaw Key Number Search: 343k163.

C.J.S. Sales Section 181.

**SECTION 36‑2‑308.** Absence of specified place for delivery.

Unless otherwise agreed

(a) the place for delivery of goods is the seller’s place of business or if he has none his residence; but

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) documents of title may be delivered through customary banking channels.

HISTORY: 1962 Code Section 10.2‑308; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Paragraphs (a) and (b)—Section 43(1), Uniform Sales Act: Paragraph (c)—none.

Changes: Slight modification in language.

Purposes of changes and new matter:

1. Paragraphs (a) and (b) provide for those noncommercial sales and for those occasional commercial sales where no place or means of delivery has been agreed upon by the parties. Where delivery by carrier is “required or authorized by the agreement”, the seller’s duties as to delivery of the goods are governed not by this section but by Section 2‑504.

2. Under paragraph (b) when the identified goods contracted for are known to both parties to be in some location other than the seller’s place of business or residence, the parties are presumed to have intended that place to be the place of delivery. This paragraph also applies (unless, as would be normal, the circumstances show that delivery by way of documents is intended) to a bulk of goods in the possession of a bailee. In such a case, however, the seller has the additional obligation to procure the acknowledgment by the bailee of the buyer’s right to possession.

3. Where “customary banking channels” call only for due notification by the banker that the documents are on hand, leaving the buyer himself to see to the physical receipt of the goods, tender at the buyer’s address is not required under paragraph (c). But that paragraph merely eliminates the possibility of a default by the seller if “customary banking channels” have been properly used in giving notice to the buyer. Where the bank has purchased a draft accompanied by documents or has undertaken its collection on behalf of the seller, Part 5 of Article 4 spells out its duties and relations to its customer. Where the documents move forward under a letter of credit the Article on Letters of Credit spells out the duties and relations between the bank, the seller and the buyer.

4. The rules of this section apply only “unless otherwise agreed.” The surrounding circumstances, usage of trade, course of dealing and course of performance, as well as the express language of the parties, may constitute an “otherwise agreement”.

Cross References:

Point 1. Sections 2‑504 and 2‑505.

Point 2: Section 2‑503.

Point 3: Section 2‑512, Articles 4, Part 5, and 5.

Definitional Cross References:

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|  |  |
| “Contract for sale” | Section 2‑106. |
| “Delivery” | Section 1‑201. |
| “Document of title” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Where the parties do not otherwise agree, this section specifies presumptive rules for determining the place of delivery. This becomes important in determining such questions as who shall bear the cost of transportation of the goods to the buyer, what constitutes a proper tender of the goods, damages for non‑delivery and when title passes.

The rule of subsections (a) and (b) that the place of delivery is the seller’s place of business, or his residence or the place of location of the goods is the generally accepted common law rule (codified in the Uniform Sales Act, Section 43(1) and South Carolina case law). See Dozier v Johnston, 2 Hill 297 (1834) where cutting and piling of lumber on seller’s premises was sufficient delivery to make buyer liable for the purchase price.

The above rules apply only in the unusual case for commercial sales where the place of delivery is not agreed upon by the parties. Also, Commercial Code Section 2‑504 applies where delivery by carrier is called for and not this section.

Subsection (c) would overrule cases in a few other jurisdictions which require the seller to notify the buyer of arrival of goods if “customary banking channels” are used in a documentary sale. (See Article 4, Part 5, as to duty of a bank receiving a draft and documents to notify the buyer.).

CROSS REFERENCES

Collection of documentary drafts, see Sections 36‑4‑501 et seq.

Manner, time and place for tender of delivery, see Section 36‑2‑503.

Payment by buyer before inspection, see Section 36‑2‑512.

Seller’s shipment under reservation, see Section 36‑2‑505.

Where seller authorized to send goods to buyer, see Section 36‑2‑504.

LIBRARY REFERENCES

Sales 79.

Westlaw Key Number Search: 343k79.

C.J.S. Sales Section 168.

**SECTION 36‑2‑309.** Absence of specific time provisions; notice of termination.

(1) The time for shipment or delivery or any other action under a contract if not provided in this chapter or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

HISTORY: 1962 Code Section 10.2‑309; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Subsection (1)—see Sections 43(2), 45(2), 47(1) and 48, Uniform Sales Act, for policy continued under this Article; Subsection (2)—none; Subsection (3)—none.

Changes: Completely different in scope.

Purposes of changes and new matter:

1. Subsection (1) requires that all actions taken under a sales contract must be taken within a reasonable time where no time has been agreed upon. The reasonable time under this provision turns on the criteria as to “reasonable time” and on good faith and commercial standards set forth in Sections 1‑203, 1‑204 and 2‑103. It thus depends upon what constitutes acceptable commercial conduct in view of the nature, purpose and circumstances of the action to be taken. Agreement as to a definite time, however, may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term. Such cases fall outside of this subsection since in them the time for action is “agreed” by usage.

2. The time for payment, where not agreed upon, is related to the time for delivery; the particular problems which arise in connection with determining the appropriate time of payment and the time for any inspection before payment which is both allowed by law and demanded by the buyer are covered in Section 2‑513.

3. The facts in regard to shipment and delivery differ so widely as to make detailed provision for them in the text of this Article impracticable. The applicable principles, however, make it clear that surprise is to be avoided, good faith judgment is to be protected, and notice or negotiation to reduce the uncertainty to certainty is to be favored.

4. When the time for delivery is left open, unreasonably early offers of or demands for delivery are intended to be read under this Article as expressions of desire or intention, requesting the assent or acquiescence of the other party, not as final positions which may amount without more to breach or to create breach by the other side. See Sections 2‑207 and 2‑609.

5. The obligation of good faith under this Act before a contract may be treated as breached because a reasonable time for delivery or demand has expired. This operates both in the case of a contract originally indefinite as to time and of one subsequently made indefinite by waiver.

When both parties let an originally reasonable time go by in silence, the course of conduct under the contract may be viewed as enlarging the reasonable time for tender or demand of performance. The contract may be terminated by abandonment.

6. Parties to a contract are not required in giving reasonable notification to fix, at peril of breach, a time which is in fact reasonable in the unforeseeable judgment of later trier of fact. Effective communication of a proposed time limit calls for a response, so that failure to reply will make out acquiescence. Where objection is made, however, or if the demand is merely for information as to when goods will be delivered or will be ordered out, demand for assurances on the ground of insecurity may be made under this Article pending further negotiations. Only when a party insists on undue delay or on rejection of the other party’s reasonable proposal is there a question of flat breach under the present section.

7. Subsection (2) applies a commercially reasonable view to resolve the conflict which has arisen in the cases as to contracts of indefinite duration. The “reasonable time” of duration appropriate to a given arrangement is limited by the circumstances. When the arrangement has been carried on by the parties over the years, the “reasonable time” can continue indefinitely and the contract will not terminate until notice.

8. Subsection (3) recognizes that the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement. An agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this subsection unless the results of putting it into operation would be the creation of an unconscionable state of affairs.

9. Justifiable cancellation for breach is a remedy for breach and is not the kind of termination covered by the present subsection.

10. The requirement of notification is dispensed with where the contract provides for termination on the happening of an “agreed event.” “Event” is a term chosen here to contrast with “option” or the like.

Cross References:

Point 1: Sections 1‑203, 1‑204 and 2‑103.

Point 2: Sections 2‑320, 2‑321, 2‑504, and 2‑511 through 2‑514.

Point 5: Section 1‑203.

Point 6: Section 2‑609.

Point 7: Section 2‑204.

Point 9: Sections 2‑106, 2‑318, 2‑610 and 2‑703.

Definitional Cross References:

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|  |  |
| “Agreement” | Section 1‑201. |
| “Contract” | Section 1‑201. |
| “Notification” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Termination” | Section 2‑106. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑309(1) expresses the usual common law rule of this state that in the absence of agreement (either expressed or implied from usage of trade or course of dealing or performance), the time for actions to be taken under the contract is a reasonable time. The usual application of this rule is where the contract is silent as to time within which shipment is to be made in which case the seller has a reasonable time within which to ship. In accord, Oxweld Acetylene Co. v Davis, 115 SC 426, 106 SE 157 (1921); J. B. Colt Co. v Hallman, 118 SC 404, 110 SE 462 (1922); Virginia Iron, Coal & Coke Co. v Woodside Cotton Mills Co., 6 F2d 442 (4th Cir 1925). This section does not apply where the time is specified elsewhere in this article as, for example, time for payment (2‑310), time for acceptance (2‑602, 2‑606), time for inspection (2‑513), time for notice of rejection (2‑607).

Section 2‑309(2) expresses the commercially expected rule applicable to contracts of indefinite duration that “reasonable time” is to be implied and may be terminated by either party.

Where a party has the right to terminate a going contract relationship, subsection (3) requires reasonable notification before the termination becomes effective in order to give the other party reasonable time to seek a substitute arrangement. This principle of good faith commercial practice was recognized in Philadelphia Storage Battery Co. v Mutual Tire Stores, 161 SC 487, 490, 159 SE 825 (1931) when the court stated that . . . “It (radio jobbing contract providing either party may terminate by giving written notice) may not be terminated, if the manner of its termination be against equity and good conscience.” More recently, a United States District Court applied this principle as a matter of South Carolina law under the authority of the Philadelphia Storage Battery Co. case by holding that a franchised dealership contract containing an express right to terminate the relationship at any time, carried the implied obligation to give reasonable notice of termination in order to allow sufficient time for the dealer to make the necessary adjustment and that the relationship would continue for a reasonable time after notice of termination. Gaines W. Harrison & Sons, Inc. v J. I. Case Co., 180 F Supp 243 (1960).

The provision of this subsection that an “unconscionable” agreement dispensing with notification is invalid is a specific application of the general principle of Commercial Code Section 2‑302. A similar result would presumably be reached in South Carolina under the authority of the above cited cases assuming that the expression “if the manner of its termination be against equity and good conscience” is synonymous with the Commercial Code word “unconscionable.”

CROSS REFERENCES

Definitions, see Sections 36‑2‑103 to 36‑2‑106.

Formation of contract generally, see Section 36‑2‑204.

Obligation of good faith, see Section 36‑1‑304.

Payment by buyer, see Sections 36‑2‑511 to 36‑2‑514.

Repudiation of contract with respect to performance not yet due, see Section 36‑2‑610.

Right to adequate assurance of performance, see Section 36‑2‑609.

Seller’s remedies generally, see Section 36‑2‑703.

Shipment by seller, see Section 36‑2‑504.

LIBRARY REFERENCES

Sales 81(2), 84, 107, 127.

Westlaw Key Number Searches: 343k81(2); 343k84; 343k107; 343k127.

C.J.S. Sales Sections 108, 119, 141 to 143, 169 to 171, 204.

NOTES OF DECISIONS

Termination of contract 1

1. Termination of contract

The standard of conduct for terminating a contract unilaterally is far more stringent than one forbidding only actual fraud, and it may apply to an unconscionable reason for termination as well as to the causing of needless injury in the course of termination. deTreville v. Outboard Marine Corp. (C.A.4 (S.C.) 1971) 439 F.2d 1099. Torts 112

Termination of contract must not be contrary to equity and good conscience. deTreville v. Outboard Marine Corp. (C.A.4 (S.C.) 1971) 439 F.2d 1099.

**SECTION 36‑2‑310.** Open time for payment or running of credit; authority to ship under reservation.

Unless otherwise agreed

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 36‑2‑513); and

(c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due regardless of where the goods are to be received (i) at the time and place at which the buyer is to receive delivery of the tangible documents or (ii) at the time the buyer is to receive delivery of the electronic documents and at the seller’s place of business or if none, the seller’s residence; and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

HISTORY: 1962 Code Section 10.2‑310; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 7, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 42 and 47(2), Uniform Sales Act.

Changes: Completely rewritten in this and other sections.

Purposes of changes:

This section is drawn to reflect modern business methods of dealing at a distance rather than face to face. Thus:

1. Paragraph (a) provides that payment is due at the time and place “the buyer is to receive the goods” rather than at the point of delivery except in documentary shipment cases (paragraph (c)). This grants an opportunity for the exercise by the buyer of his preliminary right to inspection before paying even though under the delivery term the risk of loss may have previously passed to him or the running of the credit period has already started.

2. Paragraph (b) while providing for inspection by the buyer before he pays, protects the seller. He is not required to give up possession of the goods until he has received payment, where no credit has been contemplated by the parties. The seller may collect through a bank by a sight draft against an order bill of lading “hold until arrival; inspection allowed.” The obligations of the bank under such a provision are set forth in Part 5 of Article 4. Under subsection (c), in the absence of a credit term, the seller is permitted to ship under reservation and if he does payment is then due where and when the buyer is to receive delivery of the tangible documents of title. In the case of an electronic document of title, payment is due when the buyer is to receive delivery of the electronic document and at the seller’s place of business, or if none, the seller’s residence. Delivery as to documents of title is stated in Article 1, Section 1‑201.

3. Unless otherwise agreed the place for the delivery of the documents and payment is the buyer’s city but the time for payment is only after arrival of the goods, since under paragraph (b), and Sections 2‑512 and 2‑513 the buyer is under no duty to pay prior to inspection. Tender of a document of title requires that the seller be ready, willing and able to transfer possession of a tangible document of title or control of an electronic document of title to the buyer.

4. Where the mode of shipment is such that goods must be unloaded immediately upon arrival, too rapidly to permit adequate inspection before receipt, the seller must be guided by the provisions of this Article on inspection which provide that if the seller wishes to demand payment before inspection, he must put an appropriate term into the contract. Even requiring payment against documents will not of itself have this desired result if the documents are to be held until the arrival of the goods. But under (b) and (c) if the terms are C.I.F., C.O.D., or cash against documents payment may be due before inspection.

5. Paragraph (d) states the common commercial understanding that an agreed credit period runs from the time of shipment or from that dating of the invoice which is commonly recognized as a representation of the time of shipment. The provision concerning any delay in sending forth the invoice is included because such conduct results in depriving the buyer of his full notice and warning as to when he must be prepared to pay.

Cross References:

Generally: Part 5.

Point 1: Section 2‑509.

Point 2: Sections 2‑505, 2‑511, 2‑512, 2‑513 and Article 4.

Point 3: Sections 2‑308(b), 2‑512 and 2‑513.

Point 4: Section 2‑513(3)(b).

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Delivery” | Section 1‑201. |
| “Document of title” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Receipt of goods” | Section 2‑103. |
| “Seller” | Section 2‑103. |
| “Send” | Section 1‑201. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑310(a) relates the time for payment to the buyer’s receipt of the goods. This is generally the view of the South Carolina case law. Pickett v Cloud, 1 Bailey 362 (1830) holding that where no time is specified for the payment of goods sold, it must be made at the time of delivery. Followed in Neil v Cheves, 1 Bailey 537 (1830). In Alexander Sprunt & Son v Gordon, 89 SC 426, 71 SE 1033 (1911) the court held that where tender of the exact amount was impossible because the parties could not know of the exact amount of the goods at time of delivery, the tender requirement of the Pickett case means a general offer to perform. This Commercial Code section would not seem to change the logical result of that case.

Where delivery to a carrier constitutes a delivery to the buyer, it is not clear whether payment is due upon such delivery. See Mott Iron Works v Kaiser Co., 131 SC 394, 103 SE 783 (1920) where a sales contract provided for delivery F.O.B. at seller’s place of business, delivery to the carrier was putting them in the hands of the buyer. Where, however, the bill of lading is made out to the order of the seller, F.O.B. point, other than destination, this is not a delivery to buyer. Planters Oil Co. v Lightsey, 98 SC 3, 81 SE 1102 (1914). In making “receipt” and not “delivery” the presumed time when payment is required, this subsection makes it clear that the buyer has a right to inspect the goods before he is obligated to pay for them. (See Commercial Code Section 2‑103(1)(c) defining “receipt” as “taking physical possession of them”.) (See Commercial Code Section 2‑513 on buyer’s right of inspection.).

Section 2‑310(b) permits the seller to ship goods under reservation in a noncredit sale so that the seller is protected against losing possession of the goods before payment and the buyer will still have the opportunity to inspect before payment. The qualifying language of this subsection “unless such inspection is inconsistent with the terms of the contract” means that the buyer will not have the right to inspect prior to payment as where the transaction is a “C.O.D.” sale of “cash against documents” under subsection (c).

Where the transaction is a documentary sale and not made under reservation under subsection (b), the usual commercial understanding is that payment is due upon presentment of the documents of title. Subsection (c) gives effect to this expectation with the result that the buyer must pay before he acquires the goods themselves and without the right of inspection. This principle was recognized in Sanders v Landreth Seed Co., 100 SC 389, 84 SE 880 (1914), where the court concluded that the buyer of seed potatoes had no right to inspect until after he had paid the draft and received the bill of lading. This is also the sense of the following cases holding that where goods are shipped under contract calling for sight draft with bill of lading attached, title to the goods and right to possession did not pass to the buyer until the draft was paid. State v Maloney & Carter, 81 SC 226, 62 SE 215 (1908); Greenwood Grocery Co. v Canadian County Mill & Elevator Co., 72 SC 450, 52 SE 191 (1905); F. Z. Layton & Sons v Char. & West. Car. R. R. Co., 90 SC 323, 72 SE 988 (1911). Also see SC Code Sections 58‑1763, 58‑1764.

Where there is a credit sale, subsection (d) prescribed the time the goods are shipped as the time when the period of credit begins to run. This is said to be the usual commercial understanding in absence of agreement. (See 1 New York Law Rev Comm Report 386 (1955) and Restatement, Contracts Section 276 (1932).).

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 7, rewrote subsection (c).

CROSS REFERENCES

Bank deposits and collections, see Sections 36‑4‑101 et seq.

Buyer’s right to inspection of goods before payment or acceptance, see Section 36‑2‑513.

Contract requiring payment before inspection, see Section 36‑2‑512.

Reservation by seller of security interest when goods shipped, see Section 36‑2‑505.

Risk of loss where contract requires or authorizes seller to ship, see Section 36‑2‑509.

Tender of payment, see Section 36‑2‑511.

LIBRARY REFERENCES

Sales 82.

Westlaw Key Number Search: 343k82.

C.J.S. Sales Section 208.

**SECTION 36‑2‑311.** Options and cooperation respecting performance.

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 36‑2‑204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer’s option and except as otherwise provided in subsections (1)(c) and (3) of Section 36‑2‑319 specifications or arrangements relating to shipment are at the seller’s option.

(3) Where such specification would materially affect the other party’s performance but is not seasonably made or where one party’s cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

HISTORY: 1962 Code Section 10.2‑311; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Subsection (1) permits the parties to leave certain detailed particulars of performance to be filled in by either of them without running the risk of having the contract invalidated for indefiniteness. The party to whom the agreement gives power to specify the missing details is required to exercise good faith and to act in accordance with commercial standards so that there is no surprise and the range of permissible variation is limited by what is commercially reasonable. The “agreement” which permits one party so to specify may be found as well in a course of dealing, usage of trade, or implication from circumstances as in explicit language used by the parties.

2. Options as to assortment of goods or shipping arrangements are specifically reserved to the buyer and seller respectively under subsection (2) where no other arrangement has been made. This section rejects the test which mechanically and without regard to usage or the purpose of the option gave the option to the party “first under a duty to move” and applies instead a standard commercial interpretation to these circumstances. The “unless otherwise agreed” provision of this subsection covers not only express terms but the background and circumstances which enter into the agreement.

3. Subsection (3) applies when the exercise of an option or cooperation by one party is necessary to or materially affects the other party’s performance, but it is not seasonably forthcoming; the subsection relieves the other party from the necessity for performance or excuses his delay in performance as the case may be. The contract‑keeping party may at his option under this subsection proceed to perform in any commercially reasonable manner rather than wait. In addition to the special remedies provided, this subsection also reserves “all other remedies”. The remedy of particular importance in this connection is that provided for insecurity. Request may also be made pursuant to the obligation of good faith for a reasonable indication of the time and manner of performance for which a party is to hold himself ready.

4. The remedy provided in subsection (3) is one which does not operate in the situation which falls within the scope of Section 2‑614 on substituted performance. Where the failure to cooperate results from circumstances set forth in that Section, the other party is under a duty to proffer or demand (as the case may be) substitute performance as a condition to claiming rights against the noncooperating party.

Cross References:

Point 1: Sections 1‑201, 2‑204 and 1‑203.

Point 3: Sections 1‑203 and 2‑609.

Point 4: Section 2‑614.

Definitional Cross References:

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|  |  |
| “Agreement” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Remedy” | Section 1‑201. |
| “Seasonably” | Section 1‑204. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

As another specific example of the policy of Commercial Code Section 2‑204(3) that a contract should not fail on the ground of indefiniteness where terms are left open, Commercial Code Section 2‑311(1) provides for the “validity of a contract which leaves particulars of performance to be specified by one of the parties.” This is closely related to the approval of open price contracts (2‑305) and output and requirements (2‑306) including the limitation that the performance specified be made in good faith. This approach is in line with South Carolina cases. Hugenot Mills v Jempson & Co., 68 SC 363, 47 SE 687 (1903) (damages allowed seller for breach of an executory contract to purchase goods to be selected by the buyer and the time of delivery to be fixed by the buyer); Clinton Oil & Mfg. Co. v Carpenter, 113 SC 10, 101 SE 47 (1919) (court recognized validity of contract providing for buyer to call for delivery from time to time). See Restatement, Contracts Section 32 (1932).

Section 2‑311(2) gives the buyer the option with respect to assortment of the goods and the seller the option with respect to shipping arrangements as a matter of presumptive rules.

Section 2‑311(3) covers the factual situation where the performance of one party is dependant upon cooperation or furnishing of specifications for performance by the other party. A typical example is the case of Cooper & Griffin v Cooke & Co., 122 SC 314, 115 SE 312 (1922) where the seller was to ship cotton to a place to be designated by the buyer. The court reached a result similar to that of this subsection that the seller could not be put in breach until instructions were given by the buyer. See also Farrow v Martin, Harp 409 (1824). The option to perform or treat the failure to cooperate as a breach would be consistent with the general principles of the case decisions.

SOUTH CAROLINA REPORTER’S COMMENTS ON WARRANTY SECTIONS

Preliminary to a consideration of Commercial Code Sections 2‑312 through 2‑318 on warranties, it may be helpful to make a few general observations with respect to the development of this area of the law.

In its Anglo‑American common law inception, breach of warranty was a tort. The wrong was conceived to be a form of misrepresentation in the nature of deceit. By the mid‑eighteenth century an express warranty was recognized as a term of the contract of sale and by the early nineteenth century the implied warranties of quality were first established. As a matter of social and economic policy, these warranty obligations imposed on a seller have been expanding ever since, accelerated by a codification of the more advanced common law position of implied warranties under the Uniform Sales Act Sections 11 through 15. (See Prosser, The Implied Warranty of Merchantable Quality, 27 Minn L Rev 117 (1943).) This development can now be observed as a gradual erosion of the eighteenth century principle of caveat emptor in favor of caveat venditor.

While of common law evolved over most of the nineteenth century toward greater buyer protection, the South Carolina Court at an early date followed the civil law and rejected the principle of caveat emptor. The fundamental theory in this state has always been that a sound price paid for goods implies a representation that they are sound. (Timrod v Shoolbred, 1 Bay 324 (1793).) The evolution of the common law and the Uniform Sales Act in other jurisdictions had caught up with the South Carolina view of implied warranties by the turn of this century. The extent to which a seller will be held responsible for defective goods no longer turns on the caveat emptor v caveat venditor. The real issue today so far as the practical result of buyer recovery is concerned depends on the circumstances under which a contractual disclaimer of warranties will be effective and whether privity of sales contract is a prerequisite to recovery for breach of warranty. On these matters, especially the privity requirement which precludes recovery by a consumer of goods against the manufacturer, the case law of many jurisdictions has passed South Carolina in the movement toward greater buyer protection against defective goods. While the privity barrier in suits based on the alternative theory of negligence was crashed by Judge Cardoza in the famous case of MacPherson v Buick Motor Co., 217 NY 382, 111 NE 1050 (1916), the attack on the bastion of privity in warranty cases moves apace today.

The following Commercial Code sections make no drastic changes in the law of warranties. The general ancient rule of this state that a sound price warrants a sound product would be made more certain in its application by specific definitions and classification of types of warranties. The requirements for an effective disclaimer are made more specific. On the most important issue of privity of contract, the Commercial Code is surprisingly silent, leaving it to the developing case law to determine whether the warranty will run with the goods.

CROSS REFERENCES

Assurance of due performance, see Section 36‑2‑609.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Substituted performance, see Section 36‑2‑614.

When action is taken seasonably, see Section 36‑1‑205.

LIBRARY REFERENCES

Sales 1(4), 64, 83, 154.

Westlaw Key Number Searches: 343k1(4); 343k64; 343k83; 343k154.

C.J.S. Sales Sections 74 to 75, 82, 157.

**SECTION 36‑2‑312.** Warranty of title and against infringement; buyer’s obligation against infringement.

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

HISTORY: 1962 Code Section 10.2‑312; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 13, Uniform Sales Act.

Changes: Completely rewritten the provisions concerning infringement being new.

Purposes of changes:

1. Subsection (1) makes provision for a buyer’s basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receive a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit in order to protect it.

The warranty extends to a buyer whether or not the seller was in possession of the goods at the time the sale or contract to sell was made.

The warranty of quiet possession is abolished. Disturbance of quiet possession, although not mentioned specifically, is one way, among many, in which the breach of the warranty of title may be established.

The “knowledge” referred to in subsection 1(b) is actual knowledge as distinct from notice.

2. The provisions of this Article requiring notification to the seller within a reasonable time after the buyer’s discovery of a breach apply to notice of a breach of the warranty of title, where the seller’s breach was innocent. However, if the seller’s breach was in bad faith he cannot be permitted to claim that he has been misled or prejudiced by the delay in giving notice. In such case the “reasonable” time for notice should receive a very liberal interpretation. Whether the breach by the seller is in good or bad faith Section 2‑725 provides that the cause of action accrues when the breach occurs. Under the provisions of that section the breach of the warranty of good title occurs when tender of delivery is made since the warranty is not one which extends to “future performance of the goods.”

3. When the goods are part of the seller’s normal stock and are sold in his normal course of business, it is his duty to see that no claim of infringement of a patent or trademark by a third party will mar the buyer’s title.

A sale by a person other than a dealer, however, raises no implication in its circumstances of such a warranty. Nor is there such an implication when the buyer orders goods to be assembled, prepared or manufactured on his own specifications. If, in such a case, the resulting product infringes a patent or trademark, the liability will run from buyer to seller. There is, under such circumstances, a tacit representation on the part of the buyer that the seller will be safe in manufacturing according to the specifications, and the buyer is under an obligation in good faith to indemnify him for any loss suffered.

4. This section rejects the cases which recognize the principle that infringements violate the warranty of title but deny the buyer a remedy unless he has been expressly prevented from using the goods. Under this Article “eviction” is not a necessary condition to the buyer’s remedy since the buyer’s remedy arises immediately upon receipt of notice of infringement; it is merely one way of establishing the fact of breach.

5. Subsection (2) recognizes that sales by sheriffs, executors, foreclosing lienors and persons similarly situated are so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right. This subsection does not touch upon and leaves open all questions of restitution arising in such cases, when a unique article so sold is reclaimed by a third party as the rightful owner.

6. The warranty of subsection (1) is not designated as an “implied” warranty, and hence is not subject to Section 2‑316(3). Disclaimer of the warranty of title is governed instead by subsection (2), which requires either specific language or the described circumstances.

Cross References:

Point 1: Section 2‑403.

Point 2: Sections 2‑607 and 2‑725.

Point 3: Section 1‑203.

Point 4: Sections 2‑609 and 2‑725.

Point 6: Section 2‑316.

Definitional Cross References:

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| “Buyer” | Section 2‑103. |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Person” | Section 1‑201. |
| “Right” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑312(1) expresses the basic common law rule (as codified in the Uniform Sales Act Section 13) that upon sale of chattel, a warranty of title is implied. In accord, Moore & Nesbit v Hutson Lanham, 3 Hill 299 (1837); Computing Scales Co. v Long, 66 SC 379, 44 SE 963 (1903); Mauldin v Milford, 127 SC 508, 121 SE 547 (1923). The Mauldin case also states the rule of subsection (1)(b) to the effect that the warranty extends to include the warranty that the seller’s title is free from all liens and encumbrances of which the buyer has no actual knowledge.

There presently exists considerable uncertainty in South Carolina as well as other jurisdictions as to when the right of action of a purchaser arises for breach of a warranty of title. The principle area of dispute is whether the buyer’s possession must be interfered with before there can be a breach. (See 1 Williston, Sales Section 221 (Rev ed 1948)). Dictum in Computing Scales Co. and the Mauldin cases, supra, indicates that the South Carolina test is that there is no breach until the possession of the buyer is disturbed by the assertion of a paramount title on the part of the true owner. This general proposition of case law probably means, as was stated in Computing Scales Co. case, however, that while the buyer must show more than a “mere dispute about the title, or the contingency of future loss”, he may rescind for breach if he can “show that there is a valid adverse claim from which loss to him would inevitably occur” (quoted language from 66 SC at pages 382 and 383). While the Commercial Code does not expressly cover this question, it would seem that the language of subsection (1) that the transfer is “rightful”, means that actual eviction is not necessary and that the buyer must show that the title is defective as a matter of proof. This appears to be the sense of the South Carolina case law as cited above.

Subsection (2) limits the application of warranty of title where excluded by “specific language” (title) which is in accord with Smith v Russ Mfg. Co., 167 SC 464, 166 SE 607 (1932) holding that an express warranty in a sales contract “in lieu of all other warranties and other obligations” did not preclude the implied warranty as to seller’s title. Also, the “other circumstances” when the buyer should know that the seller is not warranting title would typically include a sheriff’s or foreclosing lienor’s sale and the like. In accord with the rule that a sheriff’s sale is caveat emptor, Moore v Aiken, 2 Hill 403 (1834); Gulf Refining Co. v McCanless, 118 SC 6, 109 SE 80 (1921).

Note that the warranty of this section is not designated as an “implied” warranty. Thus disclaimer of warranty of title is governed by this subsection and not Commercial Code Section 2‑316 dealing generally with exclusion or modification of implied warranties.

Subsection (3) extends the warranty of title to include claims by third parties by way of infringement. While there is no direct authority in this state as to whether the right to use purchased goods should stand on the same ground as a right to title, the South Carolina court in Computing Scales Co. v Long, 66 SC 379, 44 SE 963 (1903) may have assumed that if the buyer of scales had been able to prove his allegation that he could not use them without infringing the patent rights of another, he would have had the right to rescind. Note that the subsection only applies where the seller is a “merchant” and if specifications are given by a buyer to a seller for the manufacturer of goods, the warranty of no infringement runs from buyer to seller.

CROSS REFERENCES

Course of dealing; usage of trade, see Section 36‑1‑303.

Effect of acceptance by buyer, see Section 36‑2‑607.

General principles of law and equity as supplementing code provisions, see Section 36‑1‑103.

Good faith purchase of goods, see Section 36‑2‑403.

Limitations of actions, see Section 36‑2‑725.

Measure of damages for breach of warranty generally, see Section 36‑2‑714.

Modification, rescission, and waiver, see Section 36‑2‑209.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Right to adequate assurance of performance, see Section 36‑2‑609.

Varying effect of code provisions by agreement, see Section 36‑1‑302.

Warranties on negotiation or transfer of document of title, see Section 36‑7‑507.

Warranties on transfer of security, see Section 36‑8‑306.

LIBRARY REFERENCES

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Westlaw Key Number Search: 343k263.

C.J.S. Sales Sections 261, 272.

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LAW REVIEW AND JOURNAL COMMENTARIES

Consumer Product Warranty Litigation in South Carolina. 31 S.C. L. Rev. 293.

**SECTION 36‑2‑313.** Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise, including those on containers or labels, made by the seller to the buyer, whether directly or indirectly, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

HISTORY: 1962 Code Section 10.2‑313; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 12, 14 and 16, Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

To consolidate and systematize basic principles with the result that:

1. “Express” warranties rest on “dickered” aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. “Implied” warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated.

This section reverts to the older case law insofar as the warranties of description and sample are designated “express” rather than “implied”.

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2‑318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of the negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller’s obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming “all warranties, express or implied” cannot reduce the seller’s obligation with respect to such description and therefore cannot be given literal effect under Section 2‑316.

This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo‑obligation.

5. Paragraph (1)(b) makes specific some of the principles set forth above when a description of the goods is given by the seller.

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a “sample” actually drawn from the bulk of goods which is the subject matter of the sale, and a “model” which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a “sample” does not of itself show whether it is merely intended to “suggest” or to “be” the character of the subject‑matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer’s initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by a consideration if it is otherwise reasonable and in order (Section 2‑209).

8. Concerning affirmations of value or a seller’s opinion or commendation under subsection (2), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

Cross References:

Point 1: Section 2‑316.

Point 2: Sections 1‑102(3) and 2‑318.

Point 3: Section 2‑316(2)(b).

Point 4: Section 2‑316.

Point 5: Sections 1‑205(4) and 2‑314.

Point 6: Section 2‑316.

Point 7: Section 2‑209.

Point 8: Section 1‑103.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Buyer” | Section 2‑103. |
| “Conforming” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑313(1)(a) states the basic common law rule that “any affirmation of fact or promise” creates an express warranty. A typical statement held to be an express warranty under South Carolina case law appears in Spartanburg Hotel Corp. v Alexander Smith, 231 SC 1, 97 SE2d 199 (1957), where the seller represented that carpet was of first quality, was colorfast, and would not fade and was suitable for hotel needs of the buyer. Also, in accord, Robson v Miller, 12 SC 586 (1879) (“fertilizer compounded of the purest materials and of the highest standard”); Herndon v Southern Pest Control Co., 307 F2d 753 (4th Cir 1962) (insecticide is “not harmful to pigs and would not damage buyer’s pigs”).

Under existing law, a sale by description and sale by sample clearly create a warranty that the goods will conform to the description or sample. E.g., Richmond Pressed Metal Works v Haley, 157 SC 426, 154 SE 12 (1930); Stevenson v B. B. Kirkland Seed Co., 176 SC 345, 180 SE 197 (1935). Under subsections (1)(b) and (1)(c) this is made an express warranty which may be a modification of existing law that this creates an implied warranty. In Greenwood Cotton Mill v Tolbert, 105 SC 273, 89 SE 653 (1916), the court referred to a warranty of soundness of cotton when purchased by sample as “implied”. But in the Stevenson case, supra, the court found that seller’s representation that seed sold was “genuine Abruzzi rye suitable for producing growth for grazing dairy stock” created an express warranty. Whether the warranty is implied or express is important only when there is an express disclaimer of one and not the other. (For example, in Fairbanks, Morse & Co. v Consolidated Fisheries, 190 F2d 817 (3rd Cir 1951) the contract described a generator as 1136 KW and seller had disclaimed all implied warranties. The court held that the description made out an express warranty which the disclaimer did not reach).

Subsection (2) rejects some early English case decisions in the development of the law of warranties and is in accord with South Carolina case law as illustrated by the statement in Iler v Jennings, 87 SC 87, 91, 68 SE 1041 (1910): “It is certain that the word warrant need not be used, nor any other of precisely the same meaning. It is enough if the words actually used import an undertaking on the part of the owner that the chattel is what it is represented to be or an equivalent to such understanding.” In accord, Bryce v Parker, 11 SC 337 (1878). That the seller need not have a specific intent to make a warranty and need not know of its breach is in accord with the statement in the Iler case, supra, that in an action for breach of an express warranty, it is not necessary to allege or prove scienter.

The last phrase of subsection (2) refers to the requirement of an express warranty that it must be based on an affirmation of fact as distinguished from the seller’s opinion or “sales talk”. This distinction is at least implied in most of the South Carolina cases cited above by the court’s reference to statements of fact. For example, in the Iler case, supra, at page 91, the court defined a warranty as “an affirmation of the quality or condition of the thing sold (not uttered as a matter of opinion or belief) made by the seller at the time of sale for the purpose of assuring the buyer of the truth of the facts affirmed, and inducing him to make the purchase if so received and relied on by the purchaser as an express warranty.” The latter phrase in the above quote is in accord with the statement in subsection (1) of this Code section that a warranty must “Become part of the basis of the bargain . . .”

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C.J.S. Sales Section 242.

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1 ALR 7th 3 , Applicability of UCC Article 2 to Mixed Contracts for Sale of Consumer Goods and Services.

88 ALR 6th 1 , Oral Statement as Constituting “Affirmation of Fact” Giving Rise to Express Warranty Under UCC S2‑313(1)(a).

84 ALR 6th 1 , Statement in Product Packaging, User Manuals, or Other Product Documentation as Constituting “Affirmation of Fact” Giving Rise to Express Warranty Under UCC S2‑313(1)(a).

83 ALR 6th 1 , Statement in Advertisements, Product Brochures or Other Promotional Materials as Constituting “Affirmation of Fact” Giving Rise to Express Warranty Under UCC S2‑313(1)(a).

93 ALR 5th 103 , Products Liability: Statements in Advertisements as Affecting Liability of Manufacturers or Sellers for Injury Caused by Product Other Than Tobacco.

132 ALR 749 , Comment Note.‑Identity or Community of Interests Essential to Class or Representative Suit.

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The last best argument for eliminating reliance from express warranties: “real world” consumers don’t read warranties. 45 S.C. L. Rev. 429 (Spring 1994).

Attorney General’s Opinions

Because facts and circumstances vary with each case, Office of Attorney General can provide only general discussion of relevant legal principles and remedies available where individual purchased horse at auction or otherwise and subsequently discovered that horse has latent defect, such as, for example, undiagnosed illness or inability to breed. Uniform Commercial Code offers at least three remedies to be considered, express warranty (Section 36‑2‑313), implied warranty of merchantability (Section 36‑2‑314), and implied warranty of fitness for particular purpose (Section 36‑2‑315). Op Atty Gen 92‑06.

NOTES OF DECISIONS

In general 1

Construction and application 2

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Summary judgment 4.5

1. In general

Manufacturer of allegedly defective roofing shingles was not liable to named plaintiffs, in homeowners’ class action, for breach of an express warranty under South Carolina law, absent evidence that named plaintiffs purchased the allegedly defective shingles. Brooks v. GAF Materials Corp., 2014, 41 F.Supp.3d 474. Sales 1820

In order to establish a cause of action for breach of an express warranty under South Carolina law, a plaintiff must show the existence of the warranty, its breach by the failure of the goods to conform to the warranted description, and damages proximately caused by the breach. Brooks v. GAF Materials Corp., 2014, 41 F.Supp.3d 474. Sales 1643

In order to establish cause of action for breach of express warranty under South Carolina law, plaintiff must prove: (1) existence of express warranty; (2) breach of express warranty; and (3) damages proximately caused by breach. Thomas v. Louisiana‑Pacific Corp., 2007, 246 F.R.D. 505. Sales 1643

In order to establish cause of action for breach of express warranty under South Carolina law, plaintiff must prove: (1) existence of express warranty; (2) breach of express warranty; and (3) damages proximately caused by breach. Thomas v. Louisiana‑Pacific Corp., 2007, 246 F.R.D. 505. Sales 1643

When exclusive or limited warranty fails of its essential purpose, party who purchases product covered by such warranty is not limited to action for breach of warranty, but may seek other remedies, including revocation of acceptance. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 1032; Sales 1905

Breach of warranty is an action affirming contract in which buyer retains goods; revocation of acceptance, on the other hand, requires return of goods and cancellation of terms of contract. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 1032; Sales 1905; Sales 2451

When goods do not conform to promise or affirmation of fact made by seller, or goods do not conform to description, sample, or model, then seller has breached an express warranty. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 1643

In order to show a breach of an express oral warranty, purchasers were required to show the existence of the warranty, its breach by the failure of the goods to conform to the warranted description, and damages proximately caused by the breach. First State Sav. and Loan v. Phelps (S.C. 1989) 299 S.C. 441, 385 S.E.2d 821. Sales 1643

In consolidated action involving (1) manufacturer’s suit against buyer for balance due under retail‑installment contract for purchase of defective combine, and (2) buyer’s suit against manufacturer and dealer for breach of contract and breach of warranty, court held, with respect to buyer’s breach‑of‑warranty claims and manufacturer’s warranty disclaimer and limited express warranty, (1) that written and implied warranties (UCC Sections 2‑313(1), 2‑314(1), and 2‑315) were not only possible bases for jury verdict in favor of buyer; (2) that if jury believed buyer’s testimony that he had never received manufacturer’s written warranty, it could then have found that oral agreement of manufacturer’s sales representative with buyer constituted express oral warranty that ran directly from manufacturer to buyer and was limited only in duration; and (3) that under theory of breach of oral express warranty, jury, under UCC Section 2‑714, was free to award buyer any damages proximately caused by manufacturer’s breach, including consequential damages. McClary v. Massey Ferguson, Inc. (S.C.App. 1987) 291 S.C. 506, 354 S.E.2d 405.

2. Construction and application

State statute pertaining to samples or models giving rise to express warranties was not pertinent where prior negotiations, demonstrations, a conditional lease, experiments, and 2 outright sales pursuant to written agreements executed by plaintiff, preceded the transaction complained of. Investors Premium Corp. v. Burroughs Corp. (D.C.S.C. 1974) 389 F.Supp. 39.

Commonality requirement for class action certification was satisfied in homeowners’ action against manufacturer of manufactured‑wood exterior trim product alleging breach of express and implied warranties; representations made by manufacturer to homeowner warranted against delamination, checking, splitting, cracking and chipping of basic substrate or product for period of ten years from date of installation under normal conditions of use and exposure, warranties provided compensation to “owner” of trim product and thus, each class member would not have to show proof that warranty formed basis of homeowner’s bargain to own product. Brunson v. Louisiana‑Pacific Corp., 2010, 266 F.R.D. 112. Federal Civil Procedure 182.5

Causes of action for breach of warranty and for revocation of acceptance contained contradictory elements, and thus jury verdict finding in favor of purchaser of lawn mower on revocation of acceptance claim but denying recovery on breach of warranty claim was not inconsistent and did not require new trial. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. New Trial 60; Sales 2436; Sales 2471

Health care providers who use products, including breast implants, during course of providing treatment to patients are providing “services,” and are not “sellers” of “goods” within meaning of Uniform Commercial Code (U.C.C.); thus, providers may not be held liable for such products under U.C.C. provisions pertaining to express warranty, implied warranty of merchantability, and implied warranty of fitness for particular purpose. In re Breast Implant Product Liability Litigation (S.C. 1998) 331 S.C. 540, 503 S.E.2d 445. Sales 532(22)

Although Section 36‑2‑313 is limited in its scope and direct purpose to warranties made as part of a contract of sale, there is no reason why parties should be prohibited from contracting for an express warranty on personal property which is the subject of a lease. C. Ray Miles Const. Co., Inc. v. Weaver (S.C.App. 1988) 296 S.C. 466, 373 S.E.2d 905.

3. Implied warranty based on expertise

Contractor and equipment supplier are liable to owner for any breach of express warranties contained in specifications; equipment supplier whose contract with general contractor incorporates by reference general contractor’s contract with owner, and who also warrants his work to owner, is liable in contract to owner; if owner or its engineer is not expert in field, and contractor possesses superior expertise with respect to job to be performed and obtains permission to deviate from job specifications, contractor impliedly warrants that performance requirements of specifications will be satisfied. Aiken County v. BSP Div. of Envirotech Corp., 1986, 657 F.Supp. 1339, affirmed in part, reversed in part 866 F.2d 661, rehearing denied.

4. Disclaimers

In breach‑of‑warranty action by buyer of herbicide for product’s failure to control weed problem, court held (1) that under UCC Section 2‑313(2), oral statement of seller’s salesman that herbicide would control weed problem was simply seller’s opinion and did not create any warranty; (2) that buyer was bound by printed disclaimer on herbicide’s label, which buyer had read, of all warranties except those expressly stated in disclaimer (see UCC Section 2‑316(1) and (2)); (3) that under UCC Section 2‑202, salesman’s oral statement could not vary terms of conditions of sale and warranty on product’s label; (4) that seller’s limitation‑of‑remedies clause, which was printed on product’s label, was authorized by UCC Section 2‑719; (5) that such limitation was intended to be buyer’s exclusive remedy (UCC Section 2‑719(1)(b)); and (6) that such remedy did not fail in its essential purpose within meaning of UCC Section 2‑719(2). Hill v. BASF Wyandotte Corp. (C.A.4 (S.C.) 1982) 696 F.2d 287.

4.5. Summary judgment

Genuine issue of material fact existed as to whether manufacturer created an express warranty under South Carolina law regarding the perceived duration of its shingles, precluding summary judgment in manufacturer’s favor on homeowners’ breach of express warranty claim under South Carolina law. Brooks v. GAF Materials Corp., 2014, 41 F.Supp.3d 474. Federal Civil Procedure 2510

5. Questions of fact

Whether pesticide manufacturer’s advertisement in trade journal acted as express warranty that proper application of fumigant to tobacco farm would prevent black shank disease was question for jury in farm’s action against manufacturer for breach of express warranty. Triple E, Inc. v. Hendrix and Dail, Inc. (S.C.App. 2001) 344 S.C. 186, 543 S.E.2d 245, 93 A.L.R.5th 727, rehearing denied. Sales 2810

Whether an affirmation creates an express warranty or is merely the seller’s opinion or puffing is ordinarily a question of fact for the jury. Triple E, Inc. v. Hendrix and Dail, Inc. (S.C.App. 2001) 344 S.C. 186, 543 S.E.2d 245, 93 A.L.R.5th 727, rehearing denied. Sales 2810

Judge erred in submitting counterclaim to jury on theory of both breach of express, and breach of implied, warranty where defendant alleged breach of express warranty, no mention being made of implied warranty, and counterclaim failed to give plaintiff notice that defendant was seeking relief on basis of implied warranty. Marshall & Williams Co. v. General Fibers & Fabrics, Inc. (S.C. 1978) 270 S.C. 247, 241 S.E.2d 888.

6. Sufficiency of evidence

Purchasers of horses failed to present evidence from which a jury could find the breach of an express oral warranty that the horses were high quality, registered horses where the adult horses were registered and the seller provided certificates so that the foals could be registered, even though the purchasers argued that alterations to these certificates prevented them from registering the foals, since the purchasers offered no evidence that the seller was responsible for altering the documents. Thus, the purchasers failed to present evidence which tended to show that the goods failed to conform to the guaranteed condition. First State Sav. and Loan v. Phelps (S.C. 1989) 299 S.C. 441, 385 S.E.2d 821.

Counterclaim for breach of express warranty was supported by evidence where company’s chief executive testified that he had informed manufacturer that he required oven that would process carpet backing at 100 feet per minute, and manufacturer had indicated it was capable of delivering machine meeting this criteria, but delivered machine processing backing at little more than half that rate. Marshall & Williams Co. v. General Fibers & Fabrics, Inc. (S.C. 1978) 270 S.C. 247, 241 S.E.2d 888.

7. Review

Manufacturer of lawn mower and seller of mower did not preserve for appellate review by Court of Appeals their claim that magistrate at small claims trial improperly denied their motion for directed verdict in action by purchaser of mower that alleged breach of warranty and revocation of acceptance, where circuit court, in its review of small claims trial, did not rule on that issue. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Courts 176.5

**SECTION 36‑2‑314.** Implied warranty; merchantability; usage of trade.

(1) Unless excluded or modified (Section 36‑2‑316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require.

(3) Unless excluded or modified (Section 36‑2‑316) other implied warranties may arise from course of dealing or usage of trade.

HISTORY: 1962 Code Section 10.2‑314; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 15(2), Uniform Sales Act.

Changes: Completely rewritten.

Purposes of changes:

This section, drawn in view of the steadily developing case law on the subject, is intended to make it clear that:

1. The seller’s obligation applies to present sales as well as to contracts to sell subject to the effects of any examination of specific goods. (Subsection (2) of Section 2‑316.) Also, the warranty of merchantability applies to sales for use as well as to sales for resale.

2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant‑seller, and the absence of the words “grower or manufacturer or not” which appeared in Section 15(2) of the Uniform Sales Act does not restrict the applicability of this section.

3. A specific designation of goods by the buyer does not exclude the seller’s obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second‑hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. A person making an isolated sale of goods is not a “merchant” within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

4. Although a seller may not be a “merchant” as to the goods in question, if he states generally that they are “guaranteed” the provisions of this section may furnish a guide to the content of the resulting express warranty. This has particular significance in the case of secondhand sales, and has further significance in limiting the effect of fine‑print disclaimer clauses where their effect would be inconsistent with large‑print assertions of “guarantee”.

5. The second sentence of subsection (1) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected. The principal warranty is that stated in subsections (1) and (2)(c) of this section.

6. Subsection (2) does not support to exhaust the meaning of “merchantable” nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is “must be at least such as . . .,” and the intention is to leave open other possible attributes of merchantability.

7. Paragraphs (a) and (b) of subsection (2) are to be read together. Both refer, as indicated above, to the standards of that line of the trade which fits the transaction and the seller’s business. “Fair average” is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass “without objection.” Of course a fair percentage of the least is permissible but the goods are not “fair average” if they are all of the least or worst quality possible under the description. In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.

8. Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered in paragraph (c). As stated above, merchantability is also a part of the obligation owing to the purchaser for use. Correspondingly, protection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be “honestly” resalable in the normal course of business because they are what they purport to be.

9. Paragraph (d) on evenness of kind, quality and quantity follows case law. But precautionary language has been added as a reminder of the frequent usages of trade which permit substantial variations both with and without an allowance or an obligation to replace the varying units.

10. Paragraph (e) applies only where the nature of the goods and of the transaction require a certain type of container, package or label. Paragraph (f) applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labeling or the representation. This follows from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container. No problem of extra consideration arises in this connection since, under this Article, an obligation is imposed by the original contract not to deliver mislabeled articles, and the obligation is imposed where mercantile good faith so requires and without reference to the doctrine of consideration.

11. Exclusion or modification of the warranty of merchantability, or of any part of it, is dealt with in the section to which the text of the present section makes explicit precautionary references. That section must be read with particular reference to its subsection (4) on limitation of remedies. The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.

12. Subsection (3) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties and thus subject to exclusion or modification under Section 2‑316. A typical instance would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog or blooded bull.

13. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

Cross References:

Point 1: Section 2‑316.

Point 3: Sections 1‑203 and 2‑104.

Point 5: Section 2‑315.

Point 11: Section 2‑316.

Point 12: Sections 1‑201, 1‑205 and 2‑316.

Definitional Cross References:

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| “Agreement” | Section 1‑201. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Merchant” | Section 2‑104. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑314 codifies under the term “merchantability” the implied warranty of goods sold by a merchant. While the South Carolina court has not used this Uniform Sales Act term (Section 15(2)), it has been long recognized that a sound price warrants a sound commodity both as to quality and quantity. E.g., Timrod v Shoolbred, 1 Bay 324 (1793); Southern Iron & Equipment Co. v Bamberg E. & W. Ry. Co., 151 SC 506, 149 SE 271; Columbia Weighing Machine Co. v Rhem, 164 SC 376, 162 SE 427; Bond Bros. Cash & Delivery Grocery v Claussen’s Bakeries, 184 SC 95, 191 SE 717 (1937). These cases reflect the early lead taken by the South Carolina court in rejecting the doctrine of “caveat emptor” in favor of “caveat venditor” in the evolution of common law contractual warranties.

The listing of the necessary characteristics of the goods in order to be merchantable in subsections (2)(a) through (f) is a more specific definition of minimum requirements, but is still not exhaustive. Subsection (3) leaves open the further expansion of implied warranties based on course of dealing or usage of trade in any particular sales transaction.

The statement in subsection (1) that the serving of food is a sale thus giving rise to the implied warranty of merchantability resolves a conflict in other jurisdictions, which has never been directly passed on by the South Carolina court (see Williston, Sales Section 242(b) (Rev ed 1948)). (See also for a collection of the cases, 7 ALR2d 1027).

Since this section deals only with implied warranties of a contractual nature, the numerous South Carolina cases in which the buyer has been able to recover on the theory of negligence, particularly where there has been a violation of the Food and Drugs Act (SC Code Sections 32‑1451 et seq.), giving rise to a finding of negligence, would not be affected by this Code section. E.g., McKinzie v Peoples Baking Co., 205 SC 149, 131 SE2d 154 (1944); Peters v Double Cola Bottling Co., 224 SC 437, 70 SE2d 710 (1954); Turner v Wilson, 227 SC 95, 86 SE 867 (1955).

CROSS REFERENCES

Course of dealing or usage of trade, see Section 36‑1‑303.

General principles of law and equity as supplementing code provisions, see Section 36‑1‑103.

Modification, rescission, and waiver, see Section 36‑2‑209.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Varying effect of code provisions by agreement, see Section 36‑1‑302.

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11 Causes of Action 531, Cause of Action for Economic Loss Resulting from Breach of Implied Warranty of Merchantability Under UCC S2‑314.

19 Causes of Action 2d 337, Cause of Action for Defective Mobile Home.

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Commercial Transactions—Warranties—Implied Warranties of Quality under the Uniform Commercial Code. 20 S.C. L. Rev. 323.

Contracts: Implied Warranties in Home Construction: Subsequent Purchasers. 33 S.C. L. Rev. 33 (August 1981).

Sales—The Defense of Contributory Negligence in Warranty Actions. 22 S.C. L. Rev. 444.

Attorney General’s Opinions

Because facts and circumstances vary with each case, Office of Attorney General can provide only general discussion of relevant legal principles and remedies available where individual purchased horse at auction or otherwise and subsequently discovered that horse has latent defect, such as, for example, undiagnosed illness or inability to breed. Uniform Commercial Code offers at least three remedies to be considered, express warranty (Section 36‑2‑313), implied warranty of merchantability (Section 36‑2‑314), and implied warranty of fitness for particular purpose (Section 36‑2‑315). Op Atty Gen 92‑06.

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1. In general

Under South Carolina law, as a service provider rather than a seller, a pharmacy cannot be held liable for a breach of warranty; that cause of action necessarily requires the existence of a buyer‑seller relationship. Duckett v. SCP 2006‑C23‑202, LLC, 2015, 225 F.Supp.3d 432. Sales 532(22)

Under South Carolina law, if the particular purpose for which a product is purchased is also the ordinary or intended purpose of the product, the warranties of merchantability and of fitness for a particular purpose merge and are cumulative, such that a plaintiff may proceed upon either theory. Brooks v. GAF Materials Corp., 2014, 41 F.Supp.3d 474. Sales 1905

To recover for breach of the implied warranty of merchantability under South Carolina law, a plaintiff must prove (1) a merchant sold goods; (2) the goods were not merchantable at the time of sale; (3) the plaintiff or his property were injured by such goods; (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury; and (5) the plaintiff so injured gave timely notice to the seller. Brooks v. GAF Materials Corp., 2014, 41 F.Supp.3d 474. Sales 1716

Genuine issue of material fact existed as to whether “lower tar and nicotine” cigarettes were fit for their intended use as safer and healthier cigarettes, precluding summary judgment, in product liability action against tobacco company under South Carolina law. Little v. Brown & Williamson Tobacco Corp., 2001, 243 F.Supp.2d 480. Federal Civil Procedure 2515

To recover for breach of implied warranty of merchantability under South Carolina law, plaintiff must prove: (1) merchant sold goods; (2) goods were not merchantable at time of sale; (3) plaintiff or his property was injured by such goods; (4) defect or other condition amounting to breach of implied warranty of merchantability proximately caused injury; and (5) plaintiff so injured gave timely notice to seller. Thomas v. Louisiana‑Pacific Corp., 2007, 246 F.R.D. 505. Sales 1716

Causes of action for breach of warranty and for revocation of acceptance contained contradictory elements, and thus jury verdict finding in favor of purchaser of lawn mower on revocation of acceptance claim but denying recovery on breach of warranty claim was not inconsistent and did not require new trial. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. New Trial 60; Sales 2436; Sales 2471

When exclusive or limited warranty fails of its essential purpose, party who purchases product covered by such warranty is not limited to action for breach of warranty, but may seek other remedies, including revocation of acceptance. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 1032; Sales 1905

Breach of warranty is an action affirming contract in which buyer retains goods; revocation of acceptance, on the other hand, requires return of goods and cancellation of terms of contract. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 1032; Sales 1905; Sales 2451

If goods are not merchantable, then seller of those goods has breached an implied warranty. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 1716

Failure to install kill switch on motorboat does not constitute breach of any implied warranty, nor does it evidence failure to exercise due care. Young v. Tide Craft, Inc. (S.C. 1978) 270 S.C. 453, 242 S.E.2d 671, 1 A.L.R.4th 394.

Company which manufactured bulk curing tobacco barn breached not only implied warranty of merchantability but also express oral warranties that barn was first quality and that service and parts were readily available where barn in actual operation had defective doors, bulging sides, a nearly unusable firing system, and produced tobacco of lower quality than farmer’s other barns. Bell v. Harrington Mfg. Co. (S.C. 1975) 265 S.C. 468, 219 S.E.2d 906.

A purchaser is entitled to the benefit of an implied warranty unless such implied warranty was excluded from the contract in accordance with the provisions of Code 1962 Section 10.2‑316. Mid‑Continent Refrigerator Co. v. Way (S.C. 1974) 263 S.C. 101, 208 S.E.2d 31.

1.5. Preemption

Federal law governing drug labeling requirements did not preempt claim, under South Carolina law, that generic drug metoclopramide that consumer ingested was “not of merchantable quality or safe or fit for its intended use”; implied warranty of merchantability was not created by labeling content, and plaintiffs could plausibly demonstrate that long‑term use was ordinary purpose for which metoclopramide was used or that metoclopramide that defendant manufactured was objectionable in the trade under the contract description. Fisher v. Pelstring, 2011, 817 F.Supp.2d 791, on reconsideration in part. Sales 514; States 18.15

2. Choice of law

Where negotiations for purchase of component part occurred in Texas, injury was sustained in South Carolina, Texas corporation which purchased part transacted business in South Carolina, and part was shipped to South Carolina and installed in South Carolina, South Carolina law applied to claim for breach of implied warranty of merchantability arising out of failure of part. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125.

3. Pleadings

Allegation “the metoclopramide manufactured by defendant was not merchantable and was not fit for its intended purpose” stated claims, under South Carolina law, for breach of implied warranties of merchantability and fitness for particular purpose. Fisher v. Pelstring, 2011, 817 F.Supp.2d 791, on reconsideration in part. Sales 2466

Employee who was injured by defective switchboard manufactured by defendant, which was temporarily furnished to plaintiff’s employer and maintained by defendant during such time, could not maintain breach‑of‑warranty action for his injuries because (1) complaint did not allege making of any express warranty by defendant; (2) complaint also did not allege sale of switchboard to plaintiff’s employer; and (3) before implied warranties of merchantability and fitness for particular purpose can arise under UCC Sections 36‑2‑314(1) and 36‑2‑315, sale of goods must occur. Henderson v. Gould, Inc. (S.C.App. 1986) 288 S.C. 261, 341 S.E.2d 806.

Judge erred in submitting counterclaim to jury on theory of both breach of express, and breach of implied, warranty where defendant alleged breach of express warranty, no mention being made of implied warranty, and counterclaim failed to give plaintiff notice that defendant was seeking relief on basis of implied warranty. Marshall & Williams Co. v. General Fibers & Fabrics, Inc. (S.C. 1978) 270 S.C. 247, 241 S.E.2d 888.

4. Elements of liability

A supplier and a manufacturer of a chattel are liable to all whom they should expect will use the chattel or be endangered by its use if (a) they know or have reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, (b) they lack reason to believe that the user will realize the potential danger, and (c) they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous. Gardner v. Q. H. S., Inc. (C.A.4 (S.C.) 1971) 448 F.2d 238. Products Liability 110; Sales 1716

To recover for breach of implied warranty of merchantability under South Carolina law, plaintiff must prove: (1) merchant sold goods; (2) goods were not merchantable at time of sale; (3) plaintiff or his property was injured by such goods; (4) defect or other condition amounting to breach of implied warranty of merchantability proximately caused injury; and (5) plaintiff so injured gave timely notice to seller. Thomas v. Louisiana‑Pacific Corp., 2007, 246 F.R.D. 505. Sales 1716

5. Sales and leases

Employee sufficiently alleged an actual sale, as required to state a claim under South Carolina law for breach of implied warranty of merchantability and for breach of implied warranty of fitness for a particular purpose, in her action against desk installer and desk refurbisher, alleging that her desk collapsed at her workplace causing her injuries, by alleging that refurbisher was “refurbisher, supplier and purveyor of the desk in question.” Green v. Bradley Company, 2016, 194 F.Supp.3d 479. Sales 532(1)

Under South Carolina law, employee’s cause of action for breach of implied warranty of merchantability and for breach of implied warranty of fitness for a particular purpose accrued under discovery rule, and six‑year statute of limitations began to run, at time her desk collapsed at her workplace, allegedly causing her injuries, not at time desks were sold to employer, in employee’s action against desk installer and desk refurbisher. Green v. Bradley Company, 2016, 194 F.Supp.3d 479. Limitation of Actions 95(9)

Worker who was injured when he fell through partially opened hatch door on catwalk had no claim for breach of implied warranties of merchantability and fitness for particular purpose against contractor that performed assembly work on catwalk; no implied warranties arose, as no sale occurred. Duncan v. CRS Sirrine Engineers, Inc. (S.C.App. 1999) 337 S.C. 537, 524 S.E.2d 115. Sales 1719; Sales 1748

A sale must occur before an implied warranty can arise under the Uniform Commercial Code (U.C.C.). In re Breast Implant Product Liability Litigation (S.C. 1998) 331 S.C. 540, 503 S.E.2d 445. Sales 1671

Although the implied warranties provided by the Uniform Commercial Code apply only to sales, there is no logical reason for any distinction between contracts of sale and leases insofar as the recognition of implied warranties is concerned. C. Ray Miles Const. Co., Inc. v. Weaver (S.C.App. 1988) 296 S.C. 466, 373 S.E.2d 905.

Warranties implied by law are recognized pursuant to the Uniform Commercial Code but, before such implied warranty can arise under the UCC, a sale must first occur. Henderson v. Gould, Inc. (S.C.App. 1986) 288 S.C. 261, 341 S.E.2d 806.

6. Retailers

By selling a product under its trade name, the retailer warranted its merchantability and assumed the responsibilities of a manufacturer. Smith v. Regina Mfg. Corp. (C.A.4 (S.C.) 1968) 396 F.2d 826.

Recapped tires for ordinary use on automobiles are goods of which most service station operators are merchants within the meaning of this section [Code 1962 Section 10.2‑314]. McHugh v. Carlton (D.C.S.C. 1974) 369 F.Supp. 1271.

Once choosing to sell recaps for profit within the ordinary course of business, albeit only upon request, defendant retailer must face the consequences of any liability that may result if such goods are not fit for the ordinary purposes for which they are used. McHugh v. Carlton (D.C.S.C. 1974) 369 F.Supp. 1271.

7. Isolated sales

An isolated sale is one which occurs only once or at least very infrequently within the ordinary course of business. McHugh v. Carlton (D.C.S.C. 1974) 369 F.Supp. 1271. Sales 1711

8. Services

Consumer’s joinder of nonresident pharmacies, in action against manufacturer of drug that allegedly made consumer lethargic and caused him to develop female‑type breasts, alleging negligence, strict liability, and breach of warranties under South Carolina law, was fraudulent, and thus district court had jurisdiction after removal; consumer could not maintain cause of action against pharmacies, as health care providers engaged in service, rather than sellers of good, they were relieved of strict products liability, and pharmacies could not be held liable for breach of warranties because cause of action necessarily required existence of buyer‑seller relationship. Duckett v. SCP 2006‑C23‑202, LLC, 2015, 225 F.Supp.3d 432. Removal Of Cases 107(7)

Health care providers who use products, including breast implants, during course of providing treatment to patients are providing “services,” and are not “sellers” of “goods” within meaning of Uniform Commercial Code (U.C.C.); thus, providers may not be held liable for such products under U.C.C. provisions pertaining to express warranty, implied warranty of merchantability, and implied warranty of fitness for particular purpose. In re Breast Implant Product Liability Litigation (S.C. 1998) 331 S.C. 540, 503 S.E.2d 445. Sales 532(22)

9. Implied warranties for buildings

Even after conveyance of title, a builder‑vendor of a new house may be held liable to a purchaser under the theory of implied warranty for damages caused by a defective condition which renders the house unfit as a dwelling. Carolina Winds Owners’ Ass’n, Inc. v. Joe Harden Builder, Inc. (S.C.App. 1988) 297 S.C. 74, 374 S.E.2d 897.

The general contractor and a subcontractor who contracted to construct a building but executed no contracts to sell either the building or its individual dwelling units were not liable to purchasers on an implied warranty arising from the sale since they were not parties to the initial sale of the building or the condominium units. Carolina Winds Owners’ Ass’n, Inc. v. Joe Harden Builder, Inc. (S.C.App. 1988) 297 S.C. 74, 374 S.E.2d 897. Common Interest Communities 136

10. Sufficiency of evidence

Mechanic who was injured when radiator hose detached as he was adjusting pickup truck’s transmission cable could not establish liability on his strict liability and breach of warranty claims against truck manufacturer under South Carolina law, given absence of evidence demonstrating condition of radiator hose’s allegedly defective inlet connector when truck left manufacturer’s custody and evidence that owner of truck at time of injury had purchased truck as used vehicle and had removed its radiator on at least two occasions and removed and repaired its hoses. Oglesby v. General Motors Corp. (C.A.4 (S.C.) 1999) 190 F.3d 244. Products Liability 119; Products Liability 153; Products Liability 203; Sales 1732

A plaintiff may establish a breach of implied warranty of merchantability under Section 36‑2‑314 by circumstantial evidence. It is sufficient if the plaintiff presents evidence from which it can be reasonably inferred that the goods were defective at the time the sale was completed. Doty v. Parkway Homes Co. (S.C. 1988) 295 S.C. 368, 368 S.E.2d 670.

In consolidated action involving (1) manufacturer’s suit against buyer for balance due under retail‑installment contract for purchase of defective combine, and (2) buyer’s suit against manufacturer and dealer for breach of contract and breach of warranty, court held, with respect to buyer’s breach‑of‑warranty claims and manufacturer’s warranty disclaimer and limited express warranty, (1) that written and implied warranties (UCC Sections 2‑313(1), 2‑314(1), and 2‑315) were not only possible bases for jury verdict in favor of buyer; (2) that if jury believed buyer’s testimony that he had never received manufacturer’s written warranty, it could then have found that oral agreement of manufacturer’s sales representative with buyer constituted express oral warranty that ran directly from manufacturer to buyer and was limited only in duration; and (3) that under theory of breach of oral express warranty, jury, under UCC Section 2‑714, was free to award buyer any damages proximately caused by manufacturer’s breach, including consequential damages. McClary v. Massey Ferguson, Inc. (S.C.App. 1987) 291 S.C. 506, 354 S.E.2d 405.

In action for damages for negligence and breach of warranty,circumstantial evidence sufficient to support reasonable inference that insect was contained in bottle of orange soda when bottle left defendant’s bottling plant was sufficient to support jury finding of liability for (1) negligence, and (2) breach of implied warranty of merchantability under UCC Section 2‑314(1) and (2)(c) that soft drink purchased by plaintiff was fit for ordinary consumption. Cohen v. Allendale Coca‑Cola Bottling Co. (S.C.App. 1986) 291 S.C. 35, 351 S.E.2d 897.

11. Causation

Crane held merchantable and fit for purpose for which sold where injury to buyer’s employee was not result of failure or malfunction, but rather error of co‑employee in operating crane, even though crane did not contain optional safety device designed to prevent accidental overextension of crane boom. Marchant v. Mitchell Distributing Co. (S.C. 1977) 270 S.C. 29, 240 S.E.2d 511.

11.5. Damages

Public policy does not bar impaired drivers from recovering damages in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty. Donze v. General Motors, LLC (S.C. 2017) 420 S.C. 8, 800 S.E.2d 479. Products Liability 181; Products Liability 208; Sales 2457

12. Review

Manufacturer of lawn mower and seller of mower did not preserve for appellate review by Court of Appeals their claim that magistrate at small claims trial improperly denied their motion for directed verdict in action by purchaser of mower that alleged breach of warranty and revocation of acceptance, where circuit court, in its review of small claims trial, did not rule on that issue. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Courts 176.5

**SECTION 36‑2‑315.** Implied warranty: Fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section (Section 36‑2‑316) an implied warranty that the goods shall be fit for such purpose.

HISTORY: 1962 Code Section 10.2‑315; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 15(1), (4), (5), Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

1. Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller’s skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller.

2. A “particular purpose” differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.

The provisions of this Article on the cumulation and conflict of express and implied warranties must be considered on the question of inconsistency between or among warranties. In such a case any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the warranty of fitness for particular purpose as against all other warranties except where the buyer has taken upon himself the responsibility of furnishing the technical specifications.

3. In connection with the warranty of fitness for a particular purpose the provisions of this Article on the allocation or division of risks are particularly applicable in any transaction in which the purpose for which the goods are to be used combines requirements both as to the quality of the goods themselves and compliance with certain laws or regulations. How the risks are divided is a question of fact to be determined, where not expressly contained in the agreement, from the circumstances of contracting, usage of trade, course of performance and the like, matters which may constitute the “otherwise agreement” of the parties by which they may divide the risk or burden.

4. The absence from this section of the language used in the Uniform Sales Act in referring to the seller, “whether he be the grower or manufacturer or not,” is not intended to impose any requirement that the seller be a grower or manufacturer. Although normally the warranty will arise only where the seller is a merchant with the appropriate “skill or judgment,” it can arise as to nonmerchants where this is justified by the particular circumstances.

5. The elimination of the “patent or other trade name” exception constitutes the major extension of the warranty of fitness which has been made by the cases and continued in this Article. Under the present section the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not of itself decisive of the issue. If the buyer himself is insisting on a particular brand he is not relying on the seller’s skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate nonreliance if the article has been recommended by the seller as adequate for the buyer’s purposes.

6. The specific reference forward in the present section to the following section on exclusion or modification of warranties is to call attention to the possibility of eliminating the warranty in any given case. However it must be noted that under the following section the warranty of fitness for a particular purpose must be excluded or modified by a conspicuous writing.

Cross References:

Point 2: Sections 2‑314 and 2‑317.

Point 3: Section 2‑303.

Point 6: Section 2‑316.

Definitional Cross References:

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| “Buyer” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENT

Section 2‑315 codifies another type of implied warranty long recognized by common law decisions and the Uniform Sales Act (Section 15(1)) that the goods are fit for the particular purpose when the seller knows of their intended use and the buyer relies on the seller’s selection. E.g., Liquid Carbonic Co. v Coclin, 161 SC 40, 159 SE 461 (1931); Walker, Evans & Cogswell & Co. v Aver, 80 SC 292, 61 SE 557 (1908); Reliance Varnish Co. v Mullins Lumber Co., 213 SC 84, 48 SE2d 653 (1948).

CROSS REFERENCES

Course of dealing or usage of trade, see Section 36‑1‑303.

General principles of law and equity as supplementing code provisions, see Section 36‑1‑103.

Modification, rescission, and waiver, see Section 36‑2‑209.

Varying effect of code provisions by agreement, see Section 36‑1‑302.

LIBRARY REFERENCES

Sales 273.

Westlaw Key Number Search: 343k273.

C.J.S. Sales Section 258.

RESEARCH REFERENCES

ALR Library

1 ALR 7th 3 , Applicability of UCC Article 2 to Mixed Contracts for Sale of Consumer Goods and Services.

Encyclopedias

26 Am. Jur. Proof of Facts 2d 1, Sales: Implied Warranty of Merchantability.

27 Am. Jur. Proof of Facts 2d 243, Sales: Implied Warranty of Fitness for Particular Purpose.

4 Am. Jur. Trials 441, Solving Statutes of Limitation Problems.

Am. Jur. 2d Sales Section 686, Seller’s Knowledge of Buyer’s Reliance.

S.C. Jur. Products Liability Section 30, Implied Warranty of Merchantability; Uniform Commercial Code Provision ‑Fitness for Particular Purpose.

Forms

Am. Jur. Pl. & Pr. Forms Products Liability Section 60 , Introductory Comments.

Treatises and Practice Aids

American Law of Products Liability 3d Section 20:25, Local Statutory Citations.

12 Causes of Action 291, Cause of Action for Economic Loss Resulting from Breach of Implied Warranty of Fitness for Particular Purpose Under UCC S2‑315.

LAW REVIEW AND JOURNAL COMMENTARIES

Commercial Transactions—Warranties—Implied Warranties of Quality under the Uniform Commercial Code. 20 S.C. L. Rev. 323.

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Under South Carolina law, an implied warranty of fitness for a particular purpose arises if the vendor knows when the contract is formed that the purchaser is relying on the vendor’s skill or judgment in furnishing the goods. Brooks v. GAF Materials Corp., 2014, 41 F.Supp.3d 474. Sales 1744

Genuine issue of material fact existed as to whether “lower tar and nicotine” cigarettes were fit for their intended use as safer and healthier cigarettes, precluding summary judgment, in product liability action against tobacco company under South Carolina law. Little v. Brown & Williamson Tobacco Corp., 2001, 243 F.Supp.2d 480. Federal Civil Procedure 2515

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3. Sales and leases

Employee sufficiently alleged an actual sale, as required to state a claim under South Carolina law for breach of implied warranty of merchantability and for breach of implied warranty of fitness for a particular purpose, in her action against desk installer and desk refurbisher, alleging that her desk collapsed at her workplace causing her injuries, by alleging that refurbisher was “refurbisher, supplier and purveyor of the desk in question.” Green v. Bradley Company, 2016, 194 F.Supp.3d 479. Sales 532(1)

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Employee who was injured by defective switchboard manufactured by defendant, which was temporarily furnished to plaintiff’s employer and maintained by defendant during such time, could not maintain breach‑of‑warranty action for his injuries because (1) complaint did not allege making of any express warranty by defendant; (2) complaint also did not allege sale of switchboard to plaintiff’s employer; and (3) before implied warranties of merchantability and fitness for particular purpose can arise under UCC Sections 36‑2‑314(1) and 36‑2‑315, sale of goods must occur. Henderson v. Gould, Inc. (S.C.App. 1986) 288 S.C. 261, 341 S.E.2d 806.

4. Implied warranty for buildings

While implied warranty of fitness for particular purpose has been extended to sale of new buildings, it does not extend back to cover sale of land on which new building is constructed. Jackson v. River Pines, Inc. (S.C. 1981) 276 S.C. 29, 274 S.E.2d 912.

5. Services

Health care providers who use products, including breast implants, during course of providing treatment to patients are providing “services,” and are not “sellers” of “goods” within meaning of Uniform Commercial Code (U.C.C.); thus, providers may not be held liable for such products under U.C.C. provisions pertaining to express warranty, implied warranty of merchantability, and implied warranty of fitness for particular purpose. In re Breast Implant Product Liability Litigation (S.C. 1998) 331 S.C. 540, 503 S.E.2d 445. Sales 532(22)

6. Ordinary purpose and particular purpose

Where the ordinary purpose for which the goods were purchased is envisaged in the concept of merchantability, and not in the concept of fitness for a particular purpose, there is no liability under this section [Code 1962 Section 10.2‑315]. McHugh v. Carlton (D.C.S.C. 1974) 369 F.Supp. 1271. Sales 1724; Sales 1753

Tire retailer was not liable on an implied warranty of fitness for a particular purpose for damages caused to the purchaser, a user in the purchaser’s family, or an innocent third party, by a latent defect in the recapped tire sold, because the goods were purchased for the ordinary purpose for which such goods are used and not for a particular purpose which is peculiar to the defendant purchaser’s requirements. McHugh v. Carlton (D.C.S.C. 1974) 369 F.Supp. 1271. Sales 1724; Sales 1753

A manufacturer of insulation gave no warranty of fitness for a buyer’s particular use of its product where the buyer had purchased the insulation from a retail store’s existing stock, which had been purchased from the manufacturer prior to the store’s dealings with the buyer. Hite v. Ed Smith Lumber Mill, Inc. (S.C.App. 1992) 309 S.C. 185, 420 S.E.2d 860.

A manufacturer of interior insulation was not liable on an implied warranty of fitness for a particular purpose where (1) the plaintiff, who used the insulation for exterior purposes, purchased the insulation from a store’s existing stock, and (2) the manufacturer’s acknowledgment, which became part of the contract of sale to the store, required the store to restrict the sale of the product to the uses for which it was manufactured. Hite v. Ed Smith Lumber Mill, Inc. (S.C.App. 1992) 309 S.C. 185, 420 S.E.2d 860.

7. Exclusion of implied warranty

Placing alleged disclaimer under bold heading “Terms of Warranty” creates ambiguity and is likely to fail to alert consumer that exclusion of warranty is intended. Hartman v. Jensen’s, Inc. (S.C. 1982) 277 S.C. 501, 289 S.E.2d 648.

7.5. Sufficiency of claim

Patient’s allegations that seller of surgical mesh had reason to know of the particular purpose for which the mesh was to be used, that seller knew the buyer was relying in seller’s skill or judgment, and that purpose of mesh was for implantation into human body to reinforce a port used in conjunction with an adjustable gastric band were sufficient to state a claim against seller for breach of implied warranty of fitness for a particular purpose under South Carolina law. Jones v. Ram Medical, Inc., 2011, 807 F.Supp.2d 501. Sales 2466

8. Sufficiency of evidence

In consolidated action involving (1) manufacturer’s suit against buyer for balance due under retail‑installment contract for purchase of defective combine, and (2) buyer’s suit against manufacturer and dealer for breach of contract and breach of warranty, court held, with respect to buyer’s breach‑of‑warranty claims and manufacturer’s warranty disclaimer and limited express warranty, (1) that written and implied warranties (UCC Sections 2‑313(1), 2‑314(1), and 2‑315) were not only possible bases for jury verdict in favor of buyer; (2) that if jury believed buyer’s testimony that he had never received manufacturer’s written warranty, it could then have found that oral agreement of manufacturer’s sales representative with buyer constituted express oral warranty that ran directly from manufacturer to buyer and was limited only in duration; and (3) that under theory of breach of oral express warranty, jury, under UCC Section 2‑714, was free to award buyer any damages proximately caused by manufacturer’s breach, including consequential damages. McClary v. Massey Ferguson, Inc. (S.C.App. 1987) 291 S.C. 506, 354 S.E.2d 405.

9. Review

Manufacturer of lawn mower and seller of mower did not preserve for appellate review by Court of Appeals their claim that magistrate at small claims trial improperly denied their motion for directed verdict in action by purchaser of mower that alleged breach of warranty and revocation of acceptance, where circuit court, in its review of small claims trial, did not rule on that issue. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Courts 176.5

**SECTION 36‑2‑316.** Exclusion or modification of warranties.

(1) If the agreement creates an express warranty words disclaiming it are inoperative.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude the implied warranty of merchantability or of fitness for a particular purpose must be specific, and if the inclusion of such language creates an ambiguity in the contract as a whole it shall be resolved against the seller.

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by specific language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or, between merchants, by usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this chapter on liquidation or limitation of damages and on contractual modification of remedy (Sections 36‑2‑718 and 36‑2‑719).

HISTORY: 1962 Code Section 10.2‑316; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude “all warranties, express or implied.” It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

2. The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary “lack of authority” clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

5. Subsection (2) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had “reason to know” under the section on implied warranty of fitness for a particular purpose.

6. The exceptions to the general rule set forth in paragraphs (a), (b) and (c) of subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer’s attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.

7. Paragraph (a) of subsection (3) deals with general terms such as “as is,” “as they stand,” “with all faults,” and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.

8. Under paragraph (b) of subsection (3) warranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. “Examination” as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty. See Sections 2‑314 and 2‑715 and comments thereto.

In order to bring the transaction within the scope of “refused to examine” in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language “refused to examine” in this paragraph is intended to make clear the necessity for such demand.

Application of the doctrine of “caveat emptor” in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantibility or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an “express” warranty. In such cases the question is one of fact as to whether a warranty of merchantibility has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by subsection (1) of the present section.

The particular buyer’s skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

9. The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.

Cross References:

Point 2: Sections 2‑202, 2‑718 and 2‑719.

Point 7: Sections 1‑205 and 2‑208.

Definitional Cross References:

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| “Agreement” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Course of dealing” | Section 1‑205. |
| “Goods” | Section 2‑105. |
| “Remedy” | Section 1‑201. |
| “Seller” | Section 2‑103. |
| “Usage of trade” | Section 1‑205. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑316 seeks to establish a balance between the policy of freedom of contract which supports the right of a seller to expressly disclaim warranty obligations and the policy objective of protecting a buyer of goods against surprise and unbargained for loss of his expectation that he will receive a sound product when he pays a sound price. The courts have long sought to strike this balance in the case law under what appears to be more certain a standard than “unconscionability” (see SC Reporter’s Comments to Code Section 2‑302), with necessarily uncertain results as to when a disclaimer clause will be effective. With the same objectives that the courts apparently have had in mind, this Commercial Code section proposes more definite rules in determining the effectiveness of disclaimer language.

Subsection (1) states a rule of construction where there is language in a sales contract which tends to create an express warranty and also words tending to disclaim such warranties. The 1954 draft of this subsection read: “If the agreement creates an express warranty words disclaiming it are inoperative.” The present language was made in the revised draft to meet objections by the New York Law Revision Commission in which it was suggested that if the goods were described in the contract or sold by sample, this would create an express warranty which could not be effectively disclaimed in any part of the contract. Thus, under the early draft language the “express warranty” would be isolated and given effect before reading and giving effect to the rest of the writing. Such a result would reverse the leading case of Lumbrazo v Woodruff, 256 NY 92, 175 NE 525 (1931) where the court held that the words “Japanese onionsets” in the contract of sale did not create an express warranty by such description where another part of the contract expressly excluded all such warranties.

As presently written subsection (1) says that there is no express warranty from general language where there is a disclaimer of warranty obligation when the contract is read as a whole since all terms are to be read as consistent with each other. It is not a case of disclaiming an express warranty; it is a case of an express warranty never coming into existence because the contract, read in its entirety, does not contain promises which induce the buyer to purchase. If there is a term clearly establishing an express warranty and also a statement which seeks to exclude “all warranties expressed or implied” the contract when read as a whole will be construed under this section so that the attempted disclaimer was not intended to reach the express warranty. (See Commercial Code Section 2‑317 on conflict of warranties.).

The reference to Commercial Code Section 2‑202 (Parol evidence rule) in subsection (1) deserves further comment. As stated in South Carolina Reporter’s Comments to Commercial Code Section 2‑202, parol evidence of consistent additional terms are admissible unless the agreement provides otherwise. This rule was applied in the warranty context in Liquid Carbonic Co. v. Coclin, 161 SC 40, 159 SE 461 (1931) where the court permitted the showing of oral assertions made by the seller at the time of sale which formed the basis of an implied warranty. Consistent with this case law approach, the Commercial Code would still permit the seller of goods to protect himself against false allegations of oral warranties by the use of an integrated written contract expressly excluding warranty obligations. In accord, Sanders v Allis‑Chalmers Mfg. Co., 237 SC 133, 115 SE2d 793 (1960).

Consistent with the Commercial Code’s policy against unexpected (and thus “unconscionable” disclaimer of warranty clauses—see Code Section 2‑302) subsection (2) prescribes the method of disclaiming implied warranties of merchantability (Commercial Code Section 2‑314) and fitness for a particular purpose (Commercial Code Section 2‑315). While the disclaiming language must be “conspicuous” (a reaction against the “fine print” disclaimer clauses found in some contracts) for both types of implied warranties, the word “merchantability” must appear in a written disclaimer of that type of warranty. These special requirements would be new to South Carolina law but the basic purpose behind the rules have been expressed in various, albeit uncertain, ways by the court. For example, in the recent case of Durant v Pallmetto Chevrolet Co., 241 SC 508, 129 SE2d 323 (1963) the court held that a restrictive written warranty contained in a separate document given to the buyer at the time of sale was ineffective since it was not specifically brought to the buyer’s attention. This conclusion has ample authority to support it when the court feels the exclusion of a warranty would come as a surprise to the buyer. E.g., Reliance Varnish Co. v Mullins Lumber Co., 213 SC 84, 48 SE2d 653 (1948); Black v B. B. Kirkland Seed Co., 158 SC 112, 155 SE 268 (1930). The difficulty with the present tendency of the court to police warranty disclaimer clauses to prevent unfair surprise to the buyer is that it is difficult to determine in advance what standard will be employed in any given case. For example, the opposing policies of freedom of contract and the stability of written contracts (on which the parol evidence rule is based) sometimes prevail, imposing a duty on a contracting party to know the contents of a written contract to which he is a party, with the result that he may not assert that he was unaware of its terms. E.g., J. B. Colt Co. v Britt, 129 SC 226, 123 SE 845 (1924). The more specific requirement for an effective disclaimer is in reality an application of the unconscionability rule. When so viewed the net effect is to reach results similar to those under existing law but with a greater degree of predictability.

Subsection (3)(a) modifies subsection (2) but is consistent with the policy of this section that an effective disclaimer must be brought to the buyer’s attention in such a way which conveys to the buyer the risk he is required to assume. This is generally in accord with such cases as Durant, Reliance Varnish Co. and Black, cited above.

Since an action for breach of warranty rests on the assumption by the buyer that the goods meet the required standard, there is no reason to complain where the buyer’s examination did or should have revealed defects. The codification of this principle is in accord with South Carolina case law. For example, in Smith Bros. Grain Co. v Adlich Milling Co., 128 SC 434, 122 SE 868 (1924), the buyer of oats had inspected them and found some of the sacks torn requiring resacking prior to the sale. The court held that a buyer who knows of defects or accepts them without inspection after lapse of a reasonable time waives all objections to their condition. More recently the court affirmed this view in Johnston Cotton Co. v Cannon, 242 SC 42, 129 SE2d 750 (1963) when a directed verdict for the seller was sustained over the buyer’s assertion that waiver of his right to rely on breach of warranty was at least a jury question when he executed a note for the purchase price thirty‑six days after installation of allegedly defective irrigation equipment. Also in accord, Monroe v Wood, 186 SC 507, 197 SE 39 (1938); Bond Bros. Cash & Delivery Grocery v Claussen’s Bakeries, 184 SC 95, 191 SE 717 (1937); Richmond Pressed Metal Works v Haley, 157 SC 426, 154 SE 512 (1930); Southern Coal Co. v Rice, 122 SC 484, 115 SE 815 (1923).

Since this Commercial Code section refers to defects “which an examination ought to have revealed” the waiver would not apply to latent defects. In accord, Standard Boiler and Plate Iron Co. v Brock, 112 SC 323, 99 SE 769 (1919). Nor would it apply as to goods accepted where the buyer has no right to inspect until after he had purchased. In accord, Sanders v D. Lambreth Seed Co., 100 SC 389, 84 SE 880 (1915).

Subsection (c) is a further expansion of circumstances whereby warranties may be disclaimed (and thus a contraction of the rule of subsection (2)). That the court will look to the particular factual context in which the sale is made in determining whether the buyer relies on the seller is indicated by Sullivan v Huff, 24 SC 348 (1886), where a sale at public auction negated an implied warranty that a sound price warrants a sound commodity, particularly since the buyer had an opportunity to inspect prior to the sale. Another circumstance where this principle was applied was in Richmond Pressed Metal Works v Haley, 157 SC 426, 154 SE 412 (1930) where the buyer furnished the seller with the model design and instructions for stoves to be manufactured by the seller. The court held that the only warranty is that the goods are in accordance with the specifications and not that they were fit for the purpose intended. (See Commercial Code Sections 1‑205 and 1‑208 as to course of dealing, usage of trade and course of performance.).

Subsection (4) is generally in accord with South Carolina case law permitting the parties to contractually limit the remedies available upon breach of warranty. Typical of such a contract term is a provision limiting the seller’s liability to replacement of defective parts recognized as valid in Deiter v Prick Co., 169 SC 480, 169 SE 297 (1933). Also in Westinghouse Electric & Mfg. Co. v Glencoe Cotton Mills, 105 SC 133, 90 SE 526 (1916) a contract clause whereby the seller agreed to correct any defects of labor or materials in machinery which may develop within thirty days after starting was held to be an effective limitation of the seller’s obligation. See also R.C.A. Photophone v Carroll, 174 SC 183, 177 SE 23 (1934) where the buyer was not entitled to recover for alleged mechanical defects in a talking picture machine where the contract expressly released seller from liability arising from failure or stoppage of equipment. But see, Patterson v Orangeburg Fertilizer Co., 117 SC 140, 108 SE 401 (1921), holding that provision that the seller does not guarantee results does not relieve from liability for damages caused by harmful ingredient in fertilizer. And in Cannon v Pulliam Motor Co., 230 SC 131, 94 SE2d 397 (1956), the court construed a warranty term in an automobile sales contract that limited seller’s obligation “to the replacement of those parts acknowledged by the Ford Motor Co. to be defective” as not leaving the matter to the uncontrolled judgment of the warrantor but to include any defect which actually exists. These latter two cases are reconcilable with this Code section on the ground that the contract terms were ineffective as a matter of construction to so limit the buyer’s remedy.

Note the reference to Commercial Code Section 2‑718 which precludes contractual limitations of damages for injury to the person and to Commercial Code Section 2‑719 on limitation of effective liquidation of damage clauses.

LIBRARY REFERENCES

Sales 260, 267.

Westlaw Key Number Searches: 343k260; 343k267.

C.J.S. Sales Sections 238, 242, 247 to 248, 263 to 270.

RESEARCH REFERENCES

Encyclopedias

16 Am. Jur. Proof of Facts 2d 55, Intent of Contracting Parties to Benefit Third Person.

S.C. Jur. Products Liability Section 26, Remedies.

S.C. Jur. Products Liability Section 27, Generally; Uniform Commercial Code Provision.

S.C. Jur. Products Liability Section 32, Exclusion or Modification of Implied Warranties.

Treatises and Practice Aids

American Law of Products Liability 3d Section 22:12, State Statutes Adopting U.C.C. S2‑316; Variations.

American Law of Products Liability 3d Section 22:16, Disclaimer of Express Warranties.

American Law of Products Liability 3d Section 22:17, Disclaimer of Implied Warranties.

American Law of Products Liability 3d Section 22:20, Disclaimer of Implied Warranties‑Construction of Disclaimer.

American Law of Products Liability 3d PS STATESTATS, State Statutes.

LAW REVIEW AND JOURNAL COMMENTARIES

1978 Survey: Property: implied warranty as applied to real estate sales. 29 S.C. L. Rev. 181.

Commercial Transactions—Warranties—Implied Warranties of Quality under the Uniform Commercial Code. 20 S.C. L. Rev. 323.

Consumer Product Warranty Litigation in South Carolina. 31 S.C. L. Rev. 293.

The last best argument for eliminating reliance from express warranties: “real world” consumers don’t read warranties. 45 S.C. L. Rev. 429 (Spring 1994).

NOTES OF DECISIONS

Conspicuousness of disclaimer or exclusion 2

Disclaimer or exclusion of warranty 1

Express warranty 3

Oral statements of seller 4

1. Disclaimer or exclusion of warranty

Contractor, who installed allegedly defective roofing shingles and allegedly indicated that the shingles were 30‑year shingles, was acting as an independent contractor, rather than agent for manufacturer, when he purchased shingles for homeowners, and thus homeowners were bound by limited warranties disclaimer in manufacturer’s limited warranty as third‑party beneficiaries of the bargain between contractor and manufacturer. Brooks v. GAF Materials Corp., 2014, 41 F.Supp.3d 474. Sales 1792; Sales 1820

While parties can not disclaim express warranties, state law does allow parties to exclude and/or modify implied warranties of merchantability of fitness for particular purpose subject to certain conditions. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 1771

If statutory criteria are satisfied, written disclaimer of implied warranty of merchantability is valid contract provision which will be enforced if agreed upon. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 1779

According to the prevailing interpretation of the Uniform Commercial Code, a disclaimer printed on a label or other document and given to the buyer at the time of delivery of the goods is ineffective if a bargain has already arisen. Gold Kist, Inc. v. Citizens and Southern Nat. Bank of South Carolina (S.C.App. 1985) 286 S.C. 272, 333 S.E.2d 67. Sales 1771

Under South Carolina UCC Section 2‑316(2), which provides that disclaimers of implied warranties of merchantability and fitness for particular purpose must be “specific” to be effective, disclaimer of implied warranties of merchantability and fitness of new mobile home was confusing and ineffective because disclaimer’s title, “TERMS OF WARRANTY”, suggested grant of warranty rather than disclaimer thereof. Hartman v. Jensen’s, Inc. (S.C. 1982) 277 S.C. 501, 289 S.E.2d 648.

A purchaser is entitled to the benefit of an implied warranty unless such implied warranty was excluded from the contract in accordance with the provisions of this section [Code 1962 Section 10.2‑316]. Mid‑Continent Refrigerator Co. v. Way (S.C. 1974) 263 S.C. 101, 208 S.E.2d 31.

A repair clause in a contract for the sale of goods which provided that lessee/purchaser should effect and bear the expense of all necessary repairs, maintenance, operation and replacements, was not sufficient to exclude the implied warranty of fitness by the seller. Mid‑Continent Refrigerator Co. v. Way (S.C. 1974) 263 S.C. 101, 208 S.E.2d 31.

2. Conspicuousness of disclaimer or exclusion

Factors to be considered in determining whether document is conspicuous for purpose of disclaiming implied warranty include (1) color of print used for disclaimer, (2) style of print in which disclaimer is written, (3) size of disclaiming language, particularly in relation to print in other parts of document, (4) placement of disclaimer in contract, (5) appearance of “merchantability” with respect to color, style, size, and type of print in disclaimer, and (6) status of parties, whether they are consumers or sophisticated commercial entities. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 1773

Disclaimer of implied warranty of merchantability contained in two page contract for purchase of component part in fuel metering system satisfied UCC requirements where clause expressly used term “merchantability” and clearly stated that such warranty was disclaimed, and disclaimer was printed in capital letters in large type, distinct from other print in contract, disclaimer was prominently located and parties were sophisticated entities familiar with commercial negotiations. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 1780

Written contract for the sale of goods fully complied with state requirements regarding exclusion of implied warranty of merchantability, or fitness for a particular purpose, where it specifically provided, in a separate paragraph, that there would be no warranty of merchantability or of fitness for a particular purpose, and where the paragraph was set out in all capital letters. Investors Premium Corp. v. Burroughs Corp. (D.C.S.C. 1974) 389 F.Supp. 39.

Where a conditional sales contract consisted of 7 legal sized, double spaced, typed pages with an attempted disclaimer buried in the text of a lengthy paragraph which was not in larger or contrasting type or color as required by statute, purchaser of defective merchandise could assert any breach of the implied warranty of merchantability, or any breach of implied warranty of fitness for a particular purpose which was applicable. Cooley v. Salopian Industries, Ltd. (D.C.S.C. 1974) 383 F.Supp. 1114. Sales 1773

In an action brought by a public utility against a manufacturer‑seller of a boiler and an installer of the boiler for damages sustained as a result of a fire that occurred when a flexible metal hose ruptured and sprayed heated fuel oil across the surface of a steam generating boiler, a disclaimer of implied warranties was not sufficient to meet the requirements of Section 36‑2‑316, since the disclaimer did not mention the word “merchantability,” and since the written language of the disclaimer was not conspicuous in that it appeared on page 17 of a document consisting of 22 single spaced typewritten pages and was indistinctive both as to color and as to type. South Carolina Elec. and Gas Co. v. Combustion Engineering, Inc. (S.C.App. 1984) 283 S.C. 182, 322 S.E.2d 453.

An attempted exclusion, to be effective, must be conspicuous. Mid‑Continent Refrigerator Co. v. Way (S.C. 1974) 263 S.C. 101, 208 S.E.2d 31.

3. Express warranty

Where parties to distribution agreement bargain for exclusive repair or replacement warranty which specifically and conspicuously disclaims all implied warranties of fitness and merchantability, the express limited warranty controls and precludes cause of action for incidental and consequential damages. Valtrol, Inc. v. General Connectors Corp. (C.A.4 (S.C.) 1989) 884 F.2d 149, rehearing denied.

Express disclaimer contained in contract for purchase of part for fuel metering system disclaimed any implied warranty of merchantability thereby leaving parties rights and remedies expressly articulated in written contract. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 1780

In order to protect buyers from hidden disclaimers, and pursuant to Section 36‑2‑316, any disclaimers in conflict with an express warranty are ineffective. Campus Sweater and Sportswear Co. v. M. B. Kahn Const. Co. (D.C.S.C. 1979) 515 F.Supp. 64, affirmed 644 F.2d 877. Sales 1791

4. Oral statements of seller

In breach‑of‑warranty action by buyer of herbicide for product’s failure to control weed problem, court held (1) that under UCC Section 2‑313(2), oral statement of seller’s salesman that herbicide would control weed problem was simply seller’s opinion and did not create any warranty; (2) that buyer was bound by printed disclaimer on herbicide’s label, which buyer had read, of all warranties except those expressly stated in disclaimer (see UCC Section 2‑316(1) and (2)); (3) that under UCC Section 2‑202, salesman’s oral statement could not vary terms of conditions of sale and warranty on product’s label; (4) that seller’s limitation‑of‑remedies clause, which was printed on product’s label, was authorized by UCC Section 2‑719; (5) that such limitation was intended to be buyer’s exclusive remedy (UCC Section 2‑719(1)(b)); and (6) that such remedy did not fail in its essential purpose within meaning of UCC Section 2‑719(2). Hill v. BASF Wyandotte Corp. (C.A.4 (S.C.) 1982) 696 F.2d 287.

**SECTION 36‑2‑317.** Cumulation and conflict of warranties express or implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

HISTORY: 1962 Code Section 10.2‑317; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: On cumulation of warranties see Sections 14, 15, and 16, Uniform Sales Act.

Changes: Completely rewritten into one section.

Purposes of changes:

1. The present section rests on the basic policy of this Article that no warranty is created except by some conduct (either affirmative action or failure to disclose) on the part of the seller. Therefore, all warranties are made cumulative unless this construction of the contract is impossible or unreasonable.

This Article thus follows the general policy of the Uniform Sales Act except that in case of the sale of an article by its patent or trade name the elimination of the warranty of fitness depends solely on whether the buyer has relied on the seller’s skill and judgment; the use of the patent or trade name is but one factor in making this determination.

2. The rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from the circumstances of their transaction shall prevail. These rules of intention are to be applied only where factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties which later turn out to be inconsistent. To the extent that the seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.

3. The rules in subsections (a), (b) and (c) are designed to ascertain the intention of the parties by reference to the factor which probably claimed the attention of the parties in the first instance. These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable.

Cross References:

Point 1: Section 2‑315.

Definitional Cross References:

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| “Party” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

This section states a rule of construction to be applied in the case of apparent inconsistencies between warranties. The rule to treat as cumulative and consistent whenever possible is in accord with a line of South Carolina cases generally holding that an express warranty will not preclude an implied warranty unless both relate to the same or closely allied subjects. E.g., Georgetown Towing Co. v National Supply, 204 SC 445, 29 SE 765 (1944); Black v B. B. Krikland Seed Co., 158 SC 112, 155 SE 268 (1930); Trimmer v Thompson, 10 SC 164 (1878).

When it is not reasonable to reconcile the conflicting warranties, this section states that the intention of the parties govern as to which is dominant. This is apparently the basic approach of the existing case law but without the guidelines of ascertaining that intent as supplied by subsections (a), (b) and (c) of this Commercial Code section. The result under existing case law is to create an area of uncertainty as to when the express warranty was or was not intended to displace implied warranties. For example, in Mull v Touchberry, 112 SC 422, 100 SE 152 (1919) the court held that an express warranty in writing that a car was first‑class in all respects and fully worth the value paid excluded any implied warranty of quality. The court recognized the principle that the law will imply whatever the parties may reasonably supposed to have meant by their written agreement, but the expressed undertaking may not enlarge that agreement. In reaching this result, the court cited with approval from McLaughlin v Horton, 1 Hill 383 (1833), “the soundness of the article is the subject of express warranty; it shows that that was the subject of the contract, and the plaintiff’s liability cannot be extended beyond it either by parol or legal implication.” All of these cases seem to be paying lip service to the statement that the intention of the parties will govern. In the absence of a more specific standard, however, the results of the latter two cases are difficult to reconcile with those cited above which preserve the implied warranty despite a written express warranty. The language of this Code section should bring about a firmer rule in favor of preserving implied warranties and would probably reject the conclusion in the Mull and McLaughlin cases.

The rules of subsections (a) and (b) to be employed in ascertaining the intention of the parties as to which of conflicting warranties will govern follow the general rule of contract construction that the specific shall control the general. However, in Richmond Pressed Metal Works v Haley, 157 SC 426, 154 SE 412 (1930), the buyer designed stoves and sent specifications to a manufacturer who built the model which the buyer approved, after a number of stoves had been made and accepted by the buyer without objection. In a subsequent action by the buyer for breach of warranty of fitness for a particular purpose, the court held that where the manufacturer undertakes to supply goods according to a model or sample, the only warranty is that goods comply with the model or sample. This result may be in conflict with the rule of construction of both subsections (a) and (c) but in the case the court was influenced by the fact that the buyer had a reasonable opportunity to inspect. Furthermore, the Richmond case may be brought under subsection (b) if the description could be said to be general rather than specific.

Another South Carolina case which would probably be modified by both the general language of this section that warranties shall be construed as cumulative and specifically by subsection (c) which subordinates inconsistent express warranties to an implied warranty of fitness is Southern Coal Co. v Rice, 122 SC 484, 115 SE 815 (1922). In that case the express warranty that “this coal will not ‘clinker’” was deemed exclusive of any intent to warrant its suitability for the buyer’s purpose.

LIBRARY REFERENCES

Sales 277.

Westlaw Key Number Search: 343k277.

C.J.S. Sales Sections 238, 249 to 250, 283.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Products Liability Section 24, Cumulation and Conflict of Express or Implied Warranties.

Treatises and Practice Aids

American Law of Products Liability 3d Section 22:44, State Statutes Adopting U.C.C. S2‑317.

LAW REVIEW AND JOURNAL COMMENTARIES

Consumer Product Warranty Litigation in South Carolina. 31 S.C. L. Rev. 293.

**SECTION 36‑2‑318.** Third party beneficiaries of warranties express or implied.

A seller’s warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty. A seller may not exclude or limit the operation of this section.

HISTORY: 1962 Code Section 10.2‑318; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by Section 2‑316. Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries, in any manner provided in Sections 2‑718 or 2‑719. To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section.

2. The purpose of this section is to give the buyer’s family, household and guests the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to “privity.” It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant‑seller’s warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.

3. This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller’s warranties, given to his buyer who resells, extend to other persons in the distributive chain.

Cross References:

Point 1: Sections 2‑316, 2‑718 and 2‑719.

Point 2: Section 2‑314.

Definitional Cross References:

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| “Buyer” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

This section touches on a single aspect of the very controversial problem of products liability based on breach of warranty—the common law requirement of privity of contract. The recent judicial tendency in other jurisdictions has been to narrow the scope of the lack of privity defense or to eliminate it on the ground of public policy, especially where the article sold is foodstuffs, beverages or drugs or is inherently dangerous to human safety. (For a collection of the cases see 75 ALR2d 39.) The South Carolina court has repeatedly held that there is no implied warranty running with chattel, with the result that a buyer is precluded from recovery against a remote vendor in the chain of distribution. E.g., Mauldin v Milford, 127 SC 508, 121 SE 547 (1924); Odom v Ford Motor Co., 230 SC 320, 97 SE2d 199 (1957). Recent cases, however, indicate a tendency to find the existence of privity between a manufacturer and a sub‑vendee. In Spartanburg Hotel Corp. v Alexander Smith, 231 SC 1, 97 SE2d 199 (1957), the court held that the jury could find that the buyer contracted directly with the manufacturer even though the sale and billing was made through a dealer. Also in the Odom case, supra, the court indicated by way of dictum that an express warranty might be created by advertising material running from the manufacturer to the buyer. Following the leading case of McPherson v Buick Motor Co., 217 NY 382, 111 NE 1050 (1916), the South Carolina court has relaxed the privity requirement in tort actions against remote vendors who negligently manufacture inherently dangerous articles which cause injury. See e.g., Beasley v Ford Motor Co., 237 SC 506, 117 SE2d 863 (1961). Furthermore, the privity requirement does not apply in tort actions to injury‑causing food products where the buyer is aided in the establishment of negligence by a showing of a violation of the state Food and Drugs Act (SC Code Sections 32‑1451 et seq.). E.g., Turner v Wilson, 227 SC 95, 86 SE2d 867 (1955); Peters v Double Cola Bottling Co., 224 SC 437, 70 SE2d 710 (1954). These cases sounding in tort would not be affected by the Commercial Code which deals only with warranty obligations.

The Commercial Code generally takes a neutral position on the issue of privity leaving the matter as stated in the official comments to Section 2‑318 to “the developing case law.” The one factual situation which the Commercial Code section deals with is where a member of a family buys defective goods which are consumed by other members of the family or guests in the home resulting in personal injury. In such case the warranty runs with the goods, thus eliminating the privity requirement. While there are no South Carolina cases dealing with this precise fact situation, it is probable that a similar result would be reached under the negligent theory of the cases cited above, at least where the goods are food or beverages.

LIBRARY REFERENCES

Contracts 187.

Sales 255, 278.

Westlaw Key Number Searches: 95k187; 343k255; 343k278.

C.J.S. Contracts Sections 612 to 622, 624 to 629.

C.J.S. Sales Sections 240 to 241, 250, 288 to 289.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Products Liability Section 25, Third Party Beneficiaries of Express or Implied Warranties.

Forms

Am. Jur. Pl. & Pr. Forms Automobiles and Highway Traffic Section 70 , Introductory Comments.

Treatises and Practice Aids

American Law of Products Liability 3d Section 21:27, Table of States that Have Adopted Alternative B of U.C.C. S2‑318.

American Law of Products Liability 3d Section 21:32, Losses Contemplated; Personal Injuries‑Property Damage.

American Law of Products Liability 3d Section 21:33, Losses Contemplated; Personal Injuries‑Economic Losses.

American Law of Products Liability 3d PS STATESTATS, State Statutes.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina: Breach of Warranty; Damages Recoverable by Third‑Party Beneficiaries. 31 S.C. L. Rev. 105.

Annual Survey of South Carolina: Breach of Warranty; Privity. 31 S.C. L. Rev. 101.

Annual Survey of South Carolina Law: Torts: Products Liability. 33 S.C. L. Rev. 173 (August 1981).

Applicability of strict liability theories to service transactions. 47 S.C. L. Rev. 231 (Winter 1996).

Consumer Product Warranty Litigation in South Carolina. 31 S.C. L. Rev. 293.

Contracts: Implied Warranties in Home Construction: Subsequent Purchasers. 33 S.C. L. Rev. 33 (August 1981).

Sections 2‑725 and 2‑318, of the Uniform Commercial Code—Their Implications in South Carolina. 23 S.C. L. Rev. 308.

NOTES OF DECISIONS

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1. In general

The defense of completion and acceptance was inapplicable as a matter of law in a products liability action based on allegations of strict liability, negligence and breach of warranties. The defense of completion and acceptance is inconsistent with the statute providing that sellers of defective products are strictly liable for physical harm caused to the ultimate users of the products or to their property, and is inconsistent with the statute extending the warranty of sellers beyond those with whom they have a contractual relationship. Stanley v. B.L. Montague Co., Inc. (S.C.App. 1989) 299 S.C. 51, 382 S.E.2d 246.

2. Legislative intent

The South Carolina legislature, in its Official Comment 32 SC Code Section 36‑2‑318, by remaining neutral on the issues left unconfronted by Section 36‑2‑318, and by disavowing any intent to influence the developing case law, left the courts responsible for determining the scope of the privity defense. Campus Sweater and Sportswear Co. v. M. B. Kahn Const. Co. (D.C.S.C. 1979) 515 F.Supp. 64, affirmed 644 F.2d 877.

It was the intent of the South Carolina legislature to abolish the necessity that privity of contract exist between a seller and a user in the purchaser’s family before the injured user can bring an action for breach of implied warranty against the seller. McHugh v. Carlton (D.C.S.C. 1974) 369 F.Supp. 1271. Sales 1822

3. Persons affected by breach of warranty

Guarantors of loans of a close corporation could not recover as persons “affected by” a breach of a warranty to the corporation. Umphlett Lumber Co. v. Trident Systems, Inc., 1995, 878 F.Supp. 844.

An innocent third party, injured as a result of an inherently dangerous product, should be allowed to recover damages against the retailer and the manufacturer, with whom there is no privity of contract. McHugh v. Carlton (D.C.S.C. 1974) 369 F.Supp. 1271. Products Liability 160

Term “natural persons” in Section 36‑2‑318 extends privity to corporations. JKT Co., Inc. v. Hardwick (S.C. 1980) 274 S.C. 413, 265 S.E.2d 510.

4. Expertise

Contractor and equipment supplier are liable to owner for any breach of express warranties contained in specifications; equipment supplier whose contract with general contractor incorporates by reference general contractor’s contract with owner, and who also warrants his work to owner, is liable in contract to owner; if owner or its engineer is not expert in field, and contractor possesses superior expertise with respect to job to be performed and obtains permission to deviate from job specifications, contractor impliedly warrants that performance requirements of specifications will be satisfied. Aiken County v. BSP Div. of Envirotech Corp., 1986, 657 F.Supp. 1339, affirmed in part, reversed in part 866 F.2d 661, rehearing denied.

5. Inherently dangerous goods

A recapped tire, by its very nature, is inherently dangerous or imminently dangerous when it has a latent defect. McHugh v. Carlton (D.C.S.C. 1974) 369 F.Supp. 1271. Products Liability 119; Products Liability 205

6. Damages

Diminution in value of subject product and consequential loss of profits occasioned by its defective performance constitute property damage within meaning of Section 36‑2‑318; therefore, privity of contract is not required to maintain cause of action for incidental and consequential damages in form of economic losses. Gasque v. Eagle Machine Co., Ltd. (S.C. 1978) 270 S.C. 499, 243 S.E.2d 831.

7. Sufficiency of claim

Patient’s allegations that defendants expressly warranted to his treating physicians that the surgical mesh it sold had certain qualities and characteristics which were in fact untrue, that the United States Food and Drug Administration (FDA) had traced the alleged malfeasance of manufacturing and labeling the mesh to defendants, and inclusion of photocopy of actual surgical sticker included by defendants in packaging stating it was certain type of mesh were sufficient to state a claim against defendants for breach of express warranty under South Carolina law. Jones v. Ram Medical, Inc., 2011, 807 F.Supp.2d 501. Sales 2466

**SECTION 36‑2‑319.** F.O.B. and F.A.S. terms.

(1) Unless otherwise agreed the term F.O.B. (which means “free on board”) at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this chapter (Section 36‑2‑504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this chapter (Section 36‑2‑503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this chapter on the form of bill of lading (Section 36‑2‑323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means “free alongside”) at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a wharf designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this chapter (Section 36‑2‑311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

HISTORY: 1962 Code Section 10.2‑319; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. This section is intended to negate the uncommercial line of decision which treats an “F.O.B.” term as “merely a price term.” The distinctions taken in subsection (1) handle most of the issues which have on occasion led to the unfortunate judicial language just referred to. Other matters which have led to sound results being based on unhappy language in regard to F.O.B. clauses are dealt with in this Act by Section 2‑311(2) (seller’s option re arrangements relating to shipment) and Sections 2‑614 and 615 (substituted performance and seller’s excuse).

2. Subsection (1)(c) not only specifies the duties of a seller who engages to deliver “F.O.B. vessel,” or the like, but ought to make clear that no agreement is soundly drawn when it looks to reshipment from San Francisco or New York, but speaks merely of “F.O.B.” the place.

3. The buyer’s obligations stated in subsection (1)(c) and subsection (3) are, as shown in the text, obligations of cooperation. The last sentence of subsection (3) expressly, though perhaps unnecessarily, authorizes the seller, pending instructions, to go ahead with such preparatory moves as shipment from the interior to the named point of delivery. The sentence presupposes the usual case in which instructions “fail”; a prior repudiation by the buyer, giving notice that breach was intended, would remove the reason for the sentence, and would normally bring into play, instead, the second sentence of Section 2‑704, which duly calls for lessening damages.

4. The treatment of “F.O.B. vessel” in conjunction with F.A.S. fits, in regard to the need for payment against documents, with standard practice and case‑law; but “F.O.B. vessel” is a term which by its very language makes express the need for an “on board” document. In this respect, that term is stricter than the ordinary overseas “shipment” contract (C.I.F., etc., Section 2‑320).

Cross References:

Sections 2‑311(3), 2‑323, 2‑503 and 2‑504.

Definitional Cross References:

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| “Agreed” | Section 1‑201. |
| “Bill of lading” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Seasonably” | Section 1‑204. |
| “Seller” | Section 2‑103. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Commercial Code Sections 2‑319 through 2‑322 provide for specific definitions and the legal consequences of a number of mercantile symbols currently found in sales contracts. These symbols are a short‑hand way of expressing terms relating principally to price and delivery. While these terms have well established meanings to businessmen, the courts have not always applied this understanding. Thus the need for the statutory definitions of these sections of the Commercial Code.

The most commonly used mercantile symbol is “F.O.B.” The commercial understanding is that this is a price term with the seller paying the cost of shipment to the F.O.B. point. This meaning, as specifically provided by Commercial Code Section 2‑319(1), has been judicially noticed by the South Carolina court. Union Bleaching & Finishing Co. v Barker Fuel Co., 124 SC 458, 117 SE 735 (1923).

In addition to being a price term, the parties also use the term to indicate the point at which title passes and delivery takes place. For example, if goods are to be shipped from New York “F.O.B., Columbia, South Carolina,” the commercial meaning is that title and delivery does not pass to the buyer until the goods arrive in Columbia; “F.O.B., New York,” delivery and title pass when the goods are delivered to the carrier in New York. Subsection (1) would give effect to this understanding that the F.O.B. symbol is also a delivery term. This result has been the subject of conflicting decisions in other jurisdictions but is probably in accord with South Carolina case law. In J. B. Colt Co. v Fox, 118 SC 372, 110 SE 401 (1922), the contract required the seller to “furnish the following generator and appliance F.O.B. factory . . .” The court held that the seller’s delivery to the carrier constitutes delivery to the buyer. In accord, Oxweld Acetylene Co. v Davis, 115 SC 426, 106 SE 157 (1921); J. B. Colt Co. v Tyler, 132 SC 511, 129 SE 213 (1925). See, however, Union Bleaching & Finishing Co. v Barker Fuel Co., supra, where the court said by dictum that “F.O.B. seller’s mines” in a contract for the sale of coal was merely a declaration as to who was to be liable for freight charges and did not qualify the finding that the intention of the parties was that delivery was to be at the buyer’s city.

Subsections (1)(a) and (1)(b) point out the significant consequential differences where the F.O.B. point is place of shipment and where it is place of destination. In addition to the allocation of payment of freight charges, the risk of loss during handling and shipment passes to the buyer at the F.O.B. point. A similar result is usually reached today by the case decisions for a different reason; risk of loss is said to follow title which is a matter of intention and the presumed intent of the parties is that title passes at the F.O.B. point. (For a collection of cases see 101 ALR 292. For a general discussion see 2 Williston, Sales, Section 280 (Rev ed 1948).) The matter of risk of loss is dealt with more specifically under Commercial Code Sections 2‑509 and 2‑510 where the subject is more fully discussed in the South Carolina Reporter’s Comments.

Subsection (c) specifies the duty of the seller to load aboard the carrier where the F.O.B. term includes the vessel, car, etc., in which the goods are to be shipped. This subsection will have its principal application in foreign shipments. If a Columbia, South Carolina, seller agrees to sell goods to a London buyer “F.O.B. Charleston,” there is present uncertainty as to whether the seller completes his performance when the goods arrive on board cars in Charleston. Under this section the proper term would be “F.O.B. vessel, Charleston,” which would require the seller to load the goods on board a vessel in Charleston designated by the buyer.

Continuing the factual example of the preceding paragraph, if the parties intend that the seller shall deliver alongside a vessel in Charleston harbor, they should contract “F.A.S. Charleston” (free alongside). The definition of this term and the resulting seller’s responsibility set out in subsection (2) is according to general commercial understanding.

Under subsection (3) the buyer is required to cooperate with the seller to facilitate performance at pain of being in breach. This general duty of the buyer to cooperate has been recognized in a number of South Carolina decisions. E.g., Clinton Oil & Mfg. Co. v Carpenter, 113 SC 10, 101 SE 47 (1918); Huguenot Mills v Jempson Co., 68 SC 363, 47 SE 687 (1903) (buyer’s duty to give needed instructions as to delivery); Cooper & Griffin v W. C. Cooke & Co., 122 SC 314, 115 SE 312 (1922) (buyer’s duty to give shipment instructions).

When the seller has performed by delivery of the goods at the proper place under the F.O.B. vessel or F.A.S. term, subsection (4) states the obvious rule that he is entitled to payment upon tender of the documents representing the goods. This is in accord with the general case law that in a shipment contract for the sale of goods which is a “documentary sale” the seller tenders the documents in return for payment of the draft drawn for the purchase price. E.g., Sanders v Landreth Seed Co., 100 SC 389, 84 SE 880 (1915); Greenwood Grocery Co. v Canadian County Mill & Elev. Co., 72 SC 450, 52 SE 491 (1905).

CROSS REFERENCES

Obligations of seller authorized or required to send goods to buyer, see Section 36‑2‑504.

Tender of delivery by seller, see Section 36‑2‑503.

LIBRARY REFERENCES

Sales 77, 79, 83, 161, 201(4).

Westlaw Key Number Searches: 343k77; 343k79; 343k83; 343k161; 343k201(4).

C.J.S. Sales Sections 94, 157, 164, 167 to 168, 172, 174 to 175, 214 to 215, 224 to 228.

**SECTION 36‑2‑320.** C.I.F. and C. & F. terms.

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer’s rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

HISTORY: 1962 Code Section 10.2‑320; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

To make it clear that:

1. The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods. Delivery to the carrier is delivered to the buyer for purposes of risk and “title”. Delivery of possession of the goods is accomplished by delivery of the bill of lading, and upon tender of the required documents the buyer must pay the agreed price without awaiting the arrival of the goods and if they have been lost or damaged after proper shipment he must seek his remedy against the carrier or insurer. The buyer has no right of inspection prior to payment or acceptance of the documents.

2. The seller’s obligations remain the same even though the C.I.F. term is “used only in connection with the stated price and destination”.

3. The insurance stipulated by the C.I.F. term is for the buyer’s benefit, to protect him against risk of loss or damage to the goods in transit. A clause in a C.I.F. contract “insurance—for the account of sellers” should be viewed in its ordinary mercantile meaning that the sellers must pay for the insurance and not that it is intended to run to the seller’s benefit.

4. A bill of lading covering the entire transportation from the port of shipment is explicitly required but the provision on this point must be read in the light of its reason to assure the buyer of as full protection as the conditions of shipment reasonably permit, remembering always that this type of contract is designed to move the goods in the channels commercially available. To enable the buyer to deal with the goods while they are afloat the bill of lading must be one that covers only the quantity of goods called for by the contract. The buyer is not required to accept his part of the goods without a bill of lading because the latter covers a larger quantity, nor is he required to accept a bill of lading for the whole quantity under a stipulation to hold the excess for the owner. Although the buyer is not compelled to accept either goods or documents under such circumstances he may of course claim his rights in any goods which have been identified to his contract.

5. The seller is given the option of paying or providing for the payment of freight. He has no option to ship “freight collect” unless the agreement so provides. The rule of the common law that the buyer need not pay the freight if the goods do not arrive is preserved.

Unless the shipment has been sent “freight collect” the buyer is entitled to receive documentary evidence that he is not obligated to pay the freight; the seller is therefore required to obtain a receipt “showing that the freight has been paid or provided for.” The usual notation in the appropriate space on the bill of lading that the freight has been prepaid is a sufficient receipt, as at common law. The phrase “provided for” is intended to cover the frequent situation in which the carrier extends credit to a shipper for the freight on successive shipments and receives periodical payments of the accrued freight charges from him.

6. The requirement that unless otherwise agreed the seller must procure insurance “of a kind and on terms then current at the port for shipment in the usual amount, in the currency of the contract, sufficiently shown to cover the same goods covered by the bill of lading”, applies to both marine and war risk insurance. As applied to marine insurance, it means such insurance as is usual or customary at the port for shipment with reference to the particular kind of goods involved, the character and equipment of the vessel, the route of the voyage, the port of destination and any other considerations that affect the risk. It is the substantial equivalent of the ordinary insurance in the particular trade and on the particular voyage and is subject to agreed specifications of type or extent of coverage. The language does not mean that the insurance must be adequate to cover all risks to which the goods may be subject in transit. There are some types of loss or damage that are not covered by the usual marine insurance and are excepted in bills of lading or in applicable statutes from the causes of loss or damage for which the carrier or the vessel is liable. Such risks must be borne by the buyer under this Article.

Insurance secured in compliance with a C.I.F. term must cover the entire transportation of the goods to the named destination.

7. An additional obligation is imposed upon the seller in requiring him to procure customary war risk insurance at the buyer’s expense. This changes the common law on the point. The seller is not required to assume the risk of including in the C.I.F. price the cost of such insurance, since it often fluctuates rapidly, but is required to treat it simply as a necessary for the buyer’s account. What war risk insurance is “current” or usual turns on the standard forms of policy or rider in common use.

8. The C.I.F. contract calls for insurance covering the value of the goods at the time and place of shipment and does not include any increase in market value during transit or any anticipated profit to the buyer on a sale by him.

The contract contemplates that before the goods arrive at their destination they may be sold again and again on C.I.F. terms and that the original policy of insurance and bill of lading will run with the interest in the goods by being transferred to each successive buyer. A buyer who becomes the seller in such an intermediate contract for sale does not thereby, if his sub‑buyer knows the circumstances, undertake to insure the goods again at an increased price fixed in the new contract or to cover the increase in price by additional insurance, and his buyer may not reject the documents on the ground that the original policy does not cover such higher price. If such a sub‑buyer desires additional insurance he must procure it for himself.

Where the seller exercises an option to ship “freight collect” and to credit the buyer with the freight against the C.I.F. price, the insurance need not cover the freight since the freight is not at the buyer’s risk. On the other hand, where the seller prepays the freight upon shipping under a bill of lading requiring prepayment and providing that the freight shall be deemed earned and shall be retained by the carrier “ship and/or cargo lost or not lost,” or using words of similar import, he must procure insurance that will cover the freight, because notwithstanding that the goods are lost in transit the buyer is bound to pay the freight as part of the C.I.F. price and will be unable to recover it back from the carrier.

9. Insurance “for the account of whom it may concern” is usual and sufficient. However, for a valid tender the policy of insurance must be one which can be disposed of together with the bill of lading and so must be “sufficiently shown to cover the same goods covered by the bill of lading.” It must cover separately the quantity of goods called for by the buyer’s contract and not merely insure his goods as part of a larger quantity in which others are interested, a case provided for in American mercantile practice by the use of negotiable certificates of insurance which are expressly authorized by this section. By usage these certificates are treated as the equivalent of separate policies and are good tender under C.I.F. contracts. The term “certificate of insurance”, however, does not of itself include certificates or “cover notes” issued by the insurance broker and stating that the goods are covered by a policy. Their sufficiency as substitutes for policies will depend upon proof of an established usage or course of dealing. The present section rejects the English rule that not only brokers’ certificates and “cover notes” but also certain forms of American insurance certificates are not the equivalent of policies and are not good tender under a C.I.F. contract.

The seller’s failure to tender a proper insurance document is waived if the buyer refuses to make payment on other and untenable grounds at a time when proper insurance could have been obtained and tendered by the seller if timely objection had been made. Even a failure to insure on shipment may be cured by seasonable tender of a policy retroactive in effect; e.g., one insuring the goods “lost or not lost.” The provisions of this Article on cure of improper tender and on waiver of buyer’s objections by silence are applicable to insurance tenders under a C.I.F. term. Where there is no waiver by the buyer as described above, however, the fact that the goods arrive safely does not cure the seller’s breach of his obligations to insure them and tender to the buyer a proper insurance document.

10. The seller’s invoice of the goods shipped under a C.I.F. contract is regarded as a usual and necessary document upon which reliance may properly be placed. It is the document which evidences points of description, quality and the like which do not readily appear in other documents. This Article rejects those statements to the effect that the invoice is a usual but not a necessary document under a C.I.F. term.

11. The buyer needs all of the documents required under a C.I.F. contract, in due form and with necessary endorsements, so that before the goods arrive he may deal with them by negotiating the documents or may obtain prompt possession of the goods after their arrival. If the goods are lost or damaged in transit the documents are necessary to enable him promptly to assert his remedy against the carrier or insurer. The seller is therefore obligated to do what is mercantilely reasonable in the circumstances and should make every reasonable exertion to send forward the documents as soon as possible after the shipment. The requirement that the documents be forwarded with “commercial promptness” expresses a more urgent need for action than that suggested by the phrase “reasonable time”.

12. Under a C.I.F. contract the buyer, as under the common law, must pay the price upon tender of the required documents without first inspecting the goods, but his payment in these circumstances does not constitute an acceptance of the goods nor does it impair his right of subsequent inspection or his options and remedies in the case of improper delivery. All remedies and rights for the seller’s breach are reserved to him. The buyer must pay before inspection and assert his remedy against the seller afterward unless the non‑conformity of the goods amounts to a real failure of consideration, since the purpose of choosing this form of contract is to give the seller protection against the buyer’s unjustifiable rejection of the goods at a distant port of destination which would necessitate taking possession of the goods and suing the buyer there.

13. A valid C.I.F. contract may be made which requires part of the transportation to be made on land and part on the sea, as where the goods are to be brought by rail from an inland point to a seaport and thence transported by vessel to the named destination under a “through” or combination bill of lading issued by the railroad company. In such a case shipment by rail from the inland point within the contract period is a timely shipment notwithstanding that the loading of the goods on the vessel is delayed by causes beyond the seller’s control.

14. Although subsection (2) stating the legal effects of the C.I.F. term is an “unless otherwise agreed” provision, the express language used in an agreement is frequently a precautionary, fuller statement of the normal C.I.F. terms and hence not intended as a departure or variation from them. Moreover, the dominant outlines of the C.I.F. term are so well understood commercially that any variation should, whenever reasonably possible, be read as falling within those dominant outlines rather than as destroying the whole meaning of a term which essentially indicates a contract for proper shipment rather than one for delivery at destination. Particularly careful consideration is necessary before a printed form or clause is construed to mean agreement otherwise and where a C.I.F. contract is prepared on a printed form designed for some other type of contract, the C.I.F. terms must prevail over printed clauses repugnant to them.

15. Under subsection (4) the fact that the seller knows at the time of the tender of the documents that the goods have been lost in transit does not affect his rights if he has performed his contractual obligations. Similarly, the seller cannot perform under a C.I.F. term by purchasing and tendering landed goods.

16. Under the C. & F. term, as under the C.I.F. term, title and risk of loss are intended to pass to the buyer on shipment. A stipulation in a C. & F. contract that the seller shall effect insurance on the goods and charge the buyer with the premium (in effect that he shall act as the buyer’s agent for that purpose) is entirely in keeping with the pattern. On the other hand, it often happens that the buyer is in a more advantageous position than the seller to effect insurance on the goods or that he has in force an “open” or “floating” policy covering all shipments made by him or to him, in either of which events the C. & F. term is adequate without mention of insurance.

17. It is to be remembered that in a French contract the term “C.A.F.” does not mean “Cost and Freight” but has exactly the same meaning as the term “C.I.F.” since it is merely the French equivalent of that term. The “A” does not stand for “and” but for “assurance” which means insurance.

Cross References:

Point 4: Section 2‑323.

Point 6: Section 2‑509(1)(a).

Point 9: Sections 2‑508 and 2‑605(1)(a).

Point 12: Sections 2‑321(3), 2‑512 and 2‑513(3) and Article 5.

Definitional Cross References:

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|  |  |
| “Bill of lading” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Rights” | Section 1‑201. |
| “Seller” | Section 2‑103. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

“C.I.F.” and “C. & F.” contracts are common in international shipments. While there are no South Carolina cases construing these terms, the definitions of subsection (1) are in accord with general commercial understanding as a price term. The “I” in C.I.F. means that the seller will pay for insurance and its omission in C. & F. or C.F. means that the cost includes only the cost of the goods and freight. (The term C.A.F. is sometimes used to mean cost and freight. This is dangerous since the “A” means “assurance” in some foreign countries giving the same impact as C.I.F. Thus the Commercial Code does not recognize the C.A.F. term.).

Subsection (2) states the legal obligation of the seller under the C.I.F. term which obviously includes the usual arrangements for shipment including a bill or bills of lading under subsection (1). The requirement of subsection (2)(b) that the seller provide a receipt showing freight “has been paid or provided for” clarifies the uncertainty as to whether the seller must actually prepay the freight charges by permitting the shipper to arrange for credit with the carrier.

There is also some uncertainty as to the dollar amount of insurance coverage, the extent of the risk insured against, and the type of insurance which the seller must procure. Subsection (2)(c) requires the seller to purchase the usual marine insurance customarily written on shipments from the port of shipment and thus not necessarily all risks to which the goods may be subject in transit. Furthermore, subsection (2)(c) adopts what is probably a minority view that the seller must take out war risk insurance if customary, but since this is an extraordinary risk, the buyer may be required to pay the premiums for such coverage.

Subsection (2)(d) requires the seller to prepare an invoice of the goods which is in addition to the requirement of the bill of lading. This may not be a necessary document under existing law and is made such under this Commercial Code section since the bill of lading does not describe the goods in sufficient detail to permit the buyer to use that document in making a resale of the goods.

Subsection (3) recognizes the usual incidents of the C. & F. contract which is similar to C.I.F. except for insurance.

Subsection (4) is identical to the rule of Section 2‑319(4) with respect to F.O.B. contracts since these contract terms envisage a documentary sale whereby payment is made against documents.

CROSS REFERENCES

Buyer’s failure to state particular defect in connection with rejection, see Section 36‑2‑605.

Contract requiring payment before inspection, see Section 36‑2‑512.

Inspection of goods, when buyer not entitled to, before payment, see Section 36‑2‑513.

Letters of credit, see Sections 36‑5‑101 et seq.

Risk of loss, see Section 36‑2‑509.

Seller’s cure of nonconforming delivery, see Section 36‑2‑508.

Varying effect of code provisions by agreement, see Section 36‑1‑302.

LIBRARY REFERENCES

Sales 77(2).

Westlaw Key Number Search: 343k77(2).

C.J.S. Sales Sections 94, 96 to 98.

**SECTION 36‑2‑321.** C.I.F. or C. & F.: “Net landed weights”; “payment on arrival”; warranty of condition on arrival.

Under a contract containing a term C.I.F. or C. & F.

(1) Where the price is based on or is to be adjusted according to “net landed weights,” “delivered weights,” “out turn” quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

HISTORY: 1962 Code Section 10.2‑321; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

This section deals with two variations of the C.I.F. contract which have evolved in mercantile practice but are entirely consistent with the basic C.I.F. pattern. Subsections (1) and (2), which provide for a shift to the seller of the risk of quality and weight deterioration during shipment, are designed to conform the law to the best mercantile practice and usage without changing the legal consequences of the C.I.F. or C. & F. term as to the passing of marine risks to the buyer at the point of shipment. Subsection (3) provides that where under the contract documents are to be presented for payment after arrival of the goods, this amounts merely to a postponement of the payment under the C.I.F. contract and is not to be confused with the “no arrival, no sale” contract. If the goods are lost, delivery of the documents and payment against them are due when the goods should have arrived. The clause for payment on or after arrival is not to be construed as such a condition precedent to payment that if the goods are lost in transit the buyer need never pay and the seller must bear the loss.

Cross References:

Section 2‑324.

Definitional Cross References:

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|  |  |
| “Agreement” | Section 1‑201. |
| “Contract” | Section 1‑201. |
| “Delivery” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Seller” | Section 2‑103. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Sometimes a C. & F. or C.I.F. contract provides that the seller has the risk of quality or weight deterioration during shipment. Such terms as “net landed weights” and “delivered weights” convey this understanding. While the buyer will usually make payment of the agreed purchase price against documents in this situation, the final price is unknown until the goods arrive and the quantity of weight deterioration becomes known. Section 2‑321(1) covers such a situation by requiring the seller to reasonably estimate the price. The buyer will then pay this price and receive the documents subject to final adjustment.

Subsection (2) states the usual understanding of the seller’s obligation to assume the risk of ordinary deterioration under the terms set out in subsection (1) or where he warrants condition of the goods on arrival.

Subsection (3) clarifies the contract term for payment “on or after arrival of the goods” which postpones the time of payment until the goods arrive and the buyer makes a preliminary inspection. The argument may be made that under such a contract term if the goods are lost payment never becomes due and thus the risk of loss is on the seller. Such a result would be contrary to the usual rule that in a C.I.F. or C. & F. contract the risk of loss is on the buyer and is thus rejected by requiring payment “when the goods should have arrived.”

CROSS REFERENCES

Risk of loss, see Section 36‑2‑509.

Varying effect of code provisions by agreement, see Section 36‑1‑302.

LIBRARY REFERENCES

Sales 168, 183, 201(4).

Westlaw Key Number Searches: 343k168; 343k183; 343k201(4).

C.J.S. Sales Sections 151, 185, 188, 208 to 209, 214 to 215, 224 to 228.

**SECTION 36‑2‑322.** Delivery “ex‑ship”.

(1) Unless otherwise agreed a term for delivery of goods “ex‑ship” (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed

(a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ship’s tackle or are otherwise properly unloaded.

HISTORY: 1962 Code Section 10.2‑322; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. The delivery term, “ex ship”, as between seller and buyer, is the reverse of the F.A.S. term covered.

2. Delivery need not be made from any particular vessel under a clause calling for delivery “ex ship”, even though a vessel on which shipment is to be made originally is named in the contract, unless the agreement by appropriate language, restricts the clause to delivery from a named vessel.

3. The appropriate place and manner of unloading at the port of destination depend upon the nature of the goods and the facilities and usages of the port.

4. A contract fixing a price “ex ship” with payment “cash against documents” calls only for such documents as are appropriate to the contract. Tender of a delivery order and of a receipt for the freight after the arrival of the carrying vessel is adequate. The seller is not required to tender a bill of lading as a document of title nor is he required to insure the goods for the buyer’s benefit, as the goods are not at the buyer’s risk during the voyage.

Cross References:

Point 1: Section 2‑319(2).

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Seller” | Section 2‑103. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑322 applies the usual commercial understanding to the contract delivery term “ex ship.” Under subsection (2) the seller makes delivery when the goods are loaded from the ship free of all liens. At this time the seller’s performance is completed, risk of loss passes to the buyer and the buyer has the obligation to pay.

Subsection (1) removes a doubt where the ex‑ship contract names a particular ship and the goods arrive aboard some other ship. Since this is not usually a matter of concern, the buyer may not use this as an excuse to put the seller in breach unless the contract expressly provides otherwise.

CROSS REFERENCES

Varying effect of code provisions by agreement, see Section 36‑1‑302.

LIBRARY REFERENCES

Sales 77(2), 83, 161, 201(4).

Westlaw Key Number Searches: 343k77(2); 343k83; 343k161; 343k201(4).

C.J.S. Sales Sections 94, 96 to 98, 157, 164, 167, 172, 174 to 175, 214 to 215, 224 to 228.

**SECTION 36‑2‑323.** Form of bill of lading required in overseas shipment; “overseas”.

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a tangible bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set:

(a) due tender of a single part is acceptable within the provisions of this chapter on cure of improper delivery (subsection (1) of Section 36‑2‑508); and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is “overseas” insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

HISTORY: 1962 Code Section 10.2‑323; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 8, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Subsection (1) follows the “American” rule that a regular bill of lading indicating delivery of the goods at the dock for shipment is sufficient, except under a term “F.O.B. vessel.” See Section 2‑319 and comment thereto.

2. Subsection (2) deals with the problem of bills of lading covering deep water shipments, issued not as a single bill of lading but in a set of parts, each part referring to the other parts and the entire set constituting in commercial practice and at law a single bill of lading. Commercial practice in international commerce is to accept and pay against presentation of the first part of a set if the part is sent from overseas even though the contract of the buyer requires presentation of a full set of bills of lading provided adequate indemnity for the missing parts is forthcoming. In accord with the amendment to Section 7‑304, bills of lading in a set are limited to tangible bills.

This subsection codifies that practice as between buyer and seller. Article 5 (Section 5‑113) authorizes banks presenting drafts under letters of credit to give indemnities against the missing parts, and this subsection means that the buyer must accept and act on such indemnities if he in good faith deems them adequate. But neither this subsection nor Article 5 decides whether a bank which has issued a letter of credit is similarly bound. The issuing bank’s obligation under a letter of credit is independent and depends on its own terms. See Article 5.

Cross References:

Sections 2‑508(2), 5‑113.

Definitional Cross References:

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|  |  |
| “Bill of lading” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Delivery” | Section 1‑201. |
| “Financing agency” | Section 2‑104. |
| “Person” | Section 1‑201. |
| “Seller” | Section 2‑103. |
| “Send” | Section 1‑201. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑323 deals with “overseas” shipment sales under C.I.F., C. & F. or F.O.B. vessel terms. Subsection (1) sets out the customary duty of the seller to obtain a negotiable bill of lading.

Subsection (2) deals with the frequent practice in foreign trade of issuing the bill of lading in a set of parts, each part referring to the others. If the goods are sent from abroad, only one part of the bill of lading need be tendered if, as is the customary practice, adequate indemnity for the missing parts is supplied. Otherwise, the buyer may demand the entire set, but if less is offered, the seller will be given a reasonable time within which to cure under Code Section 2‑508.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 8, in subsection (2), inserted “tangible” before “bill of lading”, and made other nonsubstantive changes.

CROSS REFERENCES

F.O.B. terms, see Section 36‑2‑319.

Issuance of bills of lading in set of parts, see Section 36‑7‑304.

Substitution of conforming tender, see Section 36‑2‑508.

LIBRARY REFERENCES

Sales 161, 162, 201(4).

Shipping 106.

Westlaw Key Number Searches: 343k161; 343k162; 343k201(4); 354k106.

C.J.S. Sales Sections 153, 164, 167, 172 to 175, 214 to 215, 224 to 228.

C.J.S. Shipping Sections 256 to 257.

**SECTION 36‑2‑324.** “No arrival, no sale” term.

Under a term “no arrival, no sale” or terms of like meaning, unless otherwise agreed,

(a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the nonarrival; and

(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Section 36‑2‑613).

HISTORY: 1962 Code Section 10.2‑324; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. The “no arrival, no sale” term in a “destination” overseas contract leaves risk of loss on the seller but gives him an exemption from liability for nondelivery. Both the nature of the case and the duty of good faith require that the seller must not interfere with the arrival of the goods in any way. If the circumstances impose upon him the responsibility for making or arranging the shipment, he must have a shipment made despite the exemption clause. Further, the shipment made must be a conforming one, for the exemption under a “no arrival, no sale” term applies only to the hazards of transportation and the goods must be proper in all other respects.

The reason of this section is that where the seller is reselling goods bought by him as shipped by another and this fact is known to the buyer, so that the seller is not under any obligation to make the shipment himself, the seller is entitled under the “no arrival, no sale” clause to exemption from payment of damages for nondelivery if the goods do not arrive or if the goods which actually arrive are non‑conforming. This does not extend to sellers who arrange shipment by their own agents, in which case the clause is limited to casualty due to marine hazards. But sellers who make known that they are contracting only with respect to what will be delivered to them by parties over whom they assume no control are entitled to the full quantum of the exemption.

2. The provisions of this Article on identification must be read together with the present section in order to bring the exemption into application. Until there is some designation of the goods in a particular shipment or on a particular ship as being those to which the contract refers there can be no application of an exemption for their non‑arrival.

3. The seller’s duty to tender the agreed or declared goods if they do arrive is not impaired because of their delay in arrival or by their arrival after transshipment.

4. The phrase “to arrive” is often employed in the same sense as “no arrival, no sale” and may then be given the same effect. But a “to arrive” term, added to a C.I.F. or C. & F. contract, does not have the full meaning given by this section to “no arrival, no sale”. Such a “to arrive” term is usually intended to operate only to the extent that the risks are not covered by the agreed insurance and the loss or casualty is due to such uncovered hazards. In some instances the “to arrive” term may be regarded as a time of payment term, or, in the case of the reselling seller discussed in point 1 above, as negating responsibility for conformity of the goods, if they arrive, to any description which was based on his good faith belief of the quality. Whether this is the intention of the parties is a question of fact based on all the circumstances surrounding the resale and in case of ambiguity the rules of Sections 2‑316 and 2‑317 apply to preclude dishonor.

5. Paragraph (b) applies where goods arrive impaired by damage or partial loss during transportation and makes the policy of this Article on casualty to identified goods applicable to such a situation. For the term cannot be regarded as intending to give the seller an unforeseen profit through casualty; it is intended only to protect him from loss due to causes beyond his control.

Cross References:

Point 1: Section 1‑203.

Point 2: Section 2‑501(a) and (c).

Point 5: Section 2‑613.

Definitional Cross References:

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|  |  |
| ‘Buyer” | Section 2‑103. |
| “Conforming” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Fault” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Sale” | Section 2‑106. |
| “Seller” | Section 2‑103. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

The definition of the term “no arrival, no sale” in Section 2‑324(b) as leaving the risk of loss on the seller until the goods arrive at the destination point, was recognized in Moore v W. R. Grace & Co., 287 F 103 (4th Cir 1923) as a matter of South Carolina law.

Under this section the term also means that the seller is exempt from liability for non‑delivery caused by the hazards of transportation. He is not excused for failure to deliver if he has refrained from shipping goods or has shipped non‑conforming goods. If the goods arrive safely, he must tender them to the buyer.

CROSS REFERENCES

Buyer’s special property and insurable interest in identified existing goods, see Section 36‑2‑501.

Casualty to identified goods, see Section 36‑2‑613.

Obligation of good faith in performance or in performance of contract or duty, see Section 36‑1‑304.

LIBRARY REFERENCES

Sales 83, 150, 197, 217, 224.

Westlaw Key Number Searches: 343k83; 343k150; 343k197; 343k217; 343k224.

C.J.S. Sales Sections 151, 157, 167, 214, 222 to 223.

**SECTION 36‑2‑325.** “Letter of credit” term; “confirmed credit”.

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer’s obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term “letter of credit” or “banker’s credit” in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term “confirmed credit” means that the credit must also carry the direct obligation of such an agency which does business in the seller’s financial market.

HISTORY: 1962 Code Section 10.2‑325; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

To express the established commercial and banking understanding as to the meaning and effects of terms calling for “letters of credit” or “confirmed credit”:

1. Subsection (2) follows the general policy of this Article and Article 3 (Section 3‑802) on conditional payment, under which payment by check or other short‑termed instrument is not ordinarily final as between the parties if the recipient duly presents the instrument and honor is refused. Thus the furnishing of a letter of credit does not substitute the financing agency’s obligation for the buyer’s, but the seller must first give the buyer reasonable notice of his intention to demand direct payment from him.

2. Subsection (3) requires that the credit be irrevocable and be a prime credit as determined by the standing of the issuer. It is not necessary, unless otherwise agreed, that the credit be a negotiation credit; the seller can finance himself by an assignment of the proceeds under Section 5‑116(2).

3. The definition of “confirmed credit” is drawn on the supposition that the credit is issued by a bank which is not doing direct business in the seller’s financial market; there is no intention to require the obligation of two banks both local to the seller.

Cross References:

Sections 2‑403, 2‑511(3) and 3‑802 and Article 5.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Contract for sale” | Section 2‑106. |
| “Draft” | Section 3‑104. |
| “Financing agency” | Section 2‑104. |
| “Notifies” | Section 1‑201. |
| “Overseas” | Section 2‑323. |
| “Purchaser” | Section 1‑201. |
| “Seasonably” | Section 1‑204. |
| “Seller” | Section 2‑103. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Most foreign shipment contracts call for the buyer to furnish a letter of credit issued by a bank agreeing to honor documentary drafts drawn against the buyer. (See Article 5 of the Commercial Code.) Section 2‑325(1) makes it clear that the failure of the buyer to furnish the letter of credit is a breach of the contract for sale and not merely a breach of collateral contract. Thus the seller is entitled to all of the remedies of an aggrieved party under a breached sales contract as provided by this Article. In accord, Lamborn & Co. v Palmetto Grocery Co., 284 F 427 (4th Cir 1922) where a contract for sale required the buyer to furnish a letter of credit within five days. On failure to furnish such credit, the court held that the seller had the right to cancel the contract and sue for damages, or to waive the condition or extend the time for compliance without losing its rights under the contract.

When a bank has issued a letter of credit, the parties expect that the seller’s draft drawn for the purchase price will be paid by the bank. Subsection (2) provides that the seller must first look to the issuing bank for payment. If the bank dishonors the letter of credit the seller may then look to the buyer for payment. He cannot force the buyer to breach the contract by a surprise demand for payment, however, but must notify the buyer and afford him reasonable time to make payment. The result of this subsection is similar in principle to the South Carolina case decisions in an analogous situation holding that a debt is not discharged by giving a check in payment therefor, the presumption being that the check is accepted on the condition that it be paid. Atlantic Life Ins. Co. v Barringer, 174 SC 145, 178 SE 505 (1935); Holloday v South Carolina Power Co., 169 SC 241, 168 SE 691 (1933).

When a seller requires that the buyer furnish a letter of credit or “banker’s credit,” he expects an irrevocable credit from a financing agency of good repute since anything short of these will not afford the usual maximum assurance of payment. Thus, subsection (3) implies these conditions where, in an unusual instance, they are not expressed in the contract.

When the contract provides for issue of a credit by a bank not doing business in the seller’s financial market and calls for “confirmed credit,” subsection (3) also gives effect to the expectation of the parties that the seller demands confirmation from a local bank.

CROSS REFERENCES

Assignment of right to proceeds of credit, see Section 36‑5‑114.

Letters of credit generally, see Sections 36‑5‑101 et seq.

Power to transfer, see Section 36‑2‑403.

Tender of payment by buyer, see Section 36‑2‑511.

When action taken seasonably, see Section 36‑1‑205.

LIBRARY REFERENCES

Banks and Banking 191.

Sales 191.

Westlaw Key Number Searches: 52k191; 343k191.

C.J.S. Banks and Banking Section 174.

C.J.S. Bills and Notes.

C.J.S. Letters of Credit Sections 341 to 366, 368 to 370, 372 to 376.

C.J.S. Sales Section 208.

**SECTION 36‑2‑326.** Sale on approval and sale or return; consignment sales and rights of creditors.

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) a “sale on approval” if the goods are delivered primarily for use, and

(b) a “sale or return” if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer’s creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer’s possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as “on consignment” or “on memorandum.” However, this subsection is not applicable if the person making delivery

(a) complies with an applicable law providing for a consignor’s interest or the like to be evidenced by a sign, or

(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or

(c) complies with the filing provisions of the chapter on secured transactions (Title 36, Chapter 9).

(4) Any “or return” term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this chapter (Section 36‑2‑201) and as contradicting the sale aspect of the contract within the provisions of this chapter on parol or extrinsic evidence (Section 36‑2‑202).

HISTORY: 1962 Code Section 10.2‑326; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 19(3), Uniform Sales Act.

Changes: Completely rewritten in this and the succeeding section.

Purposes of changes:

To make it clear that:

1. A “sale on approval” or “sale or return” is distinct from other types of transactions with which they have frequently been confused. The type of “sale on approval,” “on trial” or “on satisfaction” dealt with involves a contract under which the seller undertakes a particular business risk to satisfy his prospective buyer with the appearance or performance of the goods in question. The goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them. The price has already been agreed. The buyer’s willingness to receive and test the goods is the consideration for the seller’s engagement to deliver and sell. The type of “sale or return” involved herein is a sale to a merchant whose unwillingness to buy is overcome only by the seller’s engagement to take back the goods (or any commercial unit of goods) in lieu of payment if they fail to be resold. These two transactions are so strongly delineated in practice and in general understanding that every presumption runs against a delivery to a consumer being a “sale or return” and against a delivery to a merchant for resale being a “sale on approval.”

The right to return the goods for failure to conform to the contract does not make the transaction a “sale on approval” or “sale or return” and has nothing to do with this and the following section. The present section is not concerned with remedies for breach of contract. It deals instead with a power given by the contract to turn back the goods even though they are wholly as warranted.

This section nevertheless presupposes that a contract for sale is contemplated by the parties although that contract may be of the peculiar character here described.

Where the buyer’s obligation as a buyer is conditioned not on his personal approval but on the article’s passing a described objective test, the risk of loss by casualty pending the test is properly the seller’s and proper return is at his expense. On the point of “satisfaction” as meaning “reasonable satisfaction” where an industrial machine is involved, this Article takes no position.

2. Pursuant to the general policies of this Act which require good faith not only between the parties to the sales contract, but as against interested third parties, subsection (3) resolves all reasonable doubts as to the nature of the transaction in favor of the general creditors of the buyer. As against such creditors words such as “on consignment” or “on memorandum”, with or without words of reservation of title in the seller, are disregarded when the buyer has a place of business at which he deals in goods of the kind involved. A necessary exception is made where the buyer is known to be engaged primarily in selling the goods of others or is selling under a relevant sign law, or the seller complies with the filing provisions of Article 9 as if his interest were a security interest. However, there is no intent in this Section to narrow the protection afforded to third parties in any jurisdiction which has a selling Factors Act. The purpose of the exception is merely to limit the effect of the present subsection itself, in the absence of any such Factors Act, to cases in which creditors of the buyer may reasonably be deemed to have been misled by the secret reservation.

3. Subsection (4) resolves a conflict in the pre‑existing case law by recognition that an “or return” provision is so definitely at odds with any ordinary contract for sale of goods that where written agreements are involved it must be contained in a written memorandum. The “or return” aspect of a sales contract must be treated as a separate contract under the Statute of Frauds section and as contradicting the sale insofar as questions of parol or extrinsic evidence are concerned.

Cross References:

Point 2: Article 9.

Point 3: Sections 2‑201 and 2‑202.

Definitional Cross References:

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|  |  |
| “Between merchants” | Section 2‑104. |
| “Buyer” | Section 2‑103. |
| “Conform” | Section 2‑106. |
| “Contract for sale” | Section 2‑106. |
| “Creditor” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Sale” | Section 2‑106. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

The intention of the parties to any agreement may indicate that the buyer takes temporary possession of the goods to see whether they are satisfactory to him and if they are not, he may refuse to complete the sale. Such a transaction is usually designated as a “sale on approval.” Alternatively, the transaction may be that the buyer actually purchases the goods with a right to return and rescind the sale. Where this is found to be the intention of the parties, the transaction is a “sale or return” (Uniform Sales Act Section 19, Rule 3(1)). Put another way, the “sale on approval” contains a condition precedent to the creation of the sales contract; “sale or return” is a completed sale with a condition subsequent (see Williston, Sales Section 270 (Rev ed 1948)). The principal difficulty in applying this understanding has been with the uncertainty in ascertaining which of the two types of transactions the parties intended.

The South Carolina court has recognized the “sale on approval” as giving the buyer the absolute right to return the goods within the time allowed by the agreement if he decides not to purchase. See Francis LaBorde v Henry Ingraham, 1 Nott & McC. 419 (1819); Columbia Weighing Machine Co. v Rhem, 164 SC 376, 162 SE 427 (1931). The court has not, however, made a clear distinction between the sale on approval and sale or return. For example, an 1858 case referred to a contract in which the purchaser had the option to return a slave if he should not like her, as a “sale or return.” Southern v Cunningham, 11 Rich 533 (1858). Also, where goods are delivered by a manufacturer to a retailer for resale the South Carolina court has designated the transaction “a consignment” rather than a sale or return. Whether the transaction is a sale on credit or delivered on consignment is a question of fact as to what the parties intend, to be determined by the jury. Greenwood Mfg. Co. v Worby, 222 SC 156, 71 SE2d 889 (1952). In accord, Weaver Piano Co. v Curtis, 158 SC 117, 155 SE 291 (1930) where the court held that an agreement appointing the defendant as a selling agent for pianos was not a sale but a consignment.

Section 2‑326(1) presents a clear definition of each of these transactions thus eliminating the uncertainty inherent in the vague test of the parties’ intention. South Carolina cases cited above which have used these terms interchangeably and without definition would be modified and clarified. The definitions in subsection (1) are functional. Since almost all true sales on approval are to consumers who are permitted to take the goods for trial, subsection (1)(a) presumes that result. On the other hand, “sale or return” is almost always a situation where goods are sold by a supplier to a retailer with a right to return goods not resold. Subsection (1)(b) gives that effect to such a factual pattern.

Since ownership vests in the buyer on delivery in a sale or return, subsection (2) provides that such goods are subject to levy by the buyer’s creditors. With similar logic, in a sale on approval the goods are not subject to the claims of the buyer’s creditors since ownership remains in the prospective seller.

The rules of the preceding paragraph are expressly subject to the provisions of subsection (3). The effect is to treat the annual consignment arrangement between an independent retail outlet and his supplier as a sale or return. Thus unless the transaction falls within one of the situations stated in subsection (3)(a), (b) or (c), the goods are subject to the claims of buyer’s or consignee’s creditors. As previously stated the South Carolina court has designated the arrangement where goods are entrusted by a supplier with a retail outlet under a selling agency as a “consignment” in which case the seller retains ownership in the goods. Columbia Weighing Machine Co. v Rhem, and Greenwood Mfg. Co. v Worby, supra. As a practical matter, however, the result of this subsection would not change the existing law with respect to the right of the buyer’s creditors to reach the goods under such an arrangement. Under the Code a compliance with subsection (3)(c) of filing under Article 9 would usually apply in order for the supplier to protect his claim to the goods against the buyer’s creditors. Similarly, recording under the South Carolina bailment statute (SC Code Section 57‑308) is necessary in order for a consignor or other bailor of goods to claim against the bailee’s creditors. See Armour & Co. v Ross, 78 SC 294, 58 SE 941 (1907) in which the court recognized the application of the bailment statute but held that the creditors were not within the class protected against the unrecorded consignment. See also, Firestone Tire & Rubber Co. v Cross, 17 F2d 419 (4th Cir 1927) to the same effect in construing the South Carolina bailment statute in federal bankruptcy.

Subsection (4) would as a matter of new coverage for this state bring an alleged “or return” provision of a sales contract within the Statute of Frauds requiring a writing to establish it. Also a conflict in the case law of other jurisdictions would be resolved by making it clear that parol evidence cannot be admitted to show the inconsistent “or return” provision in a written sales contract intended by the parties as a final expression of their agreement.

CROSS REFERENCES

Filing in order to perfect security interest, see Sections 36‑9‑501 et seq.

Parol or extrinsic evidence, see Section 36‑2‑202.

Statute of frauds, see Section 36‑2‑201.

Varying effect of code provisions by agreement, see Section 36‑1‑302.

LIBRARY REFERENCES

Factors 1, 64, 65.

Sales 8, 168.5, 204 to 206, 222.

Westlaw Key Number Searches: 167k1; 167k64; 167k65; 343k8; 343k168.5; 343k204 to 343k206; 343k222.

C.J.S. Agriculture Sections 163, 165, 178.

C.J.S. Bailments Section 11.

C.J.S. Factors Sections 1, 56, 60, 63.

C.J.S. Sales Sections 3, 165 to 166, 190, 216, 221, 229.

**SECTION 36‑2‑327.** Special incidents of sale on approval and sale or return.

(1) Under a sale on approval unless otherwise agreed

(a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller’s risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed

(a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(b) the return is at the buyer’s risk and expense.

HISTORY: 1962 Code Section 10.2‑327; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 19(3), Uniform Sales Act.

Changes: Completely rewritten in preceding and this section.

Purposes of changes:

To make it clear that:

1. In the case of a sale on approval:

If all of the goods involved conform to the contract, the buyer’s acceptance of part of the goods constitutes acceptance of the whole. Acceptance of part falls outside the normal intent of the parties in the “on approval” situation and the policy of this Article allowing partial acceptance of a defective delivery has no application here. A case where a buyer takes home two dresses to select one commonly involves two distinct contracts; if not, it is covered by the words “unless otherwise agreed”.

2. In the case of a sale or return, the return of any unsold unit merely because it is unsold is the normal intent of the “sale or return” provision, and therefore the right to return for this reason alone is independent of any other action under the contract which would turn on wholly different considerations. On the other hand, where the return of goods is for breach, including return of items resold by the buyer and returned by the ultimate purchasers because of defects, the return procedure is governed not by the present section but by the provisions on the effects and revocation of acceptance.

3. In the case of a sale on approval the risk rests on the seller until acceptance of the goods by the buyer, while in a sale or return the risk remains throughout on the buyer.

4. Notice of election to return given by the buyer in a sale on approval is sufficient to relieve him of any further liability. Actual return by the buyer to the seller is required in the case of a sale or return contract. What constitutes due “giving” of notice, as required in “on approval” sales, is governed by the provisions on good faith and notice. “Seasonable” is used here as defined in Section 1‑204. Nevertheless, the provisions of both this Article and of the contract on this point must be read with commercial reason and with full attention to good faith.

Cross References:

Point 1: Sections 2‑501, 2‑601 and 2‑603.

Point 2: Sections 2‑607 and 2‑608.

Point 4: Sections 1‑201 and 1‑204.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Agreed” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Commercial unit” | Section 2‑105. |
| “Conform” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Merchant” | Section 2‑104. |
| “Notifies” | Section 1‑201. |
| “Notification” | Section 1‑201. |
| “Sale on approval” | Section 2‑326. |
| “Sale or return” | Section 2‑326. |
| “Seasonably” | Section 1‑204. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑327 sets out the expected incidents of the sale on approval and sale or return as between the parties. Since the seller remains the owner in a sale on approval arrangement, subsection (1)(a) provides that title and risk of loss do not pass to the buyer until acceptance. In accord, LaBorde v Ingraham, 1 Nott & McC 419 (1819) where the court refused recovery for the price of a horse which had died while in possession of a buyer who had purchased on trial.

Since the purpose of the sale on approval is to permit the buyer to try out the goods, subsection (1)(b) states the obvious rule that he may so use them. Acceptance by failure to seasonably notify the seller is in accord with Columbia Weighing Machine Co. v Rhem, 164 SC 376, 162 SE 427 (1931) which held that where the buyer had the right to return a machine within thirty days his failure to do so within the prescribed time rendered the sale absolute.

Subsection (1)(c) places the risk and expense of return on the seller since he still owns the goods.

By the same logic of incidents of ownership on the seller in the sale on approval, subsection (2) states the reverse situation for the sale or return where the buyer owns the goods. Thus the return is at the buyer’s risk and expense and apparently the risk of loss remains on the buyer until the goods are returned.

While there are no South Carolina cases dealing with the sale or return arrangement, the cases which designate similar arrangements as consignments (which would be a sale or return under Code Section 2‑326(3)) seem to assume that the consignor remains the owner as against the consignee which may be modified by this subsection. See Greenwood Mfg. Co. v Worby, and Weaver Piano Co. v Curtis, cited in the South Carolina Reporter’s Comments to Code Section 2‑326(1).

CROSS REFERENCES

Acceptance of goods by buyer, effect, see Section 36‑2‑607.

Buyer’s options in case of nonconforming goods or tender of delivery, see Section 36‑2‑601.

Claims of buyer’s creditors, see Section 36‑2‑326.

Insurable interests of buyer and seller, see Section 36‑2‑501.

Merchant buyer’s duties after rejection of goods, see Section 36‑2‑603.

Revocation of acceptance, see Section 36‑2‑608.

Varying effect of code provisions by agreement, see Section 36‑1‑302.

When action taken seasonably, see Section 36‑1‑205.

LIBRARY REFERENCES

Sales 168.5, 204, 205.

Westlaw Key Number Searches: 343k168.5; 343k204; 343k205.

C.J.S. Sales Sections 165 to 166, 190, 216, 221, 229.

**SECTION 36‑2‑328.** Sale by auction.

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer’s announcement of completion of the sale, but a bidder’s retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller’s behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

HISTORY: 1962 Code Section 10.2‑328; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 21, Uniform Sales Act.

Changes: Completely rewritten.

Purposes of changes:

To make it clear that:

1. The auctioneer may in his discretion either reopen the bidding or close the sale on the bid on which the hammer was falling when a bid is made at that moment. The recognition of a bid of this kind by the auctioneer in his discretion does not mean a closing in favor of such a bidder, but only that the bid has been accepted as a continuation of the bidding. If recognized, such a bid discharges the bid on which the hammer was falling when it was made.

2. An auction “with reserve” is the normal procedure. The crucial point, however, for determining the nature of an auction is the “putting up” of the goods. This Article accepts the view that the goods may be withdrawn before they are actually “put up,” regardless of whether the auction is advertised as one without reserve, without liability on the part of the auction announcer to persons who are present. This is subject to any peculiar facts which might bring the case within the “firm offer” principle of this Article, but an offer to persons generally would require unmistakable language in order to fall within that section. The prior announcement of the nature of the auction either as with reserve or without reserve will, however, enter as an “explicit term” in the “putting up” of the goods and conduct thereafter must be governed accordingly. The present section continues the prior rule permitting withdrawal of bids in auctions both with and without reserve; and the rule is made explicit that the retraction of a bid does not revive a prior bid.

Cross References:

Point 2: Section 2‑205.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Good faith” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Lot” | Section 2‑105. |
| “Notice” | Section 1‑201. |
| “Sale” | Section 2‑106. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑328 spells out a number of rules applicable to auction sales which very closely parallels section 21 of the Uniform Sales Act, and the probable South Carolina common law.

Section 2‑328(1) states an obvious principle that where separate lots are the subject of separate bidding and one is separately knocked down, there is a separate contract or sale in regard to each lot.

Professor Williston states that “it is fairly open to argument whether the auctioneer by offering goods for sale makes an offer which ripens into a contract or sale when the highest bidder accepts the offer, or, whether putting up the goods for sale is merely an invitation to those present to make offers, which they do by making bids, one of which is ultimately accepted by the fall of the hammer.” Williston, Sales, Section 296 (Rev ed 1948). Subsection (2) adopts the latter view (as does the Uniform Sales Act Section 21(2)), with the result that the bidder may retract the bid at any time before the hammer falls and the auctioneer may withdraw the goods from sale before the hammer falls. (See Miller v Law, 10 Rich Eq 320 (1858) where the court held that a contract of sale was not completed by a bid at a judicial sale and the auctioneer could withdraw the property from sale.) A refinement is added that while the hammer is falling the auctioneer may reopen the bidding or declare the goods sold.

The above statement as a construction of subsection (2) that the auctioneer may withdraw the goods from sale does not apply where the auction sale is “without reserve” in which case there can be no withdrawal once the auctioneer calls for bids on the item. Subsection (3) continues this understanding and further provides that an auction sale is “with reserve” unless clearly stated to be without reserve. Even in sales without reserve, bids may be retracted at any time before completion of the sale.

Secret bidding by the seller may have the effect of inducing a buyer to bid higher than he otherwise would have. The early English rule was that the employment of one “puffer” was justifiable to prevent a sale of property for less than it was worth. Williston, Sales, Section 298 (Rev ed 1948). This view seems to have been adopted by an 1822 South Carolina case where the court held that where one was employed to bid at an auction sale so as to enhance the price, the purchaser will be compelled to perform his contract though the price was enhanced by the other’s bidding. Jenkins v Hogg, 2 Tread Const 821 (1822).

Subsection (4) would change this result by condemning the practice of “puffing” by the seller making secret bids at an auction sale. If the seller improperly bids, the buyer may rescind for fraud, or, alternatively, “take the goods at the price of the last good faith bid.” Expressly excluded from this subsection is the bid at a forced sale where the seller is usually a secured party who may bid in the collateral to protect his interest.

CROSS REFERENCES

Offer by merchant to buy or sell in terms giving assurance offer will be held open, see Section 36‑2‑205.

LIBRARY REFERENCES

Auctions and Auctioneers 7, 8.

Westlaw Key Number Searches: 47k7; 47k8.

C.J.S. Auctions and Auctioneers Sections 2, 8 to 20.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Auctions and Auctioneers Section 20, Conduct of Auction Sales Under South Carolina Uniform Commercial Code.

Forms

Am. Jur. Pl. & Pr. Forms Auctions and Auctioneers Section 1 , Introductory Comments.

Part 4

Title, Creditors and Good Faith Purchasers

**SECTION 36‑2‑401.** Passing of title; reservation for security; limited application of this section.

Each provision of this chapter with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 36‑2‑501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on secured transactions (Title 36, Chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a tangible document of title, title passes at the time when and the place where he delivers such documents and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document; or

(b) if the goods are at the time of contracting already identified and no documents of title are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a “sale.”

HISTORY: 1962 Code Section 10.2‑401; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 9, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: See generally, Sections 17, 18, 19 and 20, Uniform Sales Act.

Purposes:

To make it clear that:

1. This Article deals with the issues between seller and buyer in terms of step by step performance or non‑performance under the contract for sale and not in terms of whether or not “title” to the goods has passed. That the rules of this section in no way alter the rights of either the buyer, seller or third parties declared elsewhere in the Article is made clear by the preamble of this section. This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of “public” regulation depends upon a “sale” or upon location of “title” without further definition. The basic policy of this Article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a “sale” is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the “private” law.

2. “Future” goods cannot be the subject of a present sale. Before title can pass the goods must be identified in the manner set forth in Section 2‑501. The parties, however, have full liberty to arrange by specific terms for the passing of title to goods which are existing.

3. The “special property” of the buyer in goods identified to the contract is excluded from the definition of “security interest”; its incidents are defined in provisions of this Article such as those on the rights of the seller’s creditors, on good faith purchase, on the buyer’s right to goods on the seller’s insolvency, and on the buyer’s right to specific performance or replevin.

4. The factual situations in subsections (2) and (3) upon which passage of title turn actually base the test upon the time when the seller has finally committed himself in regard to specific goods. Thus in a “shipment” contract he commits himself by the act of making the shipment. If shipment is not contemplated subsection (3) turns on the seller’s final commitment, i.e. the delivery of documents or the making of the contract. As to delivery of an electronic document of title, see definition of delivery in Article 1, Section 1‑201. This Article does not state a rule as to the place of title passage as to goods covered by an electronic document of title.

Cross References:

Point 2: Sections 2‑102, 2‑501 and 2‑502.

Point 3: Sections 1‑201, 2‑402, 2‑403, 2‑502 and 2‑716.

Definitional Cross References:

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|  |  |
| “Agreement” | Section 1‑201. |
| “Bill of lading” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Delivery” | Section 1‑201. |
| “Document of title” | Section 1‑201. |
| “Good faith” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Purchaser” | Section 1‑201. |
| “Remedy” | Section 1‑201. |
| “Receipt of goods” | Section 2‑103. |
| “Rights” | Section 1‑201. |
| “Sale” | Section 2‑106. |
| “Security interest” | Section 1‑201. |
| “Seller” | Section 2‑103. |
| “Send” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Under the common law of sales as well as the Uniform Sales Act, the location of title determines such important and frequently occurring problems as risk of loss, the right of the seller to maintain an action for the price, insurable interest, creditors’ rights to the goods, and the buyer’s rights to have the goods. Going back to the leading English case of Tarling v Baxter, 6 B & C 360, 108 Eng Rep 484 (KB 1827), title is said to pass when the parties so intend and that time is presumed to be at the time of contracting with respect to existing goods then in a deliverable state. It is at this point that the risk of loss passes to the buyer. In accord, John Frazer & Co. v Hilliard, 2 Strob 309 (1848) (USA Section 22).

Under Article 2, specific rules are stated to provide solutions to specific problems without regard to the location of title. For example, Commercial Code Sections 2‑509 and 2‑510 govern risk of loss; 2‑501, insurable interest; 2‑709, seller’s action for the price; 2‑722, recovery against third parties for injury to the goods. In the few remaining situations where the location of title will be relevant, Commercial Code Section 2‑401 governs the determination. This is the meaning of the first paragraph of this section limiting the significance of title passing under the Code to matters not otherwise covered and only where the provisions refer to title. Thus, this passage of title concept, which has been a central point in Anglo‑American sales law for 150 years, is reduced to minor importance.

(It should be noted that the Certificate of Title Law, SC Code Sections 46‑139‑46‑150.95, regulating the transfer of title to motor vehicles, would not be affected by this section.).

As stated above, under the doctrine of Tarling v Baxter, title to existing goods passes at the time of contracting if nothing further remains to be done to put them in a deliverable state. With respect to goods to be manufactured or acquired by the seller after executing the contract of sale, no title can pass until the goods are “ascertained” and “appropriated” to the contract. In accord, Massillon Sign & Poster Co. v Buffalo Lick Springs Co., 81 SC 114, 61 SE 1098 (1908); Sahlman v Mills & Co., 3 Strob 384 (1894). This is simply an application of the ancient and obvious common law rule that title cannot pass until the seller owns the goods and they have become identified as the subject matter of the contract.

Section 2‑491(1) prescribes a similar requirement with the term “identification” to the contract as the earliest time for title to pass. This term is defined in Code Section 2‑501 which generally means designating the goods as those to which the contract refers. Absent a contrary agreement the buyer acquires a “special property” in the goods upon their identification to the contract. This undefined term is something short of title and has special application in sections 2‑501 (insurable interest), 2‑502 (buyer’s right to goods on seller’s insolvency), and 2‑722 (claims against third parties).

Between the time of identification of the goods to the contract and delivery of the goods to the buyer, the parties may explicitly agree on the time of passage of title. Any attempt to reserve title in the seller after delivery to the buyer, however, is ineffective under subsection (1). The typical situation is the conditional sales contract which expressly provides for title to remain in the seller until payment of the purchase price. Since this is actually a security device, the interest in the parties are governed by Article 9 from the time the buyer takes possession (see Commercial Code Section 9‑113 providing that from time of shipment of goods until the buyer takes possession the seller’s security interest is fully perfected without filing and his rights on default of the buyer are governed by Article 2). The South Carolina case law recognizes the contractual right of the seller to reserve in himself the title to the goods until the purchase price is paid, although the goods have been delivered to the buyer. Reeves v Harris, 1 Bailey 563 (1830); United States v Anders Contracting Co., 111 F Supp 700 (WD SC 1953). The language of these two cases so far as the designation of the seller’s reserved interest as “title” is in conflict with this Code section. Since Article 9 prescribes the rights, obligations and remedies of the parties to a secured transaction without regard to title to collateral, however, the change is more one of terminology than substance (see Commercial Code Section 9‑202).

In the absence of expressed agreement to the contrary and subject to the limitations discussed above, title to the goods passes when the seller makes his final commitment. Under subsection (2) this is upon delivery of the goods which is a change in the traditional common law rule that title passes as to specific goods at the time of contracting even though delivery is delayed. John Frazer & Co. v Hilliard, 2 Strob 309 (1848) (USA Section 19(1)). Where the goods are to be shipped to the buyer title passes to the buyer when the seller completes his performance with respect to such delivery. If the contract requires seller to deliver at destination, e.g., “F.O.B., destination,” title does not pass until the goods are tendered at destination under subsection (2)(b). If the seller is not required to deliver the goods at destination, e.g., “F.O.B., place of shipment,” title passes to the buyer at the time and place of shipment. (See Commercial Code Section 2‑219, et seq. for the definitions of the mercantile symbols to be applied in determining the nature of the seller’s obligation when the goods are to be shipped to the buyer.) As stated in South Carolina Reporter’s Comments to Code Section 2‑319, the South Carolina court decisions seem to recognize this commercial understanding of the meaning of these mercantile symbols with respect to completion of performance by the seller by delivery. E.g., J. B. Colt Co. v Fox, 118 SC 372, 110 SE 401 (1922); Oxweld Acetylene Co. v Davis, 115 SC 426, 106 SE 157 (1921); J. B. Colt Co. v Tyler, 132 SC 511, 129 SE 213 (1925), all to the effect that “F.O.B. place of shipment” means that delivery to the carrier is delivery to the buyer. In Standard Boiler & Iron Co. v Brock, 112 SC 321, 99 SE 769 (1919), title passed when seller delivered to carrier at the F.O.B. point giving rise to the right to recover the full purchase price without regard to damage to the goods in transit. In accord, Virginia‑Carolina Chemical Co. v Laney, 100 SC 135, 84 SE 424 (1914).

When the goods are not to be shipped to the buyer, the seller makes his final commitment at the time of contracting as to identified goods and thus title passes at that time under subsection (3)(b). This is in accord with the basic common law rule of the leading English case of Tarling v Baxter. In accord, Dozier v Johnson, 2 Hill 297 (1834), where the court found sufficient delivery to render the buyer liable for the purchase price for lumber which had burned after the seller had sawed and piled it on his premises.

Where goods are in possession of a warehouseman or other third party and the contract of sale calls for delivery of the document representing the goods, the seller has not made his final commitment until the document is delivered to the buyer under subsection (3)(a). Title was held to have passed by delivery of the document as symbolic delivery of the property in Ex parte Benjamin Harris & Co., 141 SC 430, 140 SE 101 (1927); Southworth v Sebring, 2 Hill 287 (1935).

Though title to the goods may have passed under this section, that title revests back to the seller if the buyer refuses to accept or retain the goods under subsection (4). In Sherer‑Gillett Co. v Moore‑Barnes Co., 114 SC 387, 103 SE 766, this principle was recognized by the court in holding that a seller was not guilty of conversion of the property of another by taking possession of goods after the buyer refused to receive them on the ground that the shipment had been unduly delayed. Also, Robson v Jones, 2 Bailey 4 (1830), was a case of trespass brought by a buyer of cotton against the seller who had come on the premises to remove the cotton after the buyer had refused to pay the agreed purchase price on the ground that it had been fraudulently packed. In holding for the defendant on the ground that he had title to the cotton, the court seems to have approved the principle of this subsection that title reverts in the seller upon a “justified revocation of acceptance.”

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 9, in subsection (3)(a), inserted “tangible” before “document of title” and added text at the end relating to electronic documents; and in subsection (3)(b), inserted “of title”.

CROSS REFERENCES

Buyer’s right to replevin for goods identified to contract, see Section 36‑2‑716.

Secured transactions, see Sections 36‑9‑101 et seq.

Security interest subject to Chapter 9, see Section 36‑9‑110

Seller’s insolvency as affecting buyer’s rights with respect to goods not shipped but paid for in whole or in part, see Section 36‑2‑502.

LIBRARY REFERENCES

Sales 197 to 218.5.

Westlaw Key Number Searches: 343k197 to 343k218.5.

C.J.S. Sales Sections 214 to 218, 221, 223 to 229.

NOTES OF DECISIONS

Delivery 4

Identification of goods 1

Rejection 3

Security interests 2

1. Identification of goods

Where the contract calls for the sale of goods from a larger stock, title does not pass to the buyer until the portion contracted to be sold is separated and set apart for the buyer by an actual choice of a specific article or specific goods to be supplied in the performance of the contract. In re Colonial Distributing Co. (D.C.S.C. 1968) 291 F.Supp. 154. Sales 1127

2. Security interests

Under South Carolina law, whatever interest automobile dealership retained in motor vehicle that it “spot delivered” to buyer, subject to buyer’s being approved for financing, was in nature of security, rather than of ownership, interest, where application for certificate of title, vehicle registration, vehicle insurance, and county tax notice all identified buyer as owner of vehicle, where sales agreement stated that dealership retained security interest but did not mention title, and where dealership, prior to buyer’s Chapter 7 filing, had sent buyer a collection letter demanding payment but had never sought to recover vehicle; thus, vehicle was included in “property of the estate” and was protected by automatic stay. In re Joyner (Bkrtcy.D.S.C. 2004) 326 B.R. 334. Bankruptcy 2392; Bankruptcy 2579; Secured Transactions 25

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC Section 2‑401(1), such title‑retention clause created security interest in seller’s favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four‑month‑continuation‑of‑perfection provision set forth in UCC Section 9‑103(3), and (c) that because yarn had arrived at buyer’s plant in South Carolina within four months of August 31, 1976 (date on which buyer’s bankruptcy petition was filed and bankruptcy trustee’s lien arose), seller’s perfected security interest was superior to trustee’s lien, court held (1) that because seller relied on UCC Section 2‑401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC Section 2‑401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC Section 9‑113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee’s lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller’s security interest had never been perfected and could not prevail over trustee’s lien under UCC Section 9‑301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re Duplan Corp., 1978, 455 F.Supp. 926.

3. Rejection

Where buyer, in seller’s action for purchase price of hole‑punching equipment, (1) never tendered any payment for such equipment, (2) continuously maintained that it had rejected it, and (3) on several occasions had attempted to have it removed from its plant, court held (1) that buyer clearly had rejected equipment, and (2) that under UCC Section 2‑401(4), such rejection revested title to equipment in seller. Joseph T. Ryerson & Sons, Inc. v. Commodity Engineering Co. (C.A.4 (S.C.) 1982) 689 F.2d 478. Sales 973; Sales 1140

Under Section 36‑2‑401(4), where a purchaser of steel fabrication equipment rejected goods in question, never tendered any payment for the equipment and on several occasions attempted to have it removed from its plant, it was clear that the purchaser had rejected the goods and that title to the goods had therefore revested in the seller. Joseph T. Ryerson & Sons, Inc. v. Commodity Engineering Co. (C.A.4 (S.C.) 1982) 689 F.2d 478. Sales 973; Sales 1140

4. Delivery

Automobile dealership’s decision to allow prospective purchaser to take possession of automobile pending credit approval on financing from third‑party lender did not evince completion of sale or transfer of title, as purchase agreement between parties explicitly stated that physical delivery of the car was only a convenience provided to purchaser and the sale was pending credit approval. Brewer v. Stokes Kia, Isuzu, Subaru, Inc. (S.C.App. 2005) 364 S.C. 444, 613 S.E.2d 802, rehearing denied, certiorari denied. Sales 1134

**SECTION 36‑2‑402.** Rights of seller’s creditors against sold goods.

(1) Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer’s rights to recover the goods under this chapter (Sections 36‑2‑502 and 36‑2‑716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant‑seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this chapter shall be deemed to impair the rights of creditors of the seller

(a) under the provisions of the chapter on secured transactions (Title 36, Chapter 9); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this chapter constitute the transaction a fraudulent transfer or voidable preference.

HISTORY: 1962 Code Section 10.2‑402; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Subsection (2)—Section 26, Uniform Sales Act; Subsections (1) and (3)—none.

Changes: Rephrased.

Purposes of changes and new matter:

To avoid confusion on ordinary issues between current sellers and buyers and issues in the field of preference and hindrance by making it clear that:

1. Local law on questions of hindrance of creditors by the seller’s retention of possession of the goods are outside the scope of this Article, but retention of possession in the current course of trade is legitimate. Transactions which fall within the law’s policy against improper preferences are reserved from the protection of this Article.

2. The retention of possession of the goods by a merchant seller for a commercially reasonable time after a sale or identification in current course is exempted from attack as fraudulent. Similarly, the provisions of subsection (3) have no application to identification or delivery made in the current course of trade, as measured against general commercial understanding of what a “current” transaction is.

Definitional Cross References:

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| “Contract for sale” | Section 2‑106. |
| “Creditor” | Section 1‑201. |
| “Good faith” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Merchant” | Section 2‑104. |
| “Money” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Rights” | Section 1‑201. |
| “Sale” | Section 2‑106. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑402(1) states a general rule of priority in favor of the buyer’s right to title to the goods upon the seller’s insolvency and to recover the goods over the rights of unsecured creditors of the seller. This is subject to exceptions recognized in subsections (2) and (3) where the seller’s transfer is a fraudulent conveyance or a voidable preference.

Section 2‑402(2) recognizes and preserves the conflict of authority as to the effect of the seller retaining possession of goods after sale. Some states treat the retention of possession by the seller after sale as fraudulent per se as to the seller’s creditors. In other states the seller’s retention or possession after a sale is normally presumptively fraudulent which may be rebutted. (See 2 Williston, Sales, Sections 351‑404 (rev ed) (1948) for the rule in each jurisdiction.) The early South Carolina decisions held that retention of possession by the seller after sale rendered the sale conclusively fraudulent as to creditors. Debardeleden v Beekman, 1 DeSaus 246 (1793); Kennedy v Ross, 2 Mill 125 (1818). Subsequent decisions modified this view to the point where the common law rule in this state today is that the retention of possession by the seller creates a presumption of fraud which may be rebutted by a showing that it was for a proper bona fide purpose. E.g., Nelson v Good, 20 SC 223 (1883), where after sale of merchandise the buyer employed the seller as his agent to carry on the business under circumstances found to be proper and thus the sale could not be set aside by the seller’s creditors. Beaufort Veneer & Package Co. v Hiers, 142 SC 78, 140 SE 238 (1927); Dinkins v Robbins, 200 SC 475, 21 SE2d 10 (1942), where retention of possession was said to be a “badge of fraud” raising the factual issue. Where the buyer and seller live together, South Carolina cases have held that proof of good faith only is sufficient. Lott v De Graffenreid, 10 Rich Eq 346 (1858); Perkins v Douglas, 52 SC 129, 29 SE 400 (1897).

The above outlined status of South Carolina law would be continued under subsection (2) except in situations where a merchant seller retains possession “in good faith and current course of trade . . . for a commercially reasonable time” after the sale. The excepted situation would probably result in a modification of South Carolina law under the authorities set out above which treats retained possession after sale as a badge of fraud placing the burden on the parties to rebut the presumption created thereby.

Subsection (3) is intended to make it clear that the rights of a seller’s creditors to set aside a sale under the existing law of fraudulent conveyances (SC Code Section 57‑301 et seq.) or voidable preferences (SC Code Section 57‑351 et seq.), will not be disturbed by the Code.

CROSS REFERENCES

Buyer’s right to replevin for identified goods, see Section 36‑2‑716.

Incidents of buyer’s special property in identified goods, see Sections 36‑2‑502, 36‑2‑716.

Insurable interests of buyer and seller, see Section 36‑2‑501.

Protection of buyers of goods, see Section 36‑9‑320.

Rights acquired in the absence of due negotiation, effect of diversion, seller’s stoppage of delivery, see Section 36‑7‑504.

Risk of loss, see Section 36‑2‑509.

Security interest subject to Chapter 9, see Section 36‑9‑110

Seller’s insolvency as affecting buyer’s right to goods paid for in full or in part, see Section 36‑2‑502.

Transactions to which code chapter on sales does not apply, see Section 36‑2‑102.

Varying effect of code provisions by agreement, see Section 36‑1‑302.

LIBRARY REFERENCES

Fraudulent Conveyances 139.

Sales 230.

Westlaw Key Number Searches: 186k139; 343k230.

C.J.S. Fraudulent Conveyances Sections 139 to 140.

C.J.S. Sales Section 220.

**SECTION 36‑2‑403.** Power to transfer; good faith purchase of goods; “entrusting”.

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a “cash sale,” or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the chapter on secured transactions (Title 36, Chapter 9), bulk transfers (Title 36, Chapter 6) and documents of title (Title 36, Chapter 7).

HISTORY: 1962 Code Section 10.2‑403; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 20(4), 23, 24, 25, Uniform Sales Act; Section 9, especially 9(2), Uniform Trust Receipts Act; Section 9, Uniform Conditional Sales Act.

Changes: Consolidated and rewritten.

Purposes of changes:

To gather together a series of prior uniform statutory provisions and the case‑law thereunder and to state a unified and simplified policy on good faith purchase of goods.

1. The basic policy of our law allowing transfer of such title as the transferor has is generally continued and expanded under subsection (1). In this respect the provisions of the section are applicable to a person taking by any form of “purchase” as defined by this Act. Moreover the policy of this Act expressly providing for the application of supplementary general principles of law to sales transactions wherever appropriate joins with the present section to continue unimpaired all rights acquired under the law of agency or of apparent agency or ownership or other estoppel, whether based on statutory provisions or on case law principles. The section also leaves unimpaired the powers given to selling factors under the earlier Factors Acts. In addition subsection (1) provides specifically for the protection of the good faith purchaser for value in a number of specific situations which have been troublesome under prior law.

On the other hand, the contract of purchase is of course, limited by its own terms as in a case of pledge for a limited amount or of sale of a fractional interest in goods.

2. The many particular situations in which a buyer in ordinary course of business from a dealer has been protected against reservation of property or other hidden interest are gathered by subsections (2)‑(4) into a single principle protecting persons who buy in ordinary course out of inventory. Consignors have no reason to complain, nor have lenders who hold a security interest in the inventory, since the very purpose of goods in inventory is to be turned into cash by sale.

The principle is extended in subsection (3) to fit with the abolition of the old law of “cash sale” by subsection (1)(c). It is also freed from any technicalities depending on the extended law of larceny; such extension of the concept of theft to include trick, particular types of fraud, and the like is for the purpose of helping conviction of the offender; it has no proper application to the long‑standing policy of civil protection of buyers from persons guilty of such trick or fraud. Finally, the policy is extended, in the interest of simplicity and sense, to any entrusting by a bailor; this is in consonance with the explicit provisions of Section 7‑205 on the powers of a warehouseman who is also in the business of buying and selling fungible goods of the kind he warehouses. As to entrusting by a secured party, subsection (2) is limited by the more specific provisions of Section 9‑320, which deny protection to a person buying farm products from a person engaged in farming operations.

3. The definition of “buyer in ordinary course of business” (Section 1‑201) is effective here and preserves the essence of the healthy limitations engrafted by the case‑law on the older statutes. The older loose concept of good faith and wide definition of value combined to create apparent good faith purchasers in many situations in which the result outraged common sense; the court’s solution was to protect the original title especially by use of “cash sale” or of overtechnical construction of the enabling clauses of the statutes. But such rulings then turned into limitations on the proper protection of buyers in the ordinary market. Section 1‑201(9) cuts down the category of buyer in ordinary course in such fashion as to take care of the results of the cases, but with no price either in confusion or in injustice to proper dealings in the normal market.

4. Except as provided in subsection (1), the rights of purchasers other than buyers in ordinary course are left to the Articles on Secured Transactions, Documents of Title, and Bulk Sales.

Cross References:

Point 1: Sections 1‑103 and 1‑201.

Point 2: Sections 1‑201, 2‑402, 7‑205 and 9‑320.

Points 3 and 4: Sections 1‑102, 1‑201, 2‑104, 2‑707 and Articles 6, 7 and 9.

Definitional Cross References:

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| “Buyer in ordinary course of business” | Section 1‑201. |
| “Good faith” | Sections 1‑201 and 2‑103. |
| “Goods” | Section 2‑105. |
| “Person” | Section 1‑201. |
| “Purchaser” | Section 1‑201. |
| “Signed” | Section 1‑201. |
| “Term” | Section 1‑201. |
| “Value” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑403 deals with the rights of a good faith purchaser to acquire an interest in goods greater than their transferors had. Subsection (1) states the basic common law rule that a purchaser acquires all of the interest of his transferor. The common law concept of a “voidable title,” as distinguished from a void title, ripening into an indefeasible title in the hands of a bona fide purchaser for value, is also recognized. See 2 Williston, Sales, Section 311 (rev ed 1948). In accord, Carmichael v Buck, 10 Rich 332 (1857); Sun Ins. Office v Foil, 187 SC 183, 197 SE 683 (1938). The conceptual analysis of the common law decisions usually turns on whether the original owner assented to the transfer. If he did not, as where the goods are stolen from him, the thief could pass no title even to a bona fide purchaser for value (e.g., Sun Ins. Office, supra). If he intends to transfer ownership, however, he passes a voidable title and his claim to the goods will be cut off in the hands of a good faith purchaser for value. The American common law decisions have developed conflicts in a number of factual situations involving this principle which this Commercial Code section resolves. It will be seen that the results are in accord with the modern common law trend toward greater negotiability of chattel by favoring the good faith purchaser over the original owner.

The first situation dealt with is that of fraudulent impersonation of a buyer. The majority common law rule has been that where the parties deal face to face the predominant intent of the seller is to pass the property interest to the person he sees before him so that the fraudulent buyer acquires sufficient interest to pass good title to the bona fide purchaser for value. (The leading American case is Phelps v McQuade, 220 NY 232, 115 NE 441 (1917).) The rule seems to be otherwise where the deal is had by correspondence since the seller has no visual image of a person he intends to pass title to. See Vold, Sales, Section 79 (2nd ed 1959). There is dictum in the case of Russel Willis, Inc. v Page, 213 SC 156, 48 SE2d 627 (1948) indicating that a bona fide purchaser for value in good faith from a transferor who acquired the property by falsely representing that he was acting as an agent for another would not acquire good title as against the defrauded original owner. The purchaser actually prevailed in that case, however, on the ground of a jury finding of negligence resulting in estoppel to assert the title. Subsection (1)(a) gives the fraudulent purchaser power to transfer title in all cases of fraudulent impersonation. (For a similar treatment of the analogy situation for negotiable instruments, see Commercial Code Section 3‑405(1)(a).).

Where the buyer gives a worthless check in payment of goods in a cash sales transaction, the apparent majority common law view is that no title passes to the fraudulent buyer and thus the seller may assert his title against an innocent purchaser from the buyer. The reasoning of these cases is that payment of a worthless check is no payment and thus the condition has not happened upon which the property was to pass. See Williston, Sales, Section 346 (a) (rev ed 1948) where the author criticizes the view as failing to recognize that the seller assented to transfer the ownership in the goods and therefore at least voidable title passes. The only time this point has been mentioned by the South Carolina court was in Lee v Marion Nat. Bank, 167 SC 168, 202, 166 SE 148 (1932). There the court stated by way of dictum that in a cash transaction where payment is made by check which is dishonored, title does not pass. The court went on to say, however, that “the seller may repossess it (the goods) if it is not passed into the hands of an innocent purchaser without notice. If it has so passed, he may recover the value of it from the purchaser, or from one who receives it from the purchaser with notice.” (Quote from 167 SC, p 202) Commercial Code Section 2‑403(1)(b) settles the doubt by treating the title of the purchaser who gives a bad check as voidable, cutting off the claim to the goods in the hands of a good faith purchaser for value.

Under the common law doctrine of a technical “cash sale” it is said that a seller does not pass any property interest in goods until the purchase price has been paid. See Williston, Sales, Sections 342‑346 (rev ed 1948). So far as such a rule results in subjecting a subsequent purchaser of the goods to the claims of the original unpaid seller, it is rejected by subsection (1)(c).

Where the transferor acquired the goods by assent of the original owner, though induced by fraudulent misrepresentation, voidable title is acquired which becomes indefeasible in the hands of a good faith purchaser for value. Subsection (1)(d) preserves this result despite the fact that the conduct inducing the owner to transfer the goods may be defined as larceny by the common law. This principle was recognized in Fochtman v Clanton’s Auto Auction Sales, 233 SC 581, 106 SE2d 272 (1958) where the court approved instructions to the jury that their deliberations should not be affected by whether or not the transferor could be criminally prosecuted. While all the circumstances of subsection (1) protect the good faith purchaser where his transferor is said to have at least voidable title, subsection (2) contemplates a special fact situation where the original owner would lose to such a purchaser even though he in no way assented to the transfer of ownership. This result is not unusual in the common law decisions where the original owner is said to be estopped from asserting his ownership. E.g., Russell Willis, Inc. v Page, 213 SC 156, 48 SE2d 627 (1948), where the original owner of an automobile was estopped by his negligence in giving possession and indicia of ownership to the fraudulent transferor of purchaser. In accord, Folk v Sanders, 36 SC 583, 15 SE 732 (1892) (innocent purchaser protected against claim of original owner who put possession and signed bill of sale in hands of a transferor even though it was intended only as security). Most recently the South Carolina court seems to have expanded the application of estoppel against an original owner in Clanton Auction Sales, Inc. v Young, 239 SC 230, 122 SE2d 640 (1961). In that case an automobile wholesaler gave possession of cars to a dealer but retained the certificates of title and all other indicia of title until the purchase price was paid. In an action to recover one of the cars from a person who had purchased from the dealer, the court held that the plaintiff was estopped from asserting his title. See also Clanton Auction Sales, Inc. v Harvin, 238 SC 352, 120 SE2d 237 (1961); Ex parte Dort, 239 SC 250, 122 SE2d 640 (1961).

While it is said that mere possession is not enough to give rise to estoppel, the trend of the recent case law, as illustrated by the Clanton Auction Sales case, is to apply estoppel when very little more than possession is given to the transferor. This tendency is based in part on the common law cliche that if one of two innocent persons must suffer by the fraud of another, the one whose negligence makes the fraud possible must bear the loss. Also, the underlying economic policy of promoting greater negotiability of goods undoubtedly has influenced the common law development. Code Section 2‑403(2) goes beyond these cases and reaches a “market overt” (the English and European doctrine protecting purchases in the open market) result in giving protection to the buyer in the ordinary course of business (defined in Commercial Code Section 1‑201(9)) who purchases from a merchant who deals in goods of that kind. While this would seem to be a substantial change in the law as it is said to be, the change is more modest when compared with results of the recent decisions.

The broad definition of “entrusting” in subsection (3) is intended to cover all cases of possession in the merchant without regard to whether the sale was prohibited and without regard to whether the entrustment amounts to larceny by trick under the common law.

The rule of this section would also apply to cut off the claims of consignors and secured distributors who would have no reason to complain of their interest being cut off in the hands of the purchaser in the ordinary course of the business since the purpose is to have the goods sold and the proceeds used to pay for them. See Cudd v Rodgers, 111 SC 507, 98 SE 796 (1918).

CROSS REFERENCES

Buyer’s rights with respect to fungible goods sold and delivered by warehouseman, see Section 36‑7‑205.

Documents of title, see Section 36‑7‑101 et seq.

Effect of payment by check subsequently dishonored, see Section 36‑2‑512.

Law relative to fraud as supplementing code provisions, see Section 36‑1‑103.

Person in the position of a seller, see Section 36‑2‑707.

Purposes of Code and rules of construction, see Section 36‑1‑103.

Secured transaction, see Section 36‑9‑101 et seq.

Warranty of title, see Section 36‑2‑312.

LIBRARY REFERENCES

Estoppel 75.

Sales 234.

Westlaw Key Number Searches: 156k75; 343k234.

C.J.S. Estoppel Sections 118 to 119.

C.J.S. Sales Sections 232 to 233, 235.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Children and Families Section 66, Ratification or Avoidance.

NOTES OF DECISIONS

Buyer in ordinary course of business 1

Entrusting 2

1. Buyer in ordinary course of business

Buyer of used cars was not buyer in ordinary course of business, under UCC Sections 1‑201(9) and 2‑403(2), so as to be entitled to relief under entrustment provisions of UCC Section 2‑403(2) and (3) in declaratory judgment action to recover certificates of title to cars purchased, where (1) buyer, at time of purchasing cars, knew or should have known that seller did not have certificates of title to them, and (2) buyer, in order to obtain such certificates, knowingly deviated from its normally prudent course of issuing only title‑attached checks by issuing regular checks to seller in payment for cars. Rawl’s Auto Auction Sales, Inc. v. Dick Herriman Ford, Inc. (C.A.4 (S.C.) 1982) 690 F.2d 422.

Purchaser of vehicle from dealer was a “buyer in the ordinary course of business” (Code Section 36‑1‑201) and was protected against claim of true owner, where vehicle was displayed by dealer on its lot with sale indicia and in a manner that would indicate that dealer both dealt in goods of this kind and was fully empowered to sell vehicle to buyer in ordinary course of its business; consequently, Code Section 56‑19‑360 is not dispositive where innocent purchaser stands to lose to another, albeit innocent, whose acts made conduct of wrongdoer possible. American Lease Plans, Inc. v. R. C. Jacobs Plumbing, Heating & Air Conditioning, Inc. (S.C. 1979) 274 S.C. 28, 260 S.E.2d 712.

2. Entrusting

Co‑tenant of crop owner and grower entrusted crop to grower, within meaning of South Carolina Code Section 36‑2‑403, where cotenant allowed grower to retain possession and control over cotenant’s portion of crop, where cotenant knew that grower had been selling crop to purchaser since 1970, and that cotenant knew that proceeds of such sales went to grower, and where cotenant had acquiesced in growers’ selling crop to purchaser for over 10 years. Robison v. Gerber Products Co. (C.A.4 (S.C.) 1985) 765 F.2d 431.

Part 5

Performance

**SECTION 36‑2‑501.** Insurable interest in goods; manner of identification of goods.

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting, whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

HISTORY: 1962 Code Section 10.2‑501; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: See Sections 17 and 19, Uniform Sales Act.

Purposes:

1. The present section deals with the manner of identifying goods to the contract so that an insurable interest in the buyer and the rights set forth in the next section will accrue. Generally speaking, identification may be made in any manner “explicitly agreed to” by the parties. The rules of paragraphs (a), (b) and (c) apply only in the absence of such “explicit agreement”.

2. In the ordinary case identification of particular existing goods as goods to which the contract refers is unambiguous and may occur in one of many ways. It is possible, however, for the identification to be tentative or contingent. In view of the limited effect given to identification by this Article, the general policy is to resolve all doubts in favor of identification.

3. The provision of this section as to “explicit agreement” clarifies the present confusion in the law of sales which has arisen from the fact that under prior uniform legislation all rules of presumption with reference to the passing of title or to appropriation (which in turn depended upon identification) were regarded as subject to the contrary intention of the parties or of the party appropriating. Such uncertainty is reduced to a minimum under this section by requiring “explicit agreement” of the parties before the rules of paragraphs (a), (b) and (c) are displaced—as they would be by a term giving the buyer power to select the goods. An “explicit” agreement, however, need not necessarily be found in the terms used in the particular transaction. Thus, where a usage of the trade has previously been made explicit by reduction to a standard set of “rules and regulations” currently incorporated by reference into the contracts of the parties, a relevant provision of those “rules and regulations” is “explicit” within the meaning of this section.

4. In view of the limited function of identification there is no requirement in this section that the goods be in deliverable state or that all of the seller’s duties with respect to the processing of the goods be completed in order that identification occur. For example, despite identification the risk of loss remains on the seller under the risk of loss provisions until completion of his duties as to the goods and all of his remedies remain dependent upon his not defaulting under the contract.

5. Undivided shares in an identified fungible bulk, such as grain in an elevator or oil in a storage tank, can be sold. The mere making of the contract with reference to an undivided share in an identified fungible bulk is enough under subsection (a) to effect an identification if there is no explicit agreement otherwise. The seller’s duty, however, to segregate and deliver according to the contract is not affected by such an identification but is controlled by other provisions of this Article.

6. Identification of crops under paragraph (c) is made upon planting only if they are to be harvested within the year or within the next normal harvest season. The phrase “next normal harvest season” fairly includes nursery stock raised for normally quick “harvest,” but plainly excludes a “timber” crop to which the concept of a harvest “season” is inapplicable.

Paragraph (c) is also applicable to a crop of wool or the young of animals to be born within twelve months after contracting. The product of a lumbering, mining or fishing operation, though seasonal, is not within the concept of “growing”. Identification under a contract for all or part of the output of such an operation can be effected early in the operation.

Cross References:

Point 1: Section 2‑502.

Point 4: Sections 2‑509, 2‑510 and 2‑703.

Point 5: Sections 2‑105, 2‑308, 2‑503 and 2‑509.

Point 6: Sections 2‑105(1), 2‑107(1) and 2‑402.

Definitional Cross References:

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| “Agreement” | Section 1‑201. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Future goods” | Section 2‑105. |
| “Goods” | Section 2‑105. |
| “Notification” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Sale” | Section 2‑106. |
| “Security interest” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

As explained in South Carolina Reporter’s Comments to Code Section 2‑401, the earliest time when title may pass to a buyer is when the goods have been “identified” to the contract as that term is defined in Commercial Code Section 2‑501. “Identification” also is the rough equivalent of and replacement for the requirement of “ascertainment” and “appropriation” to the contract as the common law prerequisite to the passage of title with respect to future goods. Massillon Sign & Poster Co. v Buffalo Lick Springs Co., 81 SC 114, 61 SE 1098 (1903). When the goods are identified to the contract a “special property” passes to the buyer. This term is applied in Commercial Code Section 2‑502, buyer’s right to claim goods on seller’s insolvency; 2‑716(3), buyer’s right to replevin; 2‑709(1)(b), seller’s right to the price; 2‑722, claims against third parties for injury to the goods. Finally, under subsection (1) an insurable interest in the goods passes to the buyer when the goods are identified to the contract. It should be noted that this section states the circumstances under which identification occurs only when not otherwise explicitly agreed to by the parties.

In establishing the test for insurable interest, subsection (1) would probably establish a standard similar to that presently employed in South Carolina even though the terminology of “identification to the contract” would be new. It has been held in a number of cases that legal title is not necessary in order to constitute an insurable interest, an equitable interest being sufficient. E.g., Scott v Liverpool & London & Globe Ins. Co., 102 SC 115, 86 SE 484 (1915); Dunning v Firemen’s Ins. Co., 194 SC 98, 8 SE2d 318 (1940). In Milhous v Globe & Rutgers Fire Ins. Co., 161 SC 96, 159 SE 506 (1931), it was held that a vendee of an executory contract of sale had an insurable interest in the property.

Subsection (2) also recognizes that a separate insurable interest remains in the seller so long as he retains title or a security interest. This is in accord with South Carolina case law which holds that a mortgagee has an insurable interest in the mortgaged property separate from the mortgagor. Geiger v Ashley, 185 SC 71, 193 SE 192 (1937); Laurens Fed. Saving & Loan Ass’n v Home Ins. Co., 242 SC 226, 130 SE2d 558 (1963).

Section 2‑501(1)(a) provides that identification occurs when the contract is made if the goods are existing and identified. This would produce an outcome similar to that of existing case law, which holds that title passes to existing goods at the time of contracting, since identification under the Commercial Code produces similar results as passage of title under existing law. John Frazer & Co. v Hilliard, 2 Strob 309 (1848). The usual requirement that the goods be in a deliverable state, however, plays no part in accomplishing the identification. (See USA Section 19(2).).

If the contract is for the sale of future goods, identification occurs when the goods are designated by the seller as provided in subsection (1)(b). Since identification is the rough equivalent of “appropriation” under existing law which is a prerequisite to the passage of title as to future goods, the Commercial Code will produce similar results in many cases. See Massillon Sign & Poster Co. v Buffalo Lick Springs Co., 81 SC 114, 119, 61 SE 1098 (1908) where the court said “the law requires that the title to said articles passed to the defendant upon the appropriation of the finished article to the contract.” In accord, Sahlman v Mills & Co., 3 Strob 384 (1849). The usual common law requirements of an appropriation are mutual assent (i.e., the buyer must assent to the seller’s selection) and the goods must conform to the contract. See Williston, Sales, Section 275 (rev ed 1948). These conditions are not involved in identification under the Commercial Code.

Section 2‑501(1)(c) is a special treatment of future crops and livestock expressly excluded from the coverage of subsection (b). This subsection cuts back on the common law concept of “potential possession” which permits a present sale of crops not yet planted or young of animals not yet conceived so long as the seller owned the land or the mother animal. See Williston, Sales, Sections 135 and 136 (rev ed 1948). If the contract is for animals to be born within twelve months after contracting or crops to be harvested within twelve months, identification takes place when the crops are planted or otherwise become growing crops or when the young are conceived.

CROSS REFERENCES

Absence of specified place for delivery, see Section 36‑2‑308.

Contract for sale of growing crops, see Section 36‑2‑107.

Insurance generally, see Title 38.

Rights of seller’s unsecured creditors with respect to goods identified to contract, see Section 36‑2‑402.

Risk of loss, see Sections 36‑2‑509, 36‑2‑510.

Seller’s remedies generally, see Section 36‑2‑703.

LIBRARY REFERENCES

Insurance 1779, 1790.

Sales 208.

Westlaw Key Number Searches: 217k1779; 217k1790; 343k208.

C.J.S. Insurance Sections 218 to 219, 222 to 224.

C.J.S. Sales Sections 214, 217.

**SECTION 36‑2‑502.** Buyer’s right to goods on seller’s insolvency.

(1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section (Section 36‑2‑501) may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

HISTORY: 1962 Code Section 10.2‑502; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Compare Sections 17, 18 and 19, Uniform Sales Act.

Purposes:

1. This section gives an additional right to the buyer as a result of identification of the goods to the contract in the manner provided in Section 2‑501. The buyer is given a right to the goods on the seller’s insolvency occurring within 10 days after he receives the first installment on their price.

2. The question of whether the buyer also acquires a security interest in identified goods and has rights to the goods when insolvency takes place after the ten‑day period provided in this section depends upon compliance with the provisions of the Article on Secured Transactions (Article 9).

3. Subsection (2) is included to preclude the possibility of unjust enrichment which exists if the buyer were permitted to recover goods even though they were greatly superior in quality or quantity to that called for by the contract for sale.

Cross References:

Point 1: Sections 1‑201 and 2‑702.

Point 2: Article 9.

“Definitional Cross References: .

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| “Buyer” | Section 2‑103. |
| “Conform” | Section 2‑106. |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Insolvent” | Section 1‑201. |
| “Right” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Under existing law when title has passed to the buyer, he will be able to replevy the goods from an insolvent seller. Ex Parte Benjamin Harris & Co., 141 SC 430, 140 SE 101 (1927). Otherwise, in a majority of jurisdictions which have passed on the question, the insolvency of the seller affords no reason to grant specific enforcement of the contract. Williston, Sales, Section 143 (rev ed 1948). The seller is frequently permitted to recover goods sold to an insolvent buyer on the theory of fraud, however, and Commercial Code Section 2‑702 gives the seller the right to reclaim goods sold on credit upon the buyer’s insolvency.

Section 2‑502 tends to equalize the remedies of the buyer and seller by giving the buyer the right of specific performance when the following requirements of the section are met:

(1) A special property in the goods has passed to the buyer (upon their identification as provided in Code Section 2‑501);.

(2) The buyer has paid part of the purchase price;.

(3) The buyer keeps good a tender of the unpaid portion of the purchase price;.

(4) The seller has received the first installment on the price within ten days of insolvency.

Under subsection (2) if the goods are identified to the contract by the buyer (which he can do under Commercial Code Section 2‑501 even though the goods are non‑conforming), they must conform to the contract for sale. This requirement is designed to prevent the buyer from identifying to the contract goods of greater value than those called for by the contract to the detriment of the seller’s other creditors.

CROSS REFERENCES

Right of seller’s creditors against goods sold, see Section 36‑2‑402.

Secured transactions, see Sections 36‑9‑101 et seq.

Seller’s remedies in case of buyer’s insolvency, see Section 36‑2‑702.

LIBRARY REFERENCES

Sales 399.

Westlaw Key Number Search: 343k399.

C.J.S. Sales Sections 374, 389.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

**SECTION 36‑2‑503.** Manner of seller’s tender of delivery.

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer’s disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this chapter, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section (Section 36‑2‑504) respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved:

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer’s right to possession of the goods; but

(b) tender to the buyer of a nonnegotiable document of title or of a record directing the bailee to deliver is sufficient tender unless the buyer seasonably objects, and except as otherwise provided in Chapter 9 receipt by the bailee of notification of the buyer’s rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents:

(a) he must tender all such documents in correct form, except as provided in this chapter with respect to bills of lading in a set (subsection (2) of Section 36‑2‑323); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying or associated with the documents constitutes nonacceptance or rejection.

HISTORY: 1962 Code Section 10.2‑503; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 10, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: See Sections 11, 19, 20, 43(3) and (4), 46 and 51, Uniform Sales Act.

Changes: The general policy of the above sections is continued and supplemented but subsection (3) changes the rule of prior section 19(5) as to what constitutes a “destination” contract and subsection (4) incorporates a minor correction as to tender of delivery of goods in the possession of a bailee.

Purposes of changes:

1. The major general rules governing the manner of proper or due tender of delivery are gathered in this section. The term “tender” is used in this Article in two different senses. In one sense it refers to “due tender” which contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself ready to proceed. Unless the context unmistakably indicates otherwise this is the meaning of “tender” in this Article and the occasional addition of the word “due” is only for clarity and emphasis. At other times it is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation. Used in either sense, however, “tender” connotes such performance by the tendering party as puts the other party in default if he fails to proceed in some manner. These concepts of tender would apply to tender of either tangible or electronic documents of title.

2. The seller’s general duty to tender and deliver is laid down in Section 2‑301 and more particularly in Section 2‑507. The seller’s right to a receipt if he demands one and receipts are customary is governed by Section 1‑205. Subsection (1) of the present sections proceeds to set forth two primary requirements of tender: first, that the seller “put and hold conforming goods at the buyer’s disposition” and, second, that he “give the buyer any notice reasonably necessary to enable him to take delivery.”

In cases in which payment is due and demanded upon delivery the “buyer’s disposition” is qualified by the seller’s right to retain control of the goods until payment by the provision of this Article on delivery on condition. However, where the seller is demanding payment on delivery he must first allow the buyer to inspect the goods in order to avoid impairing his tender unless the contract for sale is on C.I.F., C.O.D., cash against documents or similar terms negating the privilege of inspection before payment.

In the case of contracts involving documents the seller can “put and hold conforming goods at the buyer’s disposition” under subsection (1) by tendering documents which give the buyer complete control of the goods under the provisions of Article 7 on due negotiation.

3. Under paragraph (a) of subsection (1) usage of the trade and the circumstances of the particular case determine what is a reasonable hour for tender and what constitutes a reasonable period of holding the goods available.

4. The buyer must furnish reasonable facilities for the receipt of the goods tendered by the seller under subsection (1), paragraph (b). This obligation of the buyer is no part of the seller’s tender.

5. For the purposes of subsections (2) and (3) there is omitted from this Article the rule under prior uniform legislation that a term requiring the seller to pay the freight or cost of transportation to the buyer is equivalent to an agreement by the seller to deliver to the buyer or at an agreed destination. This omission is with the specific intention of negating the rule, for under this Article the “shipment” contract is regarded as the normal one and the “destination” contract as the variant type. The seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he has specifically agreed so to deliver or the commercial understanding of the terms used by the parties contemplates such delivery.

6. Paragraph (a) of subsection (4) continues the rule of the prior uniform legislation as to acknowledgment by the bailee. Paragraph (b) of subsection (4) adopts the rule that between the buyer and the seller the risk of loss remains on the seller during a period reasonable for securing acknowledgment of the transfer from the bailee, while as against all other parties the buyer’s rights are fixed as of the time the bailee receives notice of the transfer.

7. Under subsection (5) documents are never “required” except where there is an express contract term or it is plainly implicit in the peculiar circumstances of the case or in a usage of trade. Documents may, of course, be “authorized” although not required, but such cases are not within the scope of this subsection. When documents are required, there are three main requirements of this subsection: (1) “All”: each required document is essential to a proper tender; (2) “Such”: the documents must be the ones actually required by the contract in terms of source and substance; (3) “Correct form”: all documents must be in correct form. These requirements apply to both tangible and electronic documents of title. When tender is made through customary banking channels, a draft may accompany or be associated with a document of title. The language has been broadened to allow for drafts to be associated with an electronic document of title. Compare Section 2‑104(2) definition of financing agency.

When a prescribed document cannot be procured, a question of fact arises under the provision of this Article on substituted performance as to whether the agreed manner of delivery is actually commercially impracticable and whether the substitute is commercially reasonable.

Cross References:

Point 2: Sections 1‑205, 2‑301, 2‑310, 2‑507 and 2‑513 and Article 7.

Point 5: Sections 2‑308, 2‑310 and 2‑509.

Point 7: Section 2‑614(1).

Specific matters involving tender are covered in many additional sections of this Article. See Sections 1‑205, 2‑301, 2‑306 to 2‑319, 2‑321(3), 2‑504, 2‑507(2), 2‑511(1), 2‑513, 2‑612 and 2‑614.

Definitional Cross References:

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| “Agreement” | Section 1‑201. |
| “Bill of lading” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Conforming” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Delivery” | Section 1‑201. |
| “Dishonor” | Section 3‑508. |
| “Document of title” | Section 1‑201. |
| “Draft” | Section 3‑104. |
| “Goods” | Section 2‑105. |
| “Notification” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Receipt of goods” | Section 2‑103. |
| “Rights” | Section 1‑201. |
| “Seasonably” | Section 1‑204. |
| “Seller” | Section 2‑103. |
| “Written” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑503 prescribes the manner of the seller’s duty to tender delivery of goods and documents. Only upon such tender has the seller performed giving rise to his rights to demand performance by the buyer under Commercial Code Section 2‑507.

Subsection (1) sets out the two‑fold elements of tender: (1) “put and hold conforming goods at the buyer’s disposition,” and (2) “give the buyer any notification reasonably necessary to enable him to take possession.” The first of these requirements is obvious. The second is subject to some question under existing law but there is considerable authority for the requirement of giving notice to the buyer under some circumstances. See Williston, Sales, Section 457 (rev ed 1948). In South Carolina it has been held that where the contract calls for delivery at a specified time and place, the vendor is under no implied obligation to give notice to the vendee that the goods are ready to be delivered at the time and place specified. Pickett v Cloud, 1 Bailey 362 (1830). But in Buckeye Cotton Oil Co. v Matheson, 104 SC 430, 89 SE 478 (1916) it was recognized that the carrier acting as the seller’s agent to deliver was under a duty to give notice to the consignee. The Commercial Code requirement to give notice “reasonably necessary to enable him to take possession” is probably in accord with existing law. That the buyer must furnish facilities suited to the receipt of the goods is in accord with the general requirement that the buyer must cooperate with the seller to make tender possible. For example, in Cooper & Griffin v W. C. Cooke & Co., 122 SC 314, 115 SE 312 (1922), the seller was not in breach of a sales contract which called for delivery when notified by the buyer where to ship until instructions were given by the buyer.

Subsection (2) is a cross‑reference to Commercial Code Section 2‑504 dealing with tender of delivery under shipment contracts and will be discussed under that section. Subsection (3) is also a cross‑reference to subsections (1), (4), and (5) and makes clear that the seller is not required to deliver at a named destination unless the contract expressly so provides. As pointed out in the official comments, the shipment contract (Commercial Code Section 2‑504) is the normal one and thus presumed to be intended by the parties.

Section 2‑503(4) prescribes the methods of tendering goods which are in possession of a bailee. Delivery of negotiable documents of title covering the goods is a usual method of delivery approved by subsection (4)(a). In accord, Ex parte Benjamin Harris & Co., 141 SC 140 SE 101 (1927); Southworth v Sebring, 2 Hill 587 (1835). Alternatively, tender occurs when the bailee acknowledges that he holds the goods for the buyer.

While the buyer has the right to insist on negotiable documents or acknowledgment of the bailee as a proper tender of the goods, a nonnegotiable document or written notification to the bailee is sufficient unless the buyer seasonably objects. Under subsection (4)(b) the risk of loss remains on the seller until the buyer has had a reasonable time to request the bailee’s compliance with the non‑negotiable document or written direction. (See Commercial Code Section 2‑509(2) on risk of loss.) Refusal to honor the document or direction defeats the tender.

Section 2‑503(5) deals with the tender requirement of a documentary sale. Subsection (5)(a) states the obvious rule that the seller must tender the documents in correct form. Subsection (5)(b) recognizes the usual practice of tendering the documents through banking channels to be delivered to the buyer when he honors the draft drawn on him for the purchase price.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 10, in subsection (4)(b), substituted “a record directing the bailee” for “a written direction to the bailee”, and inserted “except as otherwise provided in Chapter 9”; in subsection (5)(b), inserted “or associated with”; and made other nonsubstantive changes in subsections (4) and (5).

CROSS REFERENCES

Delivery of documents of title through banking channels, see Section 36‑2‑308.

Documents of title, see Section 36‑7‑101 et seq.

F.O.B. and F.A.S. shipments, see Section 36‑2‑319.

General obligations of seller and buyer, see Section 36‑2‑301.

Instalment contract as requiring or authorizing delivery in separate lots, see Section 36‑2‑612.

Overseas shipment, bill of lading in set of parts, see Section 36‑2‑323.

Preliminary inspection under C.I.F. or C. & F. contracts, see Section 36‑2‑321.

Single delivery or in lots, see Section 36‑2‑307.

Substitute performance, see Section 36‑2‑614.

Time and place of payment, see Section 36‑2‑310.

LIBRARY REFERENCES

Sales 153.

Westlaw Key Number Search: 343k153.

C.J.S. Sales Sections 161, 164, 182.

**SECTION 36‑2‑504.** Shipment by seller.

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

HISTORY: 1962 Code Section 10.2‑504; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 46, Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

To continue the general policy of the prior uniform statutory provision while incorporating certain modifications with respect to the requirement that the contract with the carrier be made expressly on behalf of the buyer and as to the necessity of giving notice of the shipment to the buyer, so that:

1. The section is limited to “shipment” contracts as contrasted with “destination” contracts or contracts for delivery at the place where the goods are located. The general principles embodied in this section cover the special cases of F.O.B. point of shipment contracts and C.I.F. and C. & F. contracts. Under the preceding section on manner of tender of delivery, due tender by the seller requires that he comply with the requirements of this section in appropriate cases.

2. The contract to be made with the carrier under paragraph (a) must conform to all express terms of the agreement, subject to any substitution necessary because of failure of agreed facilities as provided in the later provision on substituted performance. However, under the policies of this Article on good faith and commercial standards and on buyer’s rights on improper delivery, the requirements of explicit provisions must be read in terms of their commercial and not their literal meaning. This policy is made express with respect to bills of lading in a set in the provision of this Article on form of bills of lading required in overseas shipment.

3. In the absence of agreement, the provision of this Article on options and cooperation respecting performance gives the seller the choice of any reasonable carrier, routing and other arrangements. Whether or not the shipment is at the buyer’s expense the seller must see to any arrangements, reasonable in the circumstances, such as refrigeration, watering of live stock, protection against cold, the sending along of any necessary help, selection of specialized cars and the like for paragraph (a) is intended to cover all necessary arrangements whether made by contract with the carrier or otherwise. There is, however, a proper relaxation of such requirements if the buyer is himself in a position to make the appropriate arrangements and the seller gives him reasonable notice of the need to do so. It is an improper contract under paragraph (a) for the seller to agree with the carrier to a limited valuation below the true value and thus cut off the buyer’s opportunity to recover from the carrier in the event of loss, when the risk of shipment is placed on the buyer by his contract with the seller.

4. Both the language of paragraph (b) and the nature of the situation it concerns indicate that the requirement that the seller must obtain and deliver promptly to the buyer in due form any document necessary to enable him to obtain possession of the goods is intended to cumulate with the other duties of the seller such as those covered in paragraph (a).

In this connection, in the case of pool car shipments a delivery order furnished by the seller on the pool car consignee, or on the carrier for delivery out of a larger quantity, satisfies the requirements of paragraph (b) unless the contract requires some other form of document.

5. This Article, unlike the prior uniform statutory provision, makes it the seller’s duty to notify the buyer of shipment in all cases. The consequences of his failure to do so, however, are limited in that the buyer may reject on this ground only where material delay or loss ensues.

A standard and acceptable manner of notification in open credit shipments is the sending of an invoice and in the case of documentary contracts is the prompt forwarding of the documents as under paragraph (b) of this section. It is also usual to send on a straight bill of lading but this is not necessary to the required notification. However, should such a document prove necessary or convenient to the buyer, as in the case of loss and claim against the carrier, good faith would require the seller to send it on request.

Frequently the agreement expressly requires prompt notification as by wire or cable. Such a term may be of the essence and the final clause of paragraph (c) does not prevent the parties from making this a particular ground for rejection. To have this vital and irreparable effect upon the seller’s duties, such a term should be part of the “dickered” terms written in any “form,” or should otherwise be called seasonably and sharply to the seller’s attention.

6. Generally, under the final sentence of the section, rejection by the buyer is justified only when the seller’s dereliction as to any of the requirements of this section in fact is followed by material delay or damage. It rests on the seller, so far as concerns matters not within the peculiar knowledge of the buyer, to establish that his error has not been followed by events which justify rejection.

Cross References:

Point 1: Sections 2‑319, 2‑320 and 2‑503(2).

Point 2: Sections 1‑203, 2‑323(2), 2‑601 and 2‑614(1).

Point 3: Section 2‑311(2).

Point 5: Section 1‑203.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Agreement” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Delivery” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Notifies” | Section 1‑201. |
| “Seller” | Section 2‑103. |
| “Send” | Section 1‑201. |
| “Usage of trade” | Section 1‑205. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑504 deals with the seller’s tender requirements for shipment contracts where he is not required by the contract to make delivery at destination. The seller completes his tender performance by delivery of the goods to the carrier, tendering the necessary documents to enable the buyer to obtain possession of the goods and by notifying the buyer of the shipment. The South Carolina case law is generally in accord that delivery to the carrier is delivery to the buyer thus completing performance of the shipment contract. Standard Boiler & Plate Iron Co. v Brock, 112 SC 323, 99 SE 769 (1919); J. B. Colt Co. v Tyler, 132 SC 511, 129 SE 213 (1925).

The cases which treat delivery to the carrier as delivery to the buyer involve sales contracts which show the intention of the parties as by the mercantile symbols “F.O.B., place of shipment.” In Goodwyn Harrington & Co. v Douglas, Cheves 174 (1840), it was observed that where the seller is to pay the freight and select the carrier, this would be treated as a destination contract with risk of loss on the seller during transit. As pointed out in South Carolina Reporter’s Comments to Code Section 2‑504(3), the Commercial Code would modify this approach and treat the shipment contract as the usual one and thus presume to have been intended by the parties unless they expressly provide for a destination contract. This would be true even though the seller is charged with the responsibility for shipping arrangements under this section. (See Commercial Code Section 2‑319 for definition of mercantile symbols which determine whether a shipment or destination contract was agreed to by the parties.).

The requirement to notify the buyer of the shipment in all cases may be an extension of the requirement to notify (see USA Section 46(3) requiring notification only where it is expected that the buyer will want to insure the goods in transit). This would not be a very significant change, however, since the failure to notify will be a ground for rejection of the goods only if material delay or loss ensues.

CROSS REFERENCES

Bill of lading in set of parts in overseas shipment, see Section 36‑2‑323.

Buyer’s options in case of nonconforming tender of delivery, see Section 36‑2‑601.

C. I. F. and C. & F. contracts, see Section 36‑2‑320.

F. O. B. place of shipment contracts, see Section 36‑2‑319.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Options and co‑operation respecting performance, see Section 36‑2‑311.

Substitute performance, see Section 36‑2‑614.

LIBRARY REFERENCES

Sales 83, 161.

Westlaw Key Number Searches: 343k83; 343k161.

C.J.S. Sales Sections 157, 164, 167, 172, 174 to 175.

**SECTION 36‑2‑505.** Seller’s shipment under reservation.

(1) Where the seller has identified goods to the contract by or before shipment:

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller’s expectation of transferring that interest to the person named.

(b) a nonnegotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of Section 36‑2‑507) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession or control of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section (Section 36‑2‑504) but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller’s powers as a holder of a negotiable document of title.

HISTORY: 1962 Code Section 10.2‑505; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 11, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 20(2), (3), (4), Uniform Sales Act.

Changes: Completely rephrased, the “powers” of the parties in cases of reservation being emphasized primarily rather the “rightfulness” of reservation.

Purposes of changes:

To continue in general the policy of the prior uniform statutory provision with certain modifications of emphasis and language, so that:

1. The security interest reserved to the seller under subsection (1) is restricted to securing payment or performance by the buyer and the seller is strictly limited in his disposition and control of the goods as against the buyer and third parties. Under this Article, the provision as to the passing of interest expressly applies “despite any reservation of security title” and also provides that the “rights, obligations and remedies” of the parties are not altered by the incidence of title generally. The security interest, therefore, must be regarded as a means given to the seller to enforce his rights against the buyer which is unaffected by and in turn does not affect the location of title generally. The rules set forth in subsection (1) are not to be altered by any apparent “contrary intent” of the parties as to passing of title, since the rights and remedies of the parties to the contract of sale, as defined in this Article, rest on the contract and its performance or breach and not on stereotyped presumptions as to the location of title.

This Article does not attempt to regulate local procedure in regard to the effective maintenance of the seller’s security interest when the action is in replevin by the buyer against the carrier.

2. Every shipment of identified goods under a negotiable bill of lading reserves a security interest in the seller under subsection (1) paragraph (a).

It is frequently convenient for the seller to make the bill of lading to the order of a nominee such as his agent at destination, the financing agency to which he expects to negotiate the document or the bank issuing a credit to him. In many instances, also, the buyer is made the order party. This Article does not deal directly with the question as to whether a bill of lading made out by the seller to the order of a nominee gives the carrier notice of any rights which the nominee may have so as to limit its freedom or obligation to honor the bill of lading in the hands of the seller as the original shipper if the expected negotiation fails. This is dealt with in the Article on Documents of Title (Article 7).

3. A non‑negotiable bill of lading taken to a party other than the buyer under subsection (1) paragraph (b) reserves possession of the goods as security in the seller but if he seeks to withhold the goods improperly the buyer can tender payment and recover them.

4. In the case of a shipment by nonnegotiable bill of lading taken to a buyer, the seller, under subsection (1) retains no security interest or possession as against the buyer and by the shipment he de facto loses control as against the carrier except where he rightfully and effectively stops delivery in transit. In cases in which the contract gives the seller the right to payment against delivery, the seller, by making an immediate demand for payment, can show that his delivery is conditional, but this does not prevent the buyer’s power to transfer full title to a sub‑buyer in ordinary course or other purchaser under Section 2‑403.

5. Under subsection (2) an improper reservation by the seller which would constitute a breach in no way impairs such of the buyer’s rights as result from identification of the goods. The security title reserved by the seller under subsection (1) does not protect his retaining possession or control of the document or the goods for the purpose of exacting more than is due him under the contract.

Cross References:

Point 1: Section 1‑201.

Point 2: Article 7.

Point 3: Sections 2‑501(2) and 2‑504.

Point 4: Sections 2‑403, 2‑507(2) and 2‑705.

Point 5: Sections 2‑310, 2‑319(4), 2‑320(4), 2‑501 and 2‑502 and Article 7.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Bill of lading” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Consignee” | Section 7‑102. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Delivery” | Section 1‑201. |
| “Financing agency” | Section 2‑104. |
| “Goods” | Section 2‑105. |
| “Holder” | Section 1‑201. |
| “Person” | Section 1‑201. |
| “Security interest” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑505(1)(a) reserves in the seller a security interest in goods shipped under a negotiable bill of lading. South Carolina case law designates the shipper’s interest as “retained title” where he procures a bill of lading to his own order which cannot pass from him until he transfers the bill of lading. Liberty Nat. Bank v Hines, 115 SC 82, 104 SE 313 (1920). The bill of lading is a symbol of property and when properly transferred will operate to pass title to the goods. Campbell v Noble‑Trotter Rice Milling Co., 188 SC 212, 198 SE 373 (1938). The retained “title” in the seller is for the purpose of securing the buyer’s performance and is therefore the equivalent of the Commercial Code’s term “security interest.”

Under subsection (1)(b), a nonnegotiable bill of lading naming the seller or his nominee as consignee reserves possession of the goods in the seller as security for the purchase price. In such case the carrier cannot make a proper delivery to anyone else without authorization from the named consignee. In such a situation the seller retains control over the goods during shipment and has a security interest in the goods by virtue of this control. If the buyer is named consignee of a straight bill of lading, the seller loses his right of possession as soon as he ships and a carrier may properly deliver the goods to the buyer without taking up the bill of lading. In accord, Victor Fertilizer Co. v Southern Ry. Co., 202 SC 294, 24 SE2d 499 (1943) holding that the consignee named in the bill of lading is presumptively the owner of the goods shipped. Also in Buckeye Cotton Oil Co. v Matheson, 104 SC 430, 433, 89 SE 478 (1916) where a straight bill of lading named the buyer as consignee, the court said “If the railroad had delivered the goods to the consignee without the surrender of the bill of lading it would not be liable to the consignor.”

Section 2‑505(2) provides that when shipment by the seller with reservation of security violates the sales contract, this is not a proper contract of transportation. Such a breach does not impair the rights given to the buyer by virtue of the shipment and identification of the goods to the contract nor the seller’s power as a holder of the document of title.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 11, in subsection (1)(b), inserted “or control” before “of the bill of lading”; in subsection (2), inserted “of title” following “of a negotiable document”; and made other nonsubstantive changes in subsections (1)(b) and (2).

CROSS REFERENCES

Authority of seller to send goods to ship under reservation, see Section 36‑2‑310.

Buyer’s right to replevin for goods identified to contract, see Section 36‑2‑716.

C. I. F. or C. & F. contracts, payments against tender of required documents, see Section 36‑2‑320.

Collection of documentary drafts, see Section 36‑4‑501 et seq.

Documents of title, see Section 36‑7‑101 et seq.

“Financing agency”, see Section 36‑2‑104.

Letters of credit, see Section 36‑5‑101 et seq.

Power to transfer title, see Section 36‑2‑403.

Secured transactions, see Section 36‑9‑101 et seq.

Security interest subject to Chapter 9, see Section 36‑9‑110

Seller’s retention or reservation of title in goods shipped or delivered limited in effect to reservation of security interest, see Sections 36‑1‑201, 36‑2‑401.

Shipment F. O. B. vessel or F. A. S., payment against tender of required documents, see Section 36‑2‑319.

Stoppage in transit, see Section 36‑2‑705.

LIBRARY REFERENCES

Carriers 54 to 59.

Sales 300, 316.

Shipping 106(3).

Westlaw Key Number Searches: 70k54 to 70k59; 343k300; 343k316; 354k106(3).

C.J.S. Carriers Sections 392, 398 to 402.

C.J.S. Sales Sections 325 to 326, 328, 339 to 343.

C.J.S. Shipping Sections 256, 260 to 265.

**SECTION 36‑2‑506.** Rights of financing agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper’s right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular.

HISTORY: 1962 Code Section 10.2‑506; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 12, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. “Financing agency” is broadly defined in this Article to cover every normal instance in which a party aids or intervenes in the financing of a sales transaction. The term as used in subsection (1) is not in any sense intended as a limitation and covers any other appropriate situation which may arise outside the scope of the definition.

2. “Paying” as used in subsection (1) is typified by the letter of credit, or “authority to pay” situation in which a banker, by arrangement with the buyer or other consignee, pays on his behalf a draft for the price of the goods. It is immaterial whether the draft is formally drawn on the party paying or his principal, whether it is a sight draft paid in cash or a time draft “paid” in the first instance by acceptance, or whether the payment is viewed as absolute or conditional. All of these cases constitute “payment” under this subsection. Similarly, “purchasing for value” is used to indicate the whole area of financing by the seller’s banker, and the principle of subsection (1) is applicable without any niceties of distinction between “purchase,” “discount,” “advance against collection” or the like. But it is important to notice that the only right to have the draft honored that is acquired is that against the buyer; if any right against any one else is claimed it will have to be under some separate obligation of that other person. A letter of credit does not necessarily protect purchasers of drafts. See Article 5. And for the relations of the parties to documentary drafts see Part 5 of Article 4.

3. Subsection (1) is made applicable to payments or advances against a draft which “relates to” a shipment of goods and this has been chosen as a term of maximum breadth. In particular the term is intended to cover the case of a draft against an invoice or against a delivery order. Further, it is unnecessary that there be an explicit assignment of the invoice attached to the draft to bring the transaction within the reason of this subsection.

4. After shipment, “the rights of the shipper in the goods” are merely security rights and are subject to the buyer’s right to force delivery upon tender of the price. The rights acquired by the financing agency are similarly limited and, moreover, if the agency fails to procure any outstanding negotiable document of title, it may find its exercise of these rights hampered or even defeated by the seller’s disposition of the document to a third party. This section does not attempt to create any new rights in the financing agency against the carrier which would force the latter to honor a stop order from the agency, a stranger to the shipment, or any new rights against a holder to whom a document of title has been duly negotiated under Article 7.

5. The deletion of the language “on its face” from subsection (2) is designed to accommodate electronic documents of title without changing the requirement of regularity of the document.

Cross References:

Point 1: Section 2‑104(2) and Article 4.

Point 2: Part 5 of Article 4, and Article 5.

Point 4: Sections 2‑501 and 2‑502(1) and Article 7.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Buyer” | Section 2‑103. |
| “Document of title” | Section 1‑201. |
| “Draft” | Section 3‑104. |
| “Financing agency” | Section 2‑104. |
| “Good faith” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Honor” | Section 1‑201. |
| “Purchase” | Section 1‑201. |
| “Rights” | Section 1‑201. |
| “Value” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

This section prescribes the rights of a financing agency (see Commercial Code Section 2‑104(2)), typically the seller’s bank, who discounts a draft drawn on the buyer and takes the draft with bill of lading attached. The bank has the right to go against the seller as the drawer of the draft and the security of being the holder of the negotiable bill of lading. In accord, Union Nat. Bank v Rowan, 23 SC 339 (1885) holding that the bank can recover the goods upon dishonor of the draft from the seller’s attaching creditors. Subsection (1) gives such a financing agency any rights of the seller including the right of stoppage and the right to have the draft honored by the buyer. Similar rights are given to the buyer’s bank who pays the draft on the buyer’s behalf. In accord, Ex Parte Benjamin Harris & Co., 141 SC 430, 140 SE 101 (1927) holding that title to goods passed to the trust company upon acceptance of seller’s draft with negotiable documents attached.

When this section is read with Commercial Code Section 4‑208, it seems that a collecting bank would also have the rights prescribed by this section to the extent that any credit given for a draft deposited for collection is withdrawn or applied. The bank’s interest in the proceeds upon collection of the draft, however, would not be subject to the buyer’s right to reach these funds if the goods fail to conform to the contract. In accord, Campbell v Noble‑Trotter Rice Milling Co., 188 SC 212, 198 SE 373 (1938) recognizing that the assignee of a bill of lading is not affected by a claim of the consignee arising out of any fault in performance of the consignor’s contract.

Subsection (2) recognizes the right of a financing agency to reimbursement for a draft purchased or honored in good faith. So long as the documents are “apparently regular” on their face, the right to reimbursement is not affected by defects in the documents.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 12, in subsection (2), deleted “on its face” after “apparently regular”.

LIBRARY REFERENCES

Sales 292, 309.

Westlaw Key Number Searches: 343k292; 343k309.

C.J.S. Sales Sections 328, 334.

**SECTION 36‑2‑507.** Effect of seller’s tender; delivery on condition.

(1) Tender of delivery is a condition to the buyer’s duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

HISTORY: 1962 Code Section 10.2‑507; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: See Sections 11, 41, 42 and 69, Uniform Sales Act.

Purposes:

1. Subsection (1) continues the policies of the prior uniform statutory provisions with respect to tender and delivery by the seller. Under this Article the same rules in these matters are applied to present sales and to contracts for sales. But the provisions of this subsection must be read within the framework of the other sections of this Article which bear upon the question of delivery and payment.

2. The “unless otherwise agreed” provision of subsection (1) is directed primarily to cases in which payment in advance has been promised or a letter of credit term has been included. Payment “according to the contract” contemplates immediate payment, payment at the end of an agreed credit term, payment by a time acceptance or the like. Under this Act, “contract” means the total obligation in law which results from the parties’ agreement including the effect of this Article. In this context, therefore, there must be considered the effect in law of such provisions as those on means and manner of payment and on failure of agreed means and manner of payment.

3. Subsection (2) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer’s “right as against the seller” conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchase sections of this Article. Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.

Cross References:

Point 1: Sections 2‑310, 2‑503, 2‑511, 2‑601 and 2‑711 to 2‑713.

Point 2: Sections 1‑201, 2‑511 and 2‑614.

Point 3: Sections 2‑401, 2‑403, and 2‑702(1)(b).

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Delivery” | Section 1‑201. |
| “Document of title” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Rights” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑507 (1) states the obvious general rule that tender of delivery and payment are concurrent conditions unless otherwise agreed. (See Commercial Code Section 2‑511 on buyer’s duty to tender payment.) In accord, Sprunt v Gordon, 89 SC 426, 71 SE 1033 (1911) (seller waives tender of price by the buyer by refusing to deliver goods); Southern Coal Co. v Rice, 122 SC 484, 115 SE 815 (1923) (buyer relieved of liability for price by seller’s failure to deliver conforming goods); Pickett v Cloud, 1 Bailey 362 (1830) (where no time is specified for the payment, it must be made at the time of delivery). Under South Carolina case law and the Commercial Code, however, actual tender is not necessary where there has been anticipatory repudiation by the buyer. See, Clinton Oil & Mfg. Co. v Carpenter, 113 SC 10, 101 SE 47 (1919) where the court held one party to a contract need not tender where the other notifies him that he elects to breach the contract. Tender of delivery gives the seller the right to acceptance of the goods even though right to payment may be delayed by the express credit terms “according to the contract.”

Subsection (2) deals with the concept of conditional delivery as a limitation on the buyer’s right to retain or dispose of the goods if due presentment is not made. The conditional delivery also applies to documents of title which are delivered with a demand for payment due.

CROSS REFERENCES

Breach, repudiation, and excuse for nonperformance, see Sections 36‑2‑601 et seq.

Buyer’s remedies in case of seller’s breach, see Sections 36‑2‑711 et seq.

Good faith purchasers from buyer, see Section 36‑2‑403.

Implication arising from presence of words “unless otherwise agreed” in code provision, see Section 36‑1‑302.

Passing of title, see Section 36‑2‑401.

Seller’s remedies on buyer’s insolvency, see Section 36‑2‑702.

Substitute performance, see Section 36‑2‑614.

Time and place of payment, see Section 36‑2‑310.

LIBRARY REFERENCES

Sales 153.

Westlaw Key Number Search: 343k153.

C.J.S. Sales Sections 161, 164, 182.

**SECTION 36‑2‑508.** Cure by seller of improper tender or delivery; replacement.

(1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

HISTORY: 1962 Code Section 10.2‑508; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Subsection (1) permits a seller who has made a non‑conforming tender in any case to make a conforming delivery within the contract time upon seasonable notification to the buyer. It applies even where the seller has taken back the non‑conforming goods and refunded the purchase price. He may still make a good tender within the contract period. The closer, however, it is to the contract date, the greater is the necessity for extreme promptness on the seller’s part in notifying of his intention to cure, if such notification is to be “seasonable” under this subsection.

The rule of this subsection, moreover, is qualified by its underlying reasons. Thus if, after contracting for June delivery, a buyer later makes known to the seller his need for shipment early in the month and the seller ships accordingly, the “contract time” has been cut down by the supervening modification and the time for cure of tender must be referred to this modified time term.

2. Subsection (2) seeks to avoid injustice to the seller by reason of a surprise rejection by the buyer. However, the seller is not protected unless he had “reasonable grounds to believe” that the tender would be acceptable. Such reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract. The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture. Further, if the buyer gives notice either implicitly, as by a prior course of dealing involving rigorous inspections, or expressly, as by the deliberate inclusion of a “no replacement” clause in the contract, the seller is to be held to rigid compliance. If the clause appears in a “form” contract evidence that it is out of line with trade usage or the prior course of dealing and was not called to the seller’s attention may be sufficient to show that the seller had reasonable grounds to believe that the tender would be acceptable.

3. The words “a further reasonable time to substitute a conforming tender” are intended as words of limitation to protect the buyer. What is a “reasonable time” depends upon the attending circumstances. Compare Section 2‑511 on the comparable case of a seller’s surprise demand for legal tender.

4. Existing trade usages permitting variations without rejection but with price allowance enter into the agreement itself as contractual limitations of remedy and are not covered by this section.

Cross References:

Point 2: Section 2‑302.

Point 3: Section 2‑511.

Point 4: Sections 1‑205 and 2‑721.

Definitional Cross References:

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| “Buyer” | Section 2‑103. |
| “Conforming” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Money” | Section 1‑201. |
| “Notifies” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Seasonably” | Section 1‑204. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

This section is primarily directed at a situation which has been described as a “forced breach” by the buyer who is not happy with the sales contract and uses some minor nonconformity as an excuse to rescind. See, Hawkland, Sales and Bulk Sales Under the Uniform Commercial Code, 120 (1958). The forced breach opportunity is increased by the requirement of strict performance of sales contracts which also seems to apply under the Code. (See Commercial Code Section 2‑601 giving buyer the right to reject “if the goods fail in any respect to conform.”) This opportunity is lessened by Commercial Code Section 2‑508 giving the seller the opportunity to cure improper tender or delivery under certain circumstances.

Subsection (1) gives the seller the right to cure the non‑conformity if he seasonably notifies the buyer of his intent to cure and if he can do so within the contract time for performance. This is probably not a change of existing common law since delivery of non‑conforming goods is probably not an anticipatory breach if coupled with notice of intention to perform fully within the contract time. See, Rest., Contracts, Section 319 (1932). It has been suggested, however, that a defective tender may be made under such conditions as to warrant the buyer in believing that the tender is the only one that will be made so that if he changes his position, a subsequent conforming tender need not be accepted. 2 Williston, Sales, 459 (rev ed 1948). The requirement that the seller “seasonably notify the buyer of his intention to cure” would cover this situation.

Section 2‑508(2) which gives limited permission to the seller to cure after the contract time for performance, would remove the more serious opportunity of the forced breach situation. As suggested by the requirement that the non‑conformity be such that the “seller had reasonable grounds to believe would be acceptable,” the rule is aimed at the surprise rejection by the buyer who would usually be attempting to force a breach on the seller. The breach anticipated by this subsection would usually be minor and whether the rejection comes as a surprise to the seller will be a fact question taking into account such factors as prior course of dealing and custom and usage of trade.

The South Carolina cases dealing with the seller’s attempted cure of defects have involved the attempt by the seller to remedy a breach of warranty by replacing defective parts according to the terms of the contract. See, for example, Cannon v Pulliam Motor Co., 230 SC 131, 94 SE2d 397 (1956); Eastern Furniture Co. v Holly Hill Lumber Co., 251 F2d 228 (4th Cir 1958). There are no South Carolina cases passing directly on the point of the buyer’s absolute right to rescind when the seller has not tendered conforming goods within the contract time of performance, but see Reporter’s Comments under Commercial Code Section 2‑602.

CROSS REFERENCES

Course of dealing and usage of trade, see Section 36‑1‑303.

Effect of rejection or return of goods on claim for damages or other remedy, see Section 36‑2‑721.

Unconscionable contract or clause, see Section 36‑2‑302.

LIBRARY REFERENCES

Sales 153, 165.

Westlaw Key Number Searches: 343k153; 343k165.

C.J.S. Sales Sections 161, 164, 176, 182.

RESEARCH REFERENCES

Treatises and Practice Aids

29 Causes of Action 729, Cause of Action by Seller to Recover Contract Price or Other Damages Where Seller Claims Cure of Nonconforming Tender Under UCC S2‑508.

NOTES OF DECISIONS

Curing defect 1

Security interest in defective goods 2

1. Curing defect

Continued possession by seller of tooling which was owned by buyer, and which was to be used in manufacture of goods, after telephone conversation in which buyer had requested return of tooling, constituted conversion, notwithstanding seller’s contention that it rightfully retained tooling for purpose of curing defective shipment of goods, where seller did not preserve its right to cure by timely notice and cure. T & S Brass and Bronze Works, Inc. v. Pic‑Air, Inc. (C.A.4 (S.C.) 1986) 790 F.2d 1098.

2. Security interest in defective goods

Buyer was entitled to retain defective goods after sorting them from acceptable goods, because buyer held security interest in goods for cost of inspecting and sorting them; buyer did not waive right to object to defects by refusing to return goods, where seller neither acknowledge nonconformity or undertook responsibility to cure, suggesting instead that its subcontractor would replace any goods that were in fact defective, and where seller consistently refused to pay expenses of sorting. T & S Brass and Bronze Works, Inc. v. Pic‑Air, Inc. (C.A.4 (S.C.) 1986) 790 F.2d 1098.

**SECTION 36‑2‑509.** Risk of loss in the absence of breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 36‑2‑505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:

(a) on his receipt of possession or control of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer’s right to possession of the goods; or

(c) after his receipt of possession or control of a nonnegotiable document of title or other direction to deliver in a record, as provided in subsection (4)(b) of Section 36‑2‑503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this chapter on sale on approval (Section 36‑2‑327) and on effect of breach on risk of loss (Section 36‑2‑510).

HISTORY: 1962 Code Section 10.2‑509; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 13, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 22, Uniform Sales Act.

Changes: Rewritten, subsection (3) of this section modifying prior law.

Purposes of changes:

To make it clear that:

1. The underlying theory of these sections on risk of loss is the adoption of the contractual approach rather than an arbitrary shifting of the risk with the “property” in the goods. The scope of the present section, therefore, is limited strictly to those cases where there has been no breach by the seller. Where for any reason his delivery or tender fails to conform to the contract, the present section does not apply and the situation is governed by the provisions on effect of breach on risk of loss.

2. The provisions of subsection (1) apply where the contract “requires or authorizes” shipment of the goods. This language is intended to be construed parallel to comparable language in the section on shipment by seller. In order that the goods be “duly delivered to the carrier” under paragraph (a) a contract must be entered into with the carrier which will satisfy the requirements of the section on shipment by the seller and the delivery must be made under circumstances which will enable the seller to take any further steps necessary to a due tender. The underlying reason of this subsection does not require that the shipment be made after contracting, but where, for example, the seller buys the goods afloat and later diverts the shipment to the buyer, he must identify the goods to the contract before the risk of loss can pass. To transfer the risk it is enough that a proper shipment and a proper identification come to apply to the same goods although, aside from special agreement, the risk will not pass retroactively to the time of shipment in such a case.

3. Whether the contract involves delivery at the seller’s place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal. Protection is afforded him, in the event of breach by the buyer, under the next section.

The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.

4. Where the agreement provides for delivery of the goods as between the buyer and seller without removal from the physical possession of a bailee, the provisions on manner of tender of delivery apply on the point of transfer of risk. Due delivery of a negotiable document of title covering the goods or acknowledgment by the bailee that he holds for the buyer completes the “delivery” and passes the risk. See definition of delivery in Article 1, Section 1‑201 and the definition of control in Article 7, Section 7‑106.

5. The provisions of this section are made subject by subsection (4) to the “contrary agreement” of the parties. This language is intended as the equivalent of the phrase “unless otherwise agreed” used more frequently throughout this Act. “Contrary” is in no way used as a word of limitation and the buyer and seller are left free to readjust their rights and risks as declared by this section in any manner agreeable to them. Contrary agreement can also be found in the circumstances of the case, a trade usage or practice, or a course of dealing or performance.

Cross References:

Point 1: Section 2‑510(1).

Point 2: Sections 2‑503 and 2‑504.

Point 3: Sections 2‑104, 2‑503 and 2‑510.

Point 4: Section 2‑503(4).

Point 5: Section 1‑201.

Definitional Cross References:

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| “Agreement” | Section 1‑202. |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Delivery” | Section 1‑201. |
| “Document of title” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Merchant” | Section 2‑104. |
| “Party” | Section 1‑201. |
| “Receipt of goods” | Section 2‑103. |
| “Sale on approval” | Section 2‑326. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

The question of risk of loss of goods which forms the subject matter of sales contracts turns on the location of title under the common law decisions. John Frazer & Co. v Hilliard, 2 Strob 309 (1848). As pointed out in South Carolina Reporter’s Comments to Code Section 2‑501, the Code de‑emphasizes the passage of title test in answering a number of sales law problems. The risk of loss is an example of this approach with Commercial Code Sections 2‑509 and 2‑510 prescribing specific rules for each of several factual patterns.

Section 2‑509(1) prescribes these rules when the seller is to ship the goods to the buyer. Subsection (1)(a) deals with the normal type of shipment contract with risk of the loss passing to the buyer when the goods are “duly delivered to the carrier.” (See Commercial Code Section 2‑504 as to proper shipment.) The mercantile symbol “F.O.B., place of shipment” is usually employed to indicate such an agreement. (See Commercial Code Section 2‑319.) Under existing law it is assumed that the parties intend title and thus risk of loss to pass upon delivery of the goods to the carrier since this constitutes delivery to the buyer and nothing further remains to be done by the seller. J.B. Colt v Fox, 118 SC 372, 110 SE 401 (1922); Oxweld Acetylene Co. v Davis, 115 SC 526, 106 SE 157 (1921); Standard Boiler and Plate Iron Co. v Brock, 112 SC 323, 99 SE 769 (1919). Thus a result similar to the present case law would be reached under the Commercial Code in this situation but for a different reason. Delivery of the goods to the buyer is the key to the risk of loss problem; passage of title is the key under existing case law. In the shipment contract, delivery to the carrier is the point in time when both of these conditions occur.

Subsection (1)(b) treats the risk of loss problem for “destination contracts,” e.g., “F.O.B., point of destination.” Again a result would be reached under this Commercial Code section similar to that under existing case law. The passage of title and thus risk of loss to buyer is delayed until the goods reach their destination. In accord, Matheson v Southern Ry. Co., 79 SC 155, 60 SE 437 (1908). See 2 Williston, Sales, Section 280 (rev ed 1948). This is the same point which this Code section prescribes for the passage of risk to the buyer.

Where goods are in possession of a bailee, subsection (2) prescribes the risk of loss test which is similar to that set out in Commercial Code Section 2‑503(4) for tender of delivery. The similarity is obvious when it is realized that delivery and not title is the key to the passage of risk of loss under the Code. That tender of delivery occurs upon tender of a negotiable document covering the goods or procurement of the acknowledgment by the bailee of the buyer’s rights to possession is in accord with the common law. See 2 Williston, Sales, Section 454 (rev ed 1948). When non‑negotiable documents are tendered, “risk of loss remains on the seller until the buyer has had a reasonable time to present the document” as provided in Commercial Code Section 2‑503(4)(b).

When the goods are not to be shipped to the buyer and are not in possession of a bailee, risk of loss passes under subsection (3) upon receipt (defined in Commercial Code Section 2‑103(1)(c) as taking physical possession) by the buyer if the seller is a merchant (defined in Commercial Code Section 2‑104(1)) and upon tender if the seller is not a merchant. They typical situation is where goods are to be delivered at the seller’s place of business. This rule more clearly illustrates the Commercial Code approach of risk of loss following possession as opposed to the common law rule of the risk following title. The classic leading case of Tarling v Baxter, 6 B & C 360, 108 Eng Rep 484 (KB 1827) established the common law rule that where nothing more remains to be done under the contract to sell existing goods, title and thus risk of loss passes to the buyer at the time of contracting, even though the seller is still in possession. The rule was established in South Carolina a short time after Tarling v Baxter in Dozier v Johnston, 2 Hill 297 (1834). In that case, the court held that risk of loss had passed to the buyer of lumber which burned after it had been sawed and piled on the seller’s premises. Thus, the shift of emphasis from title to delivery or possession would be a significant change in existing law.

Subsection (4) is a reference to the qualification of the rules of this section by Commercial Code Section 2‑327 dealing with sale on approval and the next section dealing with risk of loss where one party is in breach. It is also recognized that the parties may expressly agree with respect to risk of loss.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 13, in subsection (2), twice inserted “possession or control of”, in paragraph (c), substituted “direction to deliver in a record” for “written direction to deliver”, and made other nonsubstantive changes.

CROSS REFERENCES

Passage of title, see Section 36‑2‑401.

Risk of loss with respect to identified goods, see Section 36‑2‑613.

Sale on approval, risk of loss, see Section 36‑2‑327.

LIBRARY REFERENCES

Sales 197, 201(4), 217, 224, 232.

Westlaw Key Number Searches: 343k197; 343k201(4); 343k217; 343k224; 343k232.

C.J.S. Sales Sections 214 to 215, 222 to 228.

LAW REVIEW AND JOURNAL COMMENTARIES

Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management. 32 S.C. L. Rev. 241 (December 1980).

**SECTION 36‑2‑510.** Effect of breach on risk of loss.

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

HISTORY: 1962 Code Section 10.2‑510; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

To make clear that:

1. Under subsection (1) the seller by his individual action cannot shift the risk of loss to the buyer unless his action conforms with all the conditions resting on him under the contract.

2. The “cure” of defective tenders contemplated by subsection (1) applies only to those situations in which the seller makes changes in goods already tendered, such as repair, partial substitution, sorting out from an improper mixture and the like since “cure” by repossession and new tender has no effect on the risk of loss of the goods originally tendered. The seller’s privilege of cure does not shift the risk, however, until the cure is completed.

Where defective documents are involved a cure of the defect by the seller or a waiver of the defects by the buyer will operate to shift the risk under this section. However, if the goods have been destroyed prior to the cure or the buyer is unaware of their destruction at the time he waives the defect in the documents, the risk of the loss must still be borne by the seller, for the risk shifts only at the time of cure, waiver of documentary defects or acceptance of the goods.

3. In cases where there has been a breach of the contract, if the one in control of the goods is the aggrieved party, whatever loss or damage may prove to be uncovered by his insurance falls upon the contract breaker under subsections (2) and (3) rather than upon him. The word “effective” as applied to insurance coverage in those subsections is used to meet the case of supervening insolvency of the insurer. The “deficiency” referred to in the text means such deficiency in the insurance coverage as exists without subrogation. This section merely distributes the risk of loss as stated and is not intended to be disturbed by any subrogation of an insurer.

Cross References:

Section 2‑509.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Conform” | Section 2‑106. |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

As previously stated, risk of loss follows title at common law. Breach by one of the parties may affect the title and thus the passing of risk. If the seller is in breach by shipping non‑conforming goods, title does not pass and thus risk of loss remains on the seller. 2 Williston, Sales, Section 306 (rev ed 1948). Also, where the contract is rescinded by the buyer, title and thus risk of loss revests in the seller. Harden v Walker, 2 Rich 40 (1845). It is in this way that breach will so affect title as to in turn affect risk of loss.

While the Commercial Code rejects title passing as a basis for determining risk of loss, Commercial Code Section 2‑510 treats the facts of breach of the contract as directly bearing on the risk of loss determination. Thus the rule of subsection (1) which places the risk on the breaching seller will produce a result similar to the one under the common law title theory outlined above.

Subsection (2) places the risk of loss on the seller after a buyer rightfully revokes acceptance of the goods. This is similar in result to the common law rule expressed in the Harden case, supra, that rescission by the buyer upon the seller’s breach revests title and thus risk in the seller. Since the buyer in possession is likely to carry the insurance until revocation of acceptance, this subsection would give the seller the benefit of such insurance.

Subsection (3) also would reach a result similar to existing case law but again for a different reason. Where a buyer wrongfully refuses to accept a proper tender of goods, title and thus risk nevertheless passes to the buyer and the seller holds them for him as bailee. Wilson v Trexler, 106 SC 15, 90 SE 180 (1915). Again, the Commercial Code approach is direct and not through the title concept in placing the risk of loss on the breaching buyer for a commercially reasonable time. Similar to the treatment under subsection (2), the buyer is given the benefit of any effective insurance which the seller may have.

CROSS REFERENCES

Buyer’s options in case of nonconforming delivery, see Section 36‑2‑601.

Obligations of seller and buyer generally, see Section 36‑2‑301.

Rejection of goods, see Section 36‑2‑602.

Revocation of acceptance, see Section 36‑2‑608.

LIBRARY REFERENCES

Sales 197, 217, 224, 232.

Westlaw Key Number Searches: 343k197; 343k217; 343k224; 343k232.

C.J.S. Sales Sections 214, 222 to 223.

**SECTION 36‑2‑511.** Tender of payment by buyer; payment by check.

(1) Unless otherwise agreed tender of payment is a condition to the seller’s duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this act on the effect of an instrument on an obligation (Section 36‑3‑802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

HISTORY: 1962 Code Section 10.2‑511; 1966 (54) 2716.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Act and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

CROSS REFERENCES

Assurance of due performance, see Section 36‑2‑609.

Certification of check, see Section 36‑3‑411.

“Check”, see Section 36‑3‑104.

Commercial paper, see Sections 36‑3‑101 et seq.

Contracts F.O.B. vessel or F.A.S., payment against tender of required documents, see Section 36‑2‑319.

Delivery of goods “ex‑ship”, see Section 36‑2‑322.

Delivery to seller of proper letter of credit, see Section 36‑2‑325.

Payment under C.I.F. or C. & F. contract, see Section 36‑2‑320.

Seller’s remedies on insolvency of buyer, see Section 36‑2‑702.

Single delivery or delivery in lots, see Section 36‑2‑307.

Substituted performance, see Section 36‑2‑614.

Time and place of payment, see Section 36‑2‑310.

Transfer of title to bona fide purchaser by purchaser, effect of subsequent dishonor of purchaser’s check on power to, see Section 36‑2‑403.

LIBRARY REFERENCES

Sales 185, 191.

Westlaw Key Number Searches: 343k185; 343k191.

C.J.S. Sales Section 208.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 42, Uniform Sales Act.

Changes: Rewritten by this section and section 2‑507.

Purposes of changes:

1. The requirement of payment against delivery in subsection (1) is applicable to non‑commercial sales generally and to ordinary sales at retail although it has no application to the great body of commercial contracts which carry credit terms. Subsection (1) applies also to documentary contracts in general and to contracts which look to shipment by the seller but contain no term on time and manner of payment, in which situations the payment may, in proper case, be demanded against delivery of appropriate documents.

In the case of specific transactions such as C.O.D. sales or agreements providing for payment against documents, the provisions of this subsection must be considered in conjunction with the special sections of the Article dealing with such terms. The provision that tender of payment is a condition to the seller’s duty to tender and complete “any delivery” integrates this section with the language and policy of the section on delivery in several lots which call for separate payment. Finally, attention should be directed to the provision on right to adequate assurance of performance which recognizes, even before the time for tender, an obligation on the buyer not to impair the seller’s expectation of receiving payment in due course.

2. Unless there is agreement otherwise the concurrence of the conditions as to tender of payment and tender of delivery requires their performance at a single place or time. This Article determines that place and time by determining in various other sections the place and time for tender of delivery under various circumstances and in particular types of transactions. The sections dealing with time and place of delivery together with the section on right to inspection of goods answer the subsidiary question as to when payment may be demanded before inspection by the buyer.

3. The essence of the principle involved in subsection (2) is avoidance of commercial surprise at the time of performance. The section on substituted performance covers the peculiar case in which legal tender is not available to the commercial community.

4. Subsection (3) is concerned with the rights and obligations as between the parties to a sales transaction when payment is made by check. This Article recognizes that the taking of a seemingly solvent party’s check is commercially normal and proper and, if due diligence is exercised in collection, is not to be penalized in any way. The conditional character of the payment under this section refers only to the effect of the transaction “as between the parties” thereto and does not purport to cut into the law of “absolute” and “conditional” payment as applied to such other problems as the discharge of sureties or the responsibilities of a drawee bank which is at the same time an agent for collection.

The phrase “by check” includes not only the buyer’s own but any check which does not effect a discharge under Article 3 (Section 3‑802). Similarly the reason of this subsection should apply and the same result should be reached where the buyer “pays” by sight draft on a commercial firm which is financing him.

5. Under subsection (3) payment by check is defeated if it is not honored upon due presentment. This corresponds to the provisions of article on Commercial Paper. (Section 3‑802.) But if the seller procures certification of the check instead of cashing it, the buyer is discharged. (Section 3‑411.).

6. Where the instrument offered by the buyer is not a payment but a credit instrument such as a note or a check postdated by even one day, the seller’s acceptance of the instrument insofar as third parties are concerned, amounts to a delivery on credit and his remedies are set forth in the section on buyer’s insolvency. As between the buyer and the seller, however, the matter turns on the present subsection and the section on conditional delivery and subsequent dishonor of the instrument gives the seller rights on it as well as for breach of the contract for sale.

Cross References:

Point 1: Sections 2‑307, 2‑310, 2‑320, 2‑325, 2‑503, 2‑513 and 2‑609.

Point 2: Sections 2‑307, 2‑310, 2‑319, 2‑322, 2‑503, 2‑504 and 2‑513.

Point 3: Section 2‑614.

Point 5: Article 3, esp. Sections 3‑802 and 3‑411.

Point 6: Sections 2‑507, 2‑702, and Article 3.

Definitional Cross References:

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| “Buyer” | Section 2‑103. |
| “Check” | Section 3‑104. |
| “Dishonor” | Section 3‑508. |
| “Party” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑511(1) expresses the obvious duty of the buyer to pay as a condition to the seller’s duty to deliver the goods, in the absence of agreed credit terms. When read with Commercial Code Section 2‑507(1), these sections recognize that delivery and payment are concurrent conditions. In accord, e.g., Southern Coal Co. v Rice, 122 SC 484, 115 SE 815 (1922); Mitchell v Georgia Railroad and Banking Co., 6 Rich 188 (1853); Pickett v Cloud, 1 Bailey 362 (1830).

Section 2‑511(2) is designed to prevent what has been designated as a “forced breach” by the seller who not being satisfied with the contract makes delivery at the last possible moment and demands cash in payment which the buyer is unable to procure until time for performance has passed. Since the parties are said to contemplate a cash payment, a buyer tendering a check would be in default permitting the seller to rescind. See, Hawkland, Sales and Bulk Sales Under the Uniform Commercial Code, 120‑121 (1958). While there are no reported cased in South Carolina in which a scheme by the seller to avoid an unattractive contract has been successful, it has been generally recognized that a check is not payment and thus its offer is not tender of performance. See Albrach v South Carolina Light, Power and Railroad Co., 101 SC 32, 85 SE 164 (1915); Brown v Huskamp, 141 SC 121, 139 SE 181 (1927).

Subsection (2) expressly preserves the common law rule that the seller may demand payment in legal tender. It eliminates the opportunity for the forced breach, however, by requiring the seller to wait a reasonable time for the buyer who has tendered a check to procure the cash money.

Subsection (3) follows the common law view that payment by check is conditional and is defeated if not paid. In accord, Atlantic Life Ins. v Barringer, 175 SC 145, 178 SE 505 (1935); Holloday v South Carolina Power Co., 169 SC 241, 168 SE 691 (1933); see Commercial Code Section 3‑802(1)(b).

**SECTION 36‑2‑512.** Payment by buyer before inspection.

(1) Where the contract requires payment before inspection nonconformity of the goods does not excuse the buyer from so making payment unless

(a) the nonconformity appears without inspection; or

(b) despite tender of the required documents the circumstances would justify injunction against honor under this act (Section 36‑5‑109(b)).

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer’s right to inspect or any of his remedies.

HISTORY: 1962 Code Section 10.2‑512; 1966 (54) 2716; 2001 Act No. 67, Section 16(2).

OFFICIAL COMMENT

Prior uniform statutory provision: None, but see Sections 47 and 49, Uniform Sales Act.

Purposes:

1. Subsection (1) of the present section recognizes that the essence of a contract providing for payment before inspection is the intention of the parties to shift to the buyer the risks which would usually rest upon the seller. The basic nature of the transaction is thus preserved and the buyer is in most cases required to pay first and litigate as to any defects later.

2. “Inspection” under this section is an inspection in a manner reasonable for detecting defects in goods whose surface appearance is satisfactory.

3. Clause (a) of this subsection states an exception to the general rule based on common sense and normal commercial practice. The apparent non‑conformity referred to is one which is evident in the mere process of taking delivery.

4. Clause (b) is concerned with contracts for payment against documents and incorporates the general clarification and modification of the case law contained in the section on excuse of a financing agency. Section 5‑114.

5. Subsection (2) makes explicit the general policy of the Uniform Sales Act that the payment required before inspection in no way impairs the buyer’s remedies or rights in the event of a default by the seller. The remedies preserved to the buyer are all of his remedies, which include as a matter of reason the remedy for total non‑delivery after payment in advance.

The provision on performance or acceptance under reservation of rights does not apply to the situations contemplated here in which payment is made in due course under the contract and the buyer need not pay “under protest” or the like in order to preserve his rights as to defects discovered upon inspection.

6. This section applies to cases in which the contract requires payment before inspection either by the express agreement of the parties or by reason of the effect in law of that contract. The present section must therefore be considered in conjunction with the provision on right to inspection of goods which sets forth the instances in which the buyer is not entitled to inspection before payment.

Cross References:

Point 4: Article 5.

Point 5: Section 1‑207.

Point 6: Section 2‑513(3).

Definitional Cross References:

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| --- | --- |
|  |  |
| “Buyer” | Section 2‑103. |
| “Conform” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Financing agency” | Section 2‑104. |
| “Goods” | Section 2‑105. |
| “Remedy” | Section 1‑201. |
| “Rights” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

While the buyer normally has the right of inspection prior to payment (Commercial Code Section 2‑513), Commercial Code Section 3‑512 recognizes that the parties may agree that the buyer must pay before inspection. Such an agreement would be found from terms such as “C.O.D.”, “cash against documents” and other terms where it is understood that payment is required before inspection. See Commercial Code Section 2‑313(3).

Subsection (1) (a) would excuse the buyer from making payment despite such contract terms where the non‑conformity of the goods is apparent without inspection. As stated in the official comments to this Commercial Code section, this exception is “based on common sense and normal commercial practice” where the apparent non‑conformity is one which is “evident in the mere process of taking delivery.”

Subsection (1)(b) states another exception to the enforcement of the payment before inspection agreement in a documentary sales transaction even though the documents conform. This situation is one in which the buyer procures a court order enjoining the honor of drafts by a bank issuing a letter of credit on the ground that the documents tendered are forgeries. To enforce the agreement to pay against documents before inspection of the goods would be contrary to the court order and aid in the perpetration of the fraud. See Commercial Code Section 5‑114.

Subsection (2) makes it clear that agreement to pay before inspection does not impair the buyer’s rights and remedies to subsequently assert a default by the seller. See Empire Buggy Co. v Moss, 154 SC 484, 151 SE 788 (1930) and Stewart v Smith, 138 SC 124, 135 SE 801 (1926) where the buyer did not lose his right to claim breach of warranty by continued monthly payments after notice of defect to the seller.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Act and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

CROSS REFERENCES

Performance or assent thereto by party in manner demanded by other party as not prejudicing rights reserved, see Section 36‑1‑308.

When goods are conforming, see Section 36‑2‑106.

LIBRARY REFERENCES

Sales 195.

Westlaw Key Number Search: 343k195.

C.J.S. Sales Sections 209 to 210.

**SECTION 36‑2‑513.** Buyer’s right to inspection of goods.

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this chapter on C.I.F. contracts (subsection (3) of Section 36‑2‑321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides

(a) for delivery “C.O.D.” or on other like terms; or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

HISTORY: 1962 Code Section 10.2‑513; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 47(2), (3), Uniform Sales Act.

Changes: Rewritten, Subsections (2) and (3) being new.

Purposes of changes and new matter:

To correspond in substance with the prior uniform statutory provision and to incorporate in addition some of the results of the better case law so that:

1. The buyer is entitled to inspect goods as provided in subsection (1) unless it has been otherwise agreed by the parties. The phrase “unless otherwise agreed” is intended principally to cover such situations as those outlined in subsections (3) and (4) and those in which the agreement of the parties negates inspection before tender of delivery. However, no agreement by the parties can displace the entire right of inspection except where the contract is simply for the sale of “this thing.” Even in a sale of boxed goods “as is” inspection is a right of the buyer, since if the boxes prove to contain some other merchandise altogether the price can be recovered back; nor do the limitations of the provision on effect of acceptance apply in such a case.

2. The buyer’s right of inspection is available to him upon tender, delivery or appropriation of the goods with notice to him. Since inspection is available to him on tender, where payment is due against delivery he may, unless otherwise agreed, make his inspection before payment of the price. It is also available to him after receipt of the goods and so may be postponed after receipt for a reasonable time. Failure to inspect before payment does not impair the right to inspect after receipt of the goods unless the case falls within subsection (4) on agreed and exclusive inspection provisions. The right to inspect goods which have been appropriated with notice to the buyer holds whether or not the sale was by sample.

3. The buyer may exercise his right of inspection at any reasonable time or place and in any reasonable manner. It is not necessary that he select the most appropriate time, place or manner to inspect or that his selection be the customary one in the trade or locality. Any reasonable time, place or manner is available to him and the reasonableness will be determined by trade usages, past practices between the parties and the other circumstances of the case.

The last sentence of subsection (1) makes it clear that the place of arrival of shipped goods is a reasonable place for their inspection.

4. Expenses of an inspection made to satisfy the buyer of the seller’s performance must be assumed by the buyer in the first instance. Since the rule provides merely for an allocation of expense there is no policy to prevent the parties from providing otherwise in the agreement. Where the buyer would normally bear the expenses of the inspection but the goods are rightly rejected because of what the inspection reveals, demonstrable and reasonable costs of the inspection are part of his incidental damage caused by the seller’s breach.

5. In the case of payment against documents, subsection (3) requires payment before inspection, since shipping documents against which payment is to be made will commonly arrive and be tendered while the goods are still in transit. This Article recognizes no exception in any peculiar case in which the goods happen to arrive before the documents. However, where by the agreement payment is to await the arrival of the goods, inspection before payment becomes proper since the goods are then “available for inspection.”

Where by the agreement the documents are to be held until arrival the buyer is entitled to inspect before payment since the goods are then “available for inspection”. Proof of usage is not necessary to establish this right, but if inspection before payment is disputed the contrary must be established by usage or by an explicit contract term to that effect.

For the same reason, that the goods are available for inspection, a term calling for payment against storage documents or a delivery order does not normally bar the buyer’s right to inspection before payment under subsection(3)(b). This result is reinforced by the buyer’s right under subsection (1) to inspect goods which have been appropriated with notice to him.

6. Under subsection (4) an agreed place or method of inspection is generally held to be intended as exclusive. However, where compliance with such an agreed inspection term becomes impossible, the question is basically one of intention. If the parties clearly intend that the method of inspection named is to be a necessary condition without which the entire deal is to fail, the contract is at an end if that method becomes impossible. On the other hand, if the parties merely seek to indicate a convenient and reliable method but do not intend to give up the deal in the event of its failure, any reasonable method of inspection may be substituted under this Article.

Since the purpose of an agreed place of inspection is only to make sure at that point whether or not the goods will be thrown back, the “exclusive” feature of the named place is satisfied under this Article if the buyer’s failure to inspect there is held to be an acceptance with the knowledge of such defects as inspection would have revealed within the section on waiver of buyer’s objections by failure to particularize. Revocation of the acceptance is limited to the situations stated in the section pertaining to that subject. The reasonable time within which to give notice of defects within the section on notice of breach begins to run from the point of the “acceptance.”

7. Clauses on time of inspection are commonly clauses which limit the time in which the buyer must inspect and give notice of defects. Such clauses are therefore governed by the section of this Article which requires that such a time limitation must be reasonable.

8. Inspection under this Article is not to be regarded as a “condition precedent to the passing of title” so that risk until inspection remains on the seller. Under subsection (4) such an approach cannot be sustained. Issues between the buyer and seller are settled in this Article almost wholly by special provisions and not by the technical determination of the locus of the title. Thus “inspection as a condition to the passing of title” becomes a concept almost without meaning. However, in peculiar circumstances inspection may still have some of the consequences hitherto sought and obtained under that concept.

9. “Inspection” under this section has to do with the buyer’s check‑up on whether the seller’s performance is in accordance with a contract previously made and is not to be confused with the “examination” of the goods or of a sample or model of them at the time of contracting which may effect the warranties involved in the contract.

Cross References:

Generally: Sections 2‑310(b), 2‑321(3) and 2‑606(1)(b).

Point 1: Section 2‑607.

Point 2: Sections 2‑501 and 2‑502.

Point 4: Section 2‑715.

Point 5: Section 2‑321(3).

Point 6: Sections 2‑606 to 2‑608.

Point 7: Section 1‑204.

Point 8: Comment to Section 2‑401.

Point 9: Section 2‑316(2)(b).

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Conform” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Document of title” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Presumed” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Rights” | Section 1‑201. |
| “Seller” | Section 2‑103. |
| “Send” | Section 1‑201. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑513 is in accord with existing law in recognizing the buyer’s right to inspection before payment or acceptance, unless otherwise agreed. E.g., Southern Coal Co. v Rice, 122 SC 484, 115 SE 815 (1923) (acceptance not complete until the buyer has had reasonable opportunity for effective inspection or examination); Building Supply Co. v Jones, 87 SC 426, 69 SE 881 (1911).

Since inspection is for the benefit of the buyer, subsection(2) expresses the general common law understanding that the expenses shall be borne by the buyer. See 3 Williston, Sales, Section 477 (rev ed 1948). If the goods do not conform and are rejected, the expense incurred in examining the goods and detecting their insufficiency would be a proper element of damages in an action against the seller. See, Carter & Harden v Walker, 2 Rich 40 (1845) where the seller was said to be liable to the purchaser for the expense of keeping the goods where the contract has been rescinded. See, Trexler v Wilson, 96 SC 176, 80 SE 271 (1913) and Yancey v Southern Wholesale Lumber Co., 133 SC 369, 131 SE 31 (1925) where buyer was held entitled to the expenses incurred in keeping the goods if claim for rescission is established.

Section 2‑513(3)(a) and (b) set out the two most usual terms which are inconsistent with examination of the goods before payment. See Williston, Sales, Section 479 (rev ed 1948).

Section 2‑513(4) provides that the agreement as to the place for or method of inspection shall not affect the rules regarding identification, delivery, passage of title and risk of loss. Such agreed place or method of inspection will be exclusive unless it becomes impossible.

CROSS REFERENCES

Acceptance not occurring until buyer has reasonable opportunity to inspect, see Section 36‑2‑606.

Delivery of documents on presentation or payment of draft, see Section 36‑4‑503.

Effect of acceptance, see Section 36‑2‑607.

Effect of buyer’s acceptance, see Section 36‑2‑607.

Honor or dishonor of documentary draft, see Section 36‑5‑108.

Implication from presence of words “unless otherwise agreed” in code provisions, see Section 36‑1‑302.

Incidental damages resulting from seller’s breach as including expenses of inspection, see Section 36‑2‑715.

Preliminary inspection under C.I.F. or C. & F. contracts, see Section 36‑2‑321.

Reasonable time, see Section 36‑1‑205.

Revocation of acceptance, see Section 36‑2‑608.

Time and place of payment, see Section 36‑2‑310.

Title to goods, see Section 36‑2‑401.

LIBRARY REFERENCES

Sales 168(1)‑168(6).

Westlaw Key Number Searches: 343k168(1) to 343k168(6).

C.J.S. Sales Sections 185 to 188, 195 to 196.

**SECTION 36‑2‑514.** When documents deliverable on acceptance; when on payment.

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

HISTORY: 1962 Code Section 10.2‑514; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 41, Uniform Bills of Lading Act.

Changes: Rewritten.

Purposes of changes:

To make the provision one of general application so that:

1. It covers any document against which a draft may be drawn, whatever may be the form of the document and applies to interpret the action of a seller or consignor insofar as it may affect the rights and duties of any buyer, consignee or financing agency concerned with the paper. Supplementary or corresponding provisions are found in Sections 4‑503 and 5‑112.

2. An “arrival” draft is a sight draft within the purpose of this section.

Cross References:

Point 1: See Sections 2‑502, 2‑505(2), 2‑507(2), 2‑512, 2‑513, 2‑607 concerning protection of rights of buyer and seller, and 4‑503 and 5‑112 on delivery of documents.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Delivery” | Section 1‑201. |
| “Draft” | Section 3‑104. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑514 is substantially in accord with SC Code Section 58‑1764 (Uniform Bills of Lading Act, Section 41) but is broadened to include any document against which a draft is drawn and not just a bill of lading. This section supplements Commercial Code Section 4‑503(a) requiring a bank presenting a documentary draft to “deliver the document to the drawee on acceptance of the draft if it is payable more than three days after presentment, otherwise, only on payment.” See also Commercial Code Section 5‑112. The assumption is that the seller‑drawer of the draft is willing to allow the buyer‑drawee of the draft to have the goods without prior payment only when the draft is payable more than three days after presentment.

LIBRARY REFERENCES

Sales 146, 191, 202.

Westlaw Key Number Searches: 343k146; 343k191; 343k202.

C.J.S. Sales Sections 153, 208, 214 to 215.

**SECTION 36‑2‑515.** Preserving evidence of goods in dispute.

In furtherance of the adjustment of any claim or dispute

(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

HISTORY: 1962 Code Section 10.2‑515; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. To meet certain serious problems which arise when there is a dispute as to the quality of the goods and thereby perhaps to aid the parties in reaching a settlement, and to further the use of devices which will promote certainty as to the condition of the goods, or at least aid in preserving evidence of their condition.

2. Under paragraph (a), to afford either party an opportunity for preserving evidence, whether or not agreement has been reached, and thereby to reduce uncertainty in any litigation and, in turn perhaps, to promote agreement.

Paragraph (a) does not conflict with the provisions on the seller’s right to resell rejected goods or the buyer’s similar right. Apparent conflict between these provisions which will be suggested in certain circumstances is to be resolved by requiring prompt action by the parties. Nor does paragraph (a) impair the effect of a term for payment before inspection. Short of such defects as amount to fraud or substantial failure of consideration, non‑conformity is neither an excuse nor a defense to an action for non‑acceptance of documents. Normally, therefore, until the buyer has made payment, inspected and rejected the goods, there is no occasion or use for the rights under paragraph (a).

3. Under paragraph (b), to provide for third party inspection upon the agreement of the parties, thereby opening the door to amicable adjustments based upon the findings of such third parties.

The use of the phrase “conformity or condition” makes it clear that the parties’ agreement may range from a complete settlement of all aspects of the dispute by a third party to the use of a third party merely to determine and record the condition of the goods so that they can be resold or used to reduce the stake in controversy. “Conformity”, at one end of the scale of possible issues, includes the whole question of interpretation of the agreement and its legal effect, the state of the goods in regard to quality and condition, whether any defects are due to factors which operate at the risk of the buyer, and the degree of non‑conformity where that may be material. “Condition”, at the other end of the scale, includes nothing but the degree of damage or deterioration which the goods show. Paragraph (b) is intended to reach any point in the gamut which the parties may agree upon.

The principle of the section on reservation of rights reinforces this paragraph in simplifying such adjustments as the parties wish to make in partial settlement while reserving their rights as to any further points. Paragraph (b) also suggests the use of arbitration, where desired, of any points left open, but nothing in this section is intended to repeal or amend any statute governing arbitration. Where any question arises as to the extent of the parties’ agreement under the paragraph, the presumption should be that it was meant to extend only to the relation between the contract description and the goods as delivered, since that is what a craftsman in the trade would normally be expected to report upon. Finally, a written and authenticated report of inspection or tests by a third party, whether or not sampling has been practicable, is entitled to be admitted as evidence under this Act, for it is a third party document.

Cross References:

Point 2: Sections 2‑513(3), 2‑706 and 2‑711(2) and Article 5.

Point 3: Sections 1‑202 and 1‑207.

Definitional Cross References:

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|  |  |
| “Conform” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Notification” | Section 1‑201. |
| “Party” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

There is some uncertainty under the common law decisions as to how far the buyer can go in testing and sampling the goods as part of his right of inspection without waiving his right to reject. Using up an unreasonable amount of the goods in the testing process or testing when visual inspection shows that the goods do not conform, has been held to make the buyer the owner of the goods with all rights of rejection lost. See 3 Williston, Sales, Section 475 (rev ed 1948); Vold, Sales, Section 34 (2nd ed 1959). It has been held that where the buyer claimed to have made the test in order to preserve evidence of non‑conformity, he could not use the seller’s property to gather his evidence against him and thus, testing being unnecessary, it resulted in an acceptance by the buyer. E.g., Cream City Glass Co. v Friedlander, 84 Wis 53, 54 NW 28 (1893).

Section 2‑515(a) seems to grant a broader right to both buyer and seller to test the goods for the purpose of gathering facts and preserving evidence with respect to the goods. The explicit provision for the right to inspect, test and sample the goods by the party in possession would seem to reject the contention that such inspection is inconsistent with the other party’s ownership or constitute a waiver of the inspecting party’s rights or remedies.

Section 2‑515(b) recognizes and gives legal effect to the mutual agreement of the parties to have a third party inspection or survey made to determine the question of conformity or condition of the goods. In so far as the agreement makes the third party inspection advisory, it would have evidentiary value.

If the parties agree that the inspector’s findings shall be conclusive as authorized by this subsection, this would amount to binding arbitration. This raises the problem of the relationship between the Commercial Code provisions and existing South Carolina law. The South Carolina Constitution, Article VI, Section1, directs statutory authorization to allow differences to be decided by arbitrators. SC Code Sections 10‑1901 to 10‑1905 implement this Constitutional direction and prescribe the method of statutory arbitration by agreement after differences arise. The Commercial Code would not affect these rules governing statutory arbitration.

The South Carolina case law has recognized the validity of an agreement that any particular issue of fact such as quality of goods shall be submitted to arbitration, and if the agreement makes the ascertainment of such fact by arbitration a condition precedent to a right of action, it is a good defense to a suit on the contract that the plaintiff has failed to arbitrate. Harwell v Home Mutual Fire Ins. Co., 228 SC 594, 91 SE2d 273 (1956). The agreement may not, however, apply to questions of law that may arise since that would be contrary to public policy and void as an attempt to oust the courts of jurisdiction. Jones v Enroee Power Co., 92 SC 263, 75 SE 452 (1912); Childs v Allstate Ins. Co., 237 SC 455, 117 SE2d 867 (1960). See also, Brookes v Laurens Milling Co., 84 SC 299, 66 SE 294 (1909) holding that agreements to arbitrate are not against public policy but it is proper to submit to a jury the issue of whether the inspector exercised his honest judgment in inspecting the goods. See also, Rounds v Aiken Mfg. Co. 58 SC 299, 36 SE 714 (1900) where the court held that the decision of the arbiter on whom the parties have agreed is conclusive when reached in the exercise of his honest judgment and it is immaterial that the jury might have been of the opinion that the judgment was not sound. These rules of common law should not be affected by subsection (b).

CROSS REFERENCES

Buyer’s remedies generally, see Section 36‑2‑711.

Letters of credit, see Sections 36‑5‑101 et seq.

Performance or assent to performance under reservation of rights, see Section 36‑1‑308.

Prima facie evidence of facts stated in document issued by third party, see Section 36‑1‑307.

Seller’s resale including contract for resale, see Section 36‑2‑706.

LIBRARY REFERENCES

Sales 168.

Westlaw Key Number Search: 343k168.

C.J.S. Sales Sections 185, 188.

Part 6

Breach, Repudiation and Excuse

**SECTION 36‑2‑601.** Buyer’s rights on improper delivery.

Subject to the provisions of this chapter on breach in installment contracts (Section 36‑2‑612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 36‑2‑718 and 36‑2‑719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole;

(c) accept any commercial unit or units and reject the rest.

HISTORY: 1962 Code Section 10.2‑601; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: No one general equivalent provision but numerous provisions, dealing with situations of non‑conformity where buyer may accept or reject, including Sections 11, 44 and 69(1), Uniform Sales Act.

Changes: Partial acceptance in good faith is recognized and the buyer’s remedies on the contract for breach of warranty and the like, where the buyer has returned the goods after transfer of title, are no longer barred.

Purposes of changes: To make it clear that:

1. A buyer accepting a non‑conforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover and regulate the acceptance of a part of any lot improperly tendered in any case where the price can reasonably be apportioned. Partial acceptance is permitted whether the part of the goods accepted conforms or not. The only limitation on partial acceptance is that good faith and commercial reasonableness must be used to avoid undue impairment of the value of the remaining portion of the goods. This is the reason for the insistence on the “commercial unit” in paragraph (c). In this respect, the test is not only what unit has been the basis of contract, but whether the partial acceptance produces so materially adverse an effect on the remainder as to constitute bad faith.

2. Acceptance made with the knowledge of the other party is final. An original refusal to accept may be withdrawn by a later acceptance if the seller has indicated that he is holding the tender open. However, if the buyer attempts to accept, either in whole or in part, after his original rejection has caused the seller to arrange for other disposition of the goods, the buyer must answer for any ensuing damage since the next section provides that any exercise of ownership after rejection is wrongful as against the seller. Further, he is liable even though the seller may choose to treat his action as acceptance rather than conversion, since the damage flows from the misleading notice. Such arrangements for resale or other disposition of the goods by the seller must be viewed as within the normal contemplation of a buyer who has given notice of rejection. However, the buyer’s attempts in good faith to dispose of defective goods where the seller has failed to give instructions within a reasonable time are not to be regarded as an acceptance.

Cross References:

Sections 2‑602(2) (a), 2‑612, 2‑718 and 2‑719.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Buyer” | Section 2‑103. |
| “Commercial unit” | Section 2‑105. |
| “Conform” | Section 2‑106. |
| “Contract” | Section1‑201. |
| “Goods” | Section 2‑105. |
| “Installment contract” | Section 2‑612. |
| “Rights” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑601 recognizes that the buyer may treat the sales contract as breached when the goods “fail in any respect to conform . . .” This seems to express the view of strict performance of sales contracts whereby any deviation in quality or quantity results in a breach unless it comes within the maxim of de minimis non curat lex. As expressed by Judge Learned Hand in Mitsubishi Goshi Kaisha v Aaron & Co., 16 F2d 185, 186 (2d Cir 1926), “There is no room in commercial contracts for the doctrine of substantial performance”. The factual question of degree as to the extent of deviation which goes beyond a mere de minimis and constitutes a breach will remain. As expressed in section 275 of the Restatement of Contracts, “It is impossible to lay down a rule that can be applied with mathematical exactness to answer the problem—when does a failure to perform a promise discharge the duty to perform the return promise for an agreed exchange.”

No South Carolina decision has ever expressly stated a rule of strict performance although where the court finds that the parties intend time to be of the essence or where performance within a prescribed time is an express condition precedent, failure to perform within the time constitutes a breach. S. F. Bowser & Co. v Crescent Filling Station, 133 SC 281, 130 SE 870 (1925); Jennings v Bowman, 106 SC 455, 91 SE 731 (1916). The case of Rivers v Gruget, 2 Nott & McC 265 (1820) which said that a slight or temporary defect in a horse does not constitute a breach, may be an expression of the de minimis rule and not necessarily an adoption of substantial performance as a standard for sales contracts. See also, Leroy Dyal & Co. v Allen, 161 F2d 152 (4th Cir 1947), a case under the Federal Perishable Agricultural Commodities Act (7 USCA Section 499a) which applies a rule of substantial performance, where the court detects a tendency to modify the harsh rule of strict performance.

The rule of strict performance does not apply to installment contracts covered by Commercial Code Section 2‑612 which allows rejection of an installment for non‑conformity only “if the non‑conformity substantially impairs the value of that installment.” Also Commercial Code Section 2‑504 which qualifies the buyer’s right to reject in shipment cases where the seller has failed to put the goods in possession of a carrier or has failed to notify the buyer of the shipment “only if material delay or loss ensues.” Also the right of rejection under this section would be subject to the right of the seller to cure his defective tender under Commercial Code Section 2‑508. Finally, the buyer’s right of rejection may be expressly limited by agreement such as for repair and replacement of non‑conforming goods in lieu of rejection.

Where there is improper delivery, this section gives the buyer the choice of three alternative courses of action. The first alternative is to reject all of the goods as provided in subsection (a). In accord, Green v Camlin, 229 SC 129, 92 SE2d 125 (1956).

Subsection (b) permits the buyer to alternatively accept all of the goods. Commercial Code Sections 2‑607 and 2‑714 make it clear that an acceptance of the non‑conforming goods would not prevent recovery of damages for breach of contract. In accord, Southern Brick Co. v McDaniel, 187 SC 243, 196 SE 893 (1938); Liquid Carbonic Co. v Coclin, 161 SC 40, 159 SE 461 (1931); Elner v Haverty Furniture Co., 128 SC 151, 122 SE 578 (1923).

Subsection (c) gives the buyer the flexibility of partial acceptance and rejection, but only as to commercial units. (See Commercial Code Section 2‑105(6) for definition of “commercial unit.” The reason for this limitation is that the value to the seller of a remaining part of a commercial unit may be unduly impaired by division. Thus, the test is whether the acceptance of a part unduly impairs the value of the rejected portion. While there are no South Carolina cases directly in point, this subsection would go beyond the limitations on the buyer’s right to accept a part only when the contract is divisible and not if indivisible. See, Williston, Sales, Section 493 (rev ed 1948).

CROSS REFERENCES

Buyer’s right to inspection before payment or acceptance, see Section 36‑2‑513.

Buyer’s security interest for payments on price and for expenses, see Section 36‑2‑711.

Contract requiring payment before inspection, see Section 36‑2‑512.

Contractual limitations of remedy, see Sections 36‑2‑718, 36‑2‑719.

Seller’s remedies on wrongful rejection by buyer, see Section 36‑2‑703.

When action is taken seasonably, see Section 36‑1‑205.

LIBRARY REFERENCES

Sales 177, 180.

Westlaw Key Number Searches: 343k177; 343k180.

C.J.S. Sales Sections 162, 189, 192, 194, 197 to 198.

NOTES OF DECISIONS

In general 1

1. In general

Uniform Commercial Code (UCC) displaces common‑law remedies for breach of warranty, and thus remedies for breaches of warranties that are subject to UCC’s sales article are available exclusively under that article; UCC contains comprehensive system of remedies for breach of warranty. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc. (S.C. 2005) 366 S.C. 163, 621 S.E.2d 38. Sales 1905

**SECTION 36‑2‑602.** Manner and effect of rightful rejection.

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (Sections 36‑2‑603 and 36‑2‑604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (subsection (3) of Section 36‑2‑711), he is under a duty after rejection to hold them with reasonable care at the seller’s disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller’s rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller’s remedies in general (Section 36‑2‑703).

HISTORY: 1962 Code Section 10.2‑602; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 50, Uniform Sales Act.

Changes: Rewritten.

Purposes of change:

To make it clear that:

1. A tender or delivery of goods made pursuant to a contract of sale, even though wholly non‑conforming, requires affirmative action by the buyer to avoid acceptance. Under subsection (1), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective. The sections of this Article dealing with inspection of goods must be read in connection with the buyer’s reasonable time for action under this subsection. Contract provisions limiting the time for rejection fall within the rule of the section on “Time” and are effective if the time set gives the buyer a reasonable time for discovery of defects. What constitutes a due “notifying” of rejection by the buyer to the seller is defined in Section 1‑201.

2. Subsection (2) lays down the normal duties of the buyer upon rejection, which flow from the relationship of the parties. Beyond his duty to hold the goods with reasonable care for the buyer’s disposition, this section continues the policy of prior uniform legislation in generally relieving the buyer from any duties with respect to them, except when the circumstances impose the limited obligation of salvage upon him under the next section.

3. The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a “wrongful rejection” which gives the seller immediate remedies for breach. Subsection (3) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non‑acceptance which is a breach by the buyer.

4. The provisions of this section are to be appropriately limited or modified when a negotiation is in process.

Cross References:

Point 1: Sections 1‑201, 1‑204(1) and (3), 2‑512(2), 2‑513(1) and 2‑606(1)(b).

Point 2: Section 2‑603(1).

Point 3: Section 2‑703.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Buyer” | Section 2‑103. |
| “Commercial unit” | Section 2‑105. |
| “Goods” | Section 2‑105. |
| “Merchant” | Section 2‑104. |
| “Notifies” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Remedy” | Section 1‑201. |
| “Rights” | Section 1‑201. |
| “Seasonably” | Section 1‑204. |
| “Security interest” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑602 continues the common law rule that an effective rejection of non‑conforming goods by the buyer requires him to take affirmative action of non‑acceptance and timely notification. Failing this, the buyer is deemed to have accepted the goods under Commercial Code Section 2‑606(1)(b). In accord, Reliance Varnish Co. v Mullins Lumber Co., 213 SC 84, 48 SE2d 653 (1948); Southern Coal Co. v Rice, 122 SC 484, 115 SE 815 (1922); Liquid Carbonic Co. v Coclin, 161 SC 40, 159 SE 461 (1931); C. W. Anderson Hosiery Co. v Dixie Knitting Mills, Inc., 204 F2d 503 (4th Cir 1953).

After rejection by the buyer, subsection (2)(a) makes any exercise of ownership over the goods “wrongful.” This suggests that the seller could recover damages for conversion or treat such conduct as an acceptance by the buyer under Commercial Code Section 2‑606(1)(c). See, Carter & Harden v Walker, 2 Rich 40 (1845) and cases cited above treating the exercise of dominion over the goods as evidence of waiver of any objection to inferiority of the goods.

Subsections (2)(b) and (c) prescribe the duty of the buyer to exercise reasonable care in holding goods in his possession which he subsequently rejects. In accord, Yancey v Southern Wholesale Lumber Co., 133 SC 369, 131 SE 32 (1925). Commercial Code Section 2‑603 prescribes additional duties imposed on a merchant buyer who rejects perishable goods.

Subsection (3) is a cross‑reference to Commercial Code Section 2‑703 dealing with the seller’s remedies upon the buyer’s non‑acceptance which is a breach.

LIBRARY REFERENCES

Sales 177, 179(6).

Westlaw Key Number Searches: 343k177; 343k179(6).

C.J.S. Sales Sections 162, 189, 192, 194 to 198.

RESEARCH REFERENCES

ALR Library

1 ALR 7th 3 , Applicability of UCC Article 2 to Mixed Contracts for Sale of Consumer Goods and Services.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Contract; Form of notification Under the Uniform Commercial Code. 32 S.C. L. Rev. 67 (August 1980).

NOTES OF DECISIONS

In general 1

Notice of breach or rejection 2

Return of rejected goods 3

1. In general

Delaying payment of a just bill for more than a year after delivery of goods is not reasonable under Section 36‑2‑602(1). Southern Tank & Culvert Co., Inc. v. Edisto Asphalt Co., Inc. (S.C.App. 1985) 285 S.C. 579, 330 S.E.2d 545.

2. Notice of breach or rejection

For rejection of goods to be effective under South Carolina version of Uniform Commercial Code (UCC), buyer must notify seller in writing. Plantation Shutter Co., Inc. v. Ezell (S.C.App. 1997) 328 S.C. 475, 492 S.E.2d 404. Sales 973

Notice of facts constituting breach of sales contract is not the same as notice that buyer considers those facts to be a legal breach, as is required under South Carolina version of Uniform Commercial Code (UCC). Plantation Shutter Co., Inc. v. Ezell (S.C.App. 1997) 328 S.C. 475, 492 S.E.2d 404. Sales 973

Notice of rejection of goods must be in writing under Section 36‑2‑602. American Fast Print Ltd. v. Design Prints of Hickory (S.C.App. 1986) 288 S.C. 46, 339 S.E.2d 516. Sales 2294

In an action by a seller to recover for goods sold, the trial court properly directed a verdict for the seller since, even if the shipment had not authorized by the guarantor, under Section 36‑2‑602 his son had accepted the goods by not rejecting them in a reasonable time. Porter Bros., Inc. v. Smith (S.C.App. 1985) 284 S.C. 292, 325 S.E.2d 588.

Alleged oral notice of defects was insufficient to establish buyer’s rejection, particularly where there was conflicting evidence as to receipt of the notice and buyer retained possession of the goods. Southeastern Steel Co., Inc. v. Burton Block and Concrete Co., Inc. (S.C. 1979) 273 S.C. 634, 258 S.E.2d 888. Sales 1014

3. Return of rejected goods

Buyer’s failure to return goods upon rejecting them was not acceptance or waiver where buyer had placed goods at seller’s disposal by inviting seller to inspect and sort goods at buyer’s facility. T & S Brass and Bronze Works, Inc. v. Pic‑Air, Inc. (C.A.4 (S.C.) 1986) 790 F.2d 1098. Sales 1020; Sales 1249(3)

**SECTION 36‑2‑603.** Merchant buyer’s duties as to rightfully rejected goods.

(1) Subject to any security interest in the buyer (subsection (3) of Section 36‑2‑711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller’s account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten percent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

HISTORY: 1962 Code Section 10.2‑603; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. This section recognizes the duty imposed upon the merchant buyer by good faith and commercial practice to follow any reasonable instructions of the seller as to reshipping, storing, delivery to a third party, reselling or the like. Subsection (1) goes further and extends the duty to include the making of reasonable efforts to effect a salvage sale where the value of the goods is threatened and the seller’s instructions do not arrive in time to prevent serious loss.

2. The limitations on the buyer’s duty to resell under subsection (1) are to be liberally construed. The buyer’s duty to resell under this section arises from commercial necessity and thus is present only when the seller has “no agent or place of business at the market of rejection”. A financing agency which is acting in behalf of the seller in handling the documents rejected by the buyer is sufficiently the seller’s agent to lift the burden of salvage resale from the buyer. (See provisions of Sections 4‑503 and 5‑112 on bank’s duties with respect to rejected documents.) The buyer’s duty to resell is extended only to goods in his “possession or control”, but these are intended as words of wide, rather than narrow, import. In effect, the measure of the buyer’s “control” is whether he can practicably effect control without undue commercial burden.

3. The explicit provisions for reimbursement and compensation to the buyer in subsection (2) are applicable and necessary only where he is not acting under instructions from the seller. As provided in subsection (1) the seller’s instructions to be “reasonable” must on demand of the buyer include indemnity for expenses.

4. Since this section makes the resale of perishable goods an affirmative duty in contrast to a mere right to sell as under the case law, subsection (3) makes it clear that the buyer is liable only for the exercise of good faith in determining whether the value of the goods is sufficiently threatened to justify a quick resale or whether he has waited a sufficient length of time for instructions, or what a reasonable means and place of resale is.

5. A buyer who fails to make a salvage sale when his duty to do so under this section has arisen is subject to damages pursuant to the section on liberal administration of remedies.

Cross References:

Point 2: Sections 4‑503 and 5‑112.

Point 5: Section 1‑106. Compare generally section 2‑706.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Buyer” | Section 2‑103. |
| “Good faith” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Merchant” | Section 2‑104. |
| “Security interest” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑603 imposes additional duties upon the merchant buyer who rightfully rejects. Such a buyer is under a duty to follow any reasonable instructions received from the seller with respect to goods in his possession or control if the seller provides indemnity for expenses demanded by the buyer. This duty may not be imposed on the buyer under common law since he is in the position of a bailee who has had goods thrust upon him without his assent and nothing more is required of him than reasonable care of the goods. See 3 Williston, Sales, Section 497 (rev ed 1948). This section also requires the merchant seller to make reasonable efforts to sell goods which are perishable or threaten to decline in value speedily. This latter requirement is probably an extension of the common law duty of the buyer who has the right but not the duty to sell rejected perishable goods. See 3 Williston, Sales, Section 498 (rev ed 1948).

Section 2‑603(2) prescribes the buyer’s right to reimbursement for the expenses of caring for and selling the goods which is generally recognized at common law. See 3 Williston, Sales, Section 498 (rev ed 1948).

The statement in subsection (3) that compliance with the duties imposed on the buyer by this section is not an acceptance is designed to make it clear that such conduct is not inconsistent with the seller’s ownership amounting to an acceptance. See Grainger Bros. v G. Amsinck & Co., 15 F2d 329 (8th Cir 1926) where a sale of the goods by the buyer amounted to an acceptance.

CROSS REFERENCES

Bank’s duties with respect to rejected documents, see Sections 36‑4‑503, 36‑5‑108.

Remedies to be liberally administered, see Section 36‑1‑305.

Resale by seller, see Section 36‑2‑706.

LIBRARY REFERENCES

Sales 179(6).

Westlaw Key Number Search: 343k179(6).

C.J.S. Sales Sections 192, 194 to 198.

**SECTION 36‑2‑604.** Buyer’s options as to salvage of rightfully rejected goods.

Subject to the provisions of the immediately preceding section (Section 36‑2‑603) on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller’s account or reship them to him or resell them for the seller’s account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

HISTORY: 1962 Code Section 10.2‑604; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

The basic purpose of this section is twofold: on the one hand it aims at reducing the stake in dispute and on the other at avoiding the pinning of a technical “acceptance” on a buyer who has taken steps towards realization on or preservation of the goods in good faith. This section is essentially a salvage section and the buyer’s right to act under it is conditioned upon (1) non‑conformity of the goods, (2) due notification of rejection to the seller under the section on manner of rejection, and (3) the absence of any instructions from the seller which the merchant buyer has a duty to follow under the preceding section.

This section is designed to accord all reasonable leeway to a rightfully rejecting buyer acting in good faith. The listing of what the buyer may do in the absence of instructions from the seller is intended to be not exhaustive but merely illustrative. This is not a “merchant’s” section and the options are pure options given to merchant and nonmerchant buyers alike. The merchant‑buyer, however, may in some instances be under a duty rather than an option to resell under the provisions of the preceding section.

Cross References:

Sections 2‑602(1), and 2‑603(1) and 2‑706.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Notification” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

As discussed in South Carolina Reporter’s Comments to Code Section 2‑602 and indicated by the South Carolina cases cited therein, the buyer who intends to reject non‑conforming goods must take care not to exercise such dominion over the goods as to constitute a waiver of his right to reject. There is authority in some jurisdictions for the conclusion that a sale of the goods to others is inconsistent with the seller’s ownership and amounts to an acceptance. E.g., Grainger Bros. v G. Amsinck & Co., 15 F2d 329 (8th Cir 1926); Royal Card & Paper Co. v Dresdner Bank, 27 F2d 792 (2nd Cir 1928). Such a result was indictaed in the early South Carolina case of Carter & Harden v Walker, 2 Rich 40 (1845), where the court said that an attempt by the buyer to sell goods after he had tendered them back as defective was inconsistent with and thus precluded rescission. Where a resale is for the seller’s account as a salvage operation, however, this will probably not be an acceptance. See, Vold, Sales, Section 35 (2nd ed 1959). There may also be some danger of waiver of right to reject where the buyer receives and stores the goods after notification of election to cancel. See S. F. Bowser & Co. v Crescent Filling Station, 133 SC 281, 130 SE 870 (1925) where the court said waiver or estoppel under such circumstances is a question of fact for jury determination. But in Eureka Elastic Paint Co. v Bennett‑Hedgpeth Co., 85 SC 486, 67 SE 738 (1910), the buyer did not accept by taking paint from the depot and placing it in his warehouse in light of the evidence that he declined to accept it three days after its arrival. The difficulty with the present state of the rule is that the buyer can never be sure when a court will find that he has accepted by disposing or otherwise dealing with the goods.

Section 2‑604 reduces this hazard by giving the buyer greater flexibility in storing, reshipping or reselling for the seller’s account after notifying the seller of rejection and seeking his instructions under Commercial Code Section 2‑603. These options are open to the buyer only if he receives no instructions from the seller and if not a merchant‑buyer who is under a duty to resell perishables under Commercial Code Section 2‑603.

LIBRARY REFERENCES

Sales 179(6).

Westlaw Key Number Search: 343k179(6).

C.J.S. Sales Sections 192, 194 to 198.

**SECTION 36‑2‑605.** Waiver of buyer’s objections by failure to particularize.

(1) The buyer’s failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent in the documents.

HISTORY: 1962 Code Section 10.2‑605; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 14, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. The present section rests upon a policy of permitting the buyer to give a quick and informal notice of defects in a tender without penalizing him for omissions in his statement, while at the same time protecting a seller who is reasonably misled by the buyer’s failure to state curable defects.

2. There the defect in a tender is one which could have been cured by the seller, a buyer who merely rejects the delivery without stating his objections to it is probably acting in commercial bad faith and seeking to get out of a deal which has become unprofitable. Subsection (1)(a), following the general policy of this Article which looks to preserving the deal wherever possible, therefore insists that the seller’s right to correct his tender in such circumstances be protected.

3. When the time for cure is past, subsection (1)(b) makes it plain that a seller is entitled upon request to a final statement of objections upon which he can rely. What is needed is that he make clear to the buyer exactly what is being sought. A formal demand under paragraph (b) will be sufficient in the case of a merchant‑buyer.

4. Subsection (2) applies to the particular case of documents the same principle which the section on effects of acceptance applies to the case of goods. The matter is dealt with in this section in terms of “waiver” of objections rather than of right to revoke acceptance, partly to avoid any confusion with the problems of acceptance of goods and partly because defects in documents which are not taken as grounds for rejection are generally minor ones. The only defects concerned in the present subsection are defects in the documents which are apparent. This rule applies to both tangible and electronic documents of title. Where payment is required against the documents they must be inspected before payment, and the payment then constitutes acceptance of the documents. Under the section dealing with this problem, such acceptance of the documents does not constitute an acceptance of the goods or impair any options or remedies of the buyer for their improper delivery. Where the documents are delivered without requiring such contemporary action as payment from the buyer, the reason of the next section on what constitutes acceptance of goods, applies. Their acceptance by non‑objection is therefore postponed until after a reasonable time for their inspection. In either situation, however, the buyer “waives” only the defects apparent in the documents.

Cross References:

Point 2: Section 2‑508.

Point 4: Sections 2‑512(2), 2‑606(1)(b), 2‑607(2).

Definitional Cross References:

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| --- | --- |
|  |  |
| “Between merchants” | Section 2‑104. |
| “Buyer” | Section 2‑103. |
| “Seasonably” | Section 1‑204. |
| “Seller” | Section 2‑103. |
| “Writing” and “written” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

It has been said that an objection to a tender on one ground may preclude later objection on other grounds which might have been properly made—at least where the conduct of the buyer would raise an estoppel against him. See 3 Williston, Sales, Section 495 (rev ed 1948). This seems to be the view adopted in Cape Fear Lumber Co. v Small, 84 SC 434, 66 SE 880 (1909) where a party having the option to buy timber waived all objections that the tender did not conform to the requirements of the option except those interposed. Followed in Jackson v Rogers, 111 SC 49, 96 SE 696 (1918). See also Taylor v King, 97 SC 477, 81 SE 172 (1913) and McAbee v Harrison, 50 SC 39, 27 SE 539 (1897), recognizing that where a tender of payment is rejected on one ground, the creditor cannot subsequently take the position that the tender was inadequate upon some other ground. There is, on the other hand, no duty imposed on the buyer to particularize the defects, a general notice that the goods do not conform being sufficient. As observed by one authority, this has resulted in “either sophisticated buyers misleading their sellers by failing to state any defects, or simple buyers waving their right to reject by not stating all the defects.” Hawkland, Sales and Bulk Sales Under the Uniform Commercial Code, 127 (1958).

Section 2‑605(1) deals with this problem. With respect to a defect which is discernible on inspection and which the seller could have cured (Commercial Code Section 2‑508), failure to particularize the objection will result in a waiver of the buyer’s right to reject. As to any other defects, i.e., defects which are not capable of cure, the merchant‑buyer, upon demand by a merchant‑seller, must particularize all objections which a reasonable inspection would reveal or be precluded from relying on the unstated defects.

Section 2‑605(2) states, in terms of waiver, the position of the buyer who pays against documents where there are defects apparent on the face of the documents. Of course, the buyer does not thereby waive the right to reject the goods if they are found to be defective.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 14, in subsection (2), substituted “apparent in the documents” for “apparent on the face of the documents”.

CROSS REFERENCES

Contract requiring payment before inspection, see Section 36‑2‑512.

Cure by seller of nonconforming tender or delivery, see Section 36‑2‑508.

When action is taken seasonably, see Section 36‑1‑205.

LIBRARY REFERENCES

Sales 176, 179(6).

Westlaw Key Number Searches: 343k179(6); 343k176.

C.J.S. Sales Sections 159, 177, 192, 194 to 198.

**SECTION 36‑2‑606.** What constitutes acceptance of goods.

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies in writing to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of Section 36‑2‑602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller’s ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit shall not be acceptance of the entire unit.

HISTORY: 1962 Code Section 10.2‑606; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 48, Uniform Sales Act.

Changes: Rewritten, the qualification in paragraph (c) and subsection (2) being new; otherwise the general policy of the prior legislation is continued.

Purposes of changes and new matter:

To make it clear that:

1. Under this Article “acceptance” as applied to goods means that the buyer, pursuant to the contract, takes particular goods which have been appropriated to the contract as his own, whether or not he is obligated to do so, and whether he does so by words, action, or silence when it is time to speak. If the goods conform to the contract, acceptance amounts only to the performance by the buyer of one part of his legal obligation.

2. Under this Article acceptance of goods is always acceptance of identified goods which have been appropriated to the contract or are appropriated by the contract. There is no provision for “acceptance of title” apart from acceptance in general, since acceptance of title is not material under this Article to the detailed rights and duties of the parties. (See Section 2‑401). The refinements of the older law between acceptance of goods and of title become unnecessary in view of the provisions of the sections on effect and revocation of acceptance, on effects of identification and on risk of loss, and those sections which free the seller’s and buyer’s remedies from the complications and confusions caused by the question of whether title has or has not passed to the buyer before breach.

3. Under paragraph (a), payment made after tender is always one circumstance tending to signify acceptance of the goods but in itself it can never be more than one circumstance and is not conclusive. Also, a conditional communication of acceptance always remains subject to its express conditions.

4. Under paragraph (c), any action taken by the buyer, which is inconsistent with his claim that he has rejected the goods, constitutes an acceptance. However, the provisions of paragraph (c) are subject to the sections dealing with rejection by the buyer which permit the buyer to take certain actions with respect to the goods pursuant to this options and duties imposed by those sections, without effecting an acceptance of the goods. The second clause of paragraph (c) modifies some of the prior case law and makes it clear that “acceptance” in law based on the wrongful act of the acceptor is acceptance only as against the wrongdoer and then only at the option of the party wronged.

In the same manner in which a buyer can bind himself, despite his insistence that he is rejecting or has rejected the goods, by an act inconsistent with the seller’s ownership under paragraph (c), he can obligate himself by a communication of acceptance despite a prior rejection under paragraph (a). However, the sections on buyer’s rights on improper delivery and on the effect of rightful rejection, make it clear that after he once rejects a tender, paragraph (a) does not operate in favor of the buyer unless the seller has re‑tendered the goods or has taken affirmative action indicating that he is holding the tender open. See also Comment 2 to Section 2‑601.

5. Subsection (2) supplements the policy of the section on buyer’s rights on improper delivery, recognizing the validity of a partial acceptance but insisting that the buyer exercise this right only as to whole commercial units.

Cross References:

Point 2: Sections 2‑401, 2‑509, 2‑510, 2‑607, 2‑608 and Part 7.

Point 4: Sections 2‑601 through 2‑604.

Point 5: Sections 2‑601.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Buyer” | Section 2‑103. |
| “Commercial unit” | Section 2‑105. |
| “Goods” | Section 2‑105. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑606 states the circumstances under which the buyer is deemed to have accepted goods so that he is liable for the price (Commercial Code Section 2‑709(1)), and is barred from rejection (Commercial Code Section 2‑607(2)).

Subsection (1)(a) states the usual manner of the buyer’s acceptance by signifying that he will take the goods. A typical application of this rule is Little v Veneer Mfg. Co., 130 SC 372, 126 SE 42 (1925), where the buyer was precluded from recovering damages for failure of lumber to conform to specifications after he had taken and paid for it. That the rule of acceptance does not pertain until there is a reasonable opportunity to inspect the goods is in accord with South Carolina case law. Southern Coal Co. v Rice, 122 SC 484, 115 SE 815 (1922); Building Supply Co. v Jones, 87 SC 426, 69 SE 881 (1911).

Subsection (1)(b) states the common law rule of acceptance by waiver in failing to make a timely rejection under Commercial Code Section 2‑602(1). In accord, Reliance Varnish Co. v Mullins Lumber Co., 213 SC 84, 48 SE 653 (1948); Liquid Carbonic Co. v Coclin, 161 SC 40, 159 SE 461 (1931). As stated in the preceding paragraph, the South Carolina case law is in accord with the rule that there is no acceptance or waiver of right to reject until the buyer has had a reasonable opportunity to inspect the goods.

South Carolina case law is in accord with the rule of subsection (c) that acceptance can result from conduct of the buyer inconsistent with the seller’s ownership. S. F. Bowser & Co. v Crescent Filling Station, 133 SC 281, 130 SE 870 (1925); Carter & Harden v Walker, 2 Rich 40 (1845). This section should be read with Commercial Code Section 2‑604 which gives the buyer the option of handling and disposing of rejected goods without resulting in acceptance. The second clause of subsection (c) would seem to give the seller the option to treat the exercise of ownership by the buyer after rejection as a conversion under Commercial Code Section 2‑602(2)(a) or as an acceptance by the seller’s ratification.

Subsection (2) expresses the policy discussed in Commercial Code Section 2‑601(c) limiting the right of the buyer to accept a part of the goods to acceptance of an entire commercial unit so that there will not be an undue impairment of the value of rejected goods to the seller.

CROSS REFERENCES

Documents of title, see Section 36‑7‑101 et seq.

Enforceability of contract, not satisfying requirements of writing, where payment has been accepted, see Section 36‑2‑201.

Nonconforming tender or delivery as affecting risk of loss, see Section 36‑2‑510.

Passing of title, see Section 36‑2‑401.

Risk of loss in absence of breach, see Section 36‑2‑509.

LIBRARY REFERENCES

Sales 178.

Westlaw Key Number Search: 343k178.

C.J.S. Sales Sections 189 to 191, 194 to 197.

NOTES OF DECISIONS

In general 1

1. In general

Failure of buyer of custom‑made shutters to notify seller in writing that he was rejecting goods resulted in acceptance of goods, so that seller was entitled to recovery of contract price under South Carolina version of Uniform Commercial Code (UCC) after buyer failed to pay for shutters; fact that seller’s own employees communicated, in writing, level of buyer’s dissatisfaction did not constitute notice of rejection, since buyer himself must communicate rejection, and dissatisfaction did not indicate that buyer considered source of his dissatisfaction a breach. Plantation Shutter Co., Inc. v. Ezell (S.C.App. 1997) 328 S.C. 475, 492 S.E.2d 404. Sales 973

**SECTION 36‑2‑607.** Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this chapter for nonconformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; however, no notice of injury to the person in the case of consumer goods shall be required; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 36‑2‑312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 36‑2‑312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 36‑2‑312).

HISTORY: 1962 Code Section 10.2‑607; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Subsection (1)—Section 41, Uniform Sales; Subsections (2) and (3)—Sections 49 and 69, Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

To continue the prior basic policies with respect to acceptance of goods while making a number of minor though material changes in the interest of simplicity and commercial convenience so that:

1. Under subsection (1), once the buyer accepts a tender the seller acquires a right to its price on the contract terms. In cases of partial acceptance, the price of any part accepted is, if possible, to be reasonably apportioned, using the type of apportionment familiar to the courts in quantum valebat cases, to be determined in terms of “the contract rate,” which is the rate determined from the bargain in fact (the agreement) after the rules and policies of this Article have been brought to bear.

2. Under subsection (2) acceptance of goods precludes their subsequent rejection. Any return of the goods thereafter must be by way of revocation of acceptance under the next section. Revocation is unavailable for a non‑conformity known to the buyer at the time of acceptance, except where the buyer has accepted on the reasonable assumption that the non‑conformity would be seasonably cured.

3. All other remedies of the buyer remain unimpaired under subsection (2). This is intended to include the buyer’s full rights with respect to future installments despite his acceptance of any earlier non‑conforming installment.

4. The time of notification is to be determined by applying commercial standards to a merchant buyer. “A reasonable time” for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer’s rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2‑605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer’s rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

5. Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller’s breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

6. Subsection (4) unambiguously places the burden of proof to establish breach on the buyer after acceptance. However, this rule becomes one purely of procedure when the tender accepted was non‑conforming and the buyer has given the seller notice of breach under subsection (3). For subsection (2) makes it clear that acceptance leaves unimpaired the buyer’s right to be made whole, and that right can be exercised by the buyer not only by way of cross‑claim for damages, but also by way of recoupment in diminution or extinction of the price.

7. Subsections (3)(b) and (5)(b) give a warrantor against infringement an opportunity to defend or compromise third‑party claims or be relieved of his liability. Subsection (5)(a) codifies for all warranties the practice of voucher to defend. Compare Section 3‑803. Subsection (6) makes these provisions applicable to the buyer’s liability for infringement under Section 2‑312.

8. All of the provisions of the present section are subject to any explicit reservation of rights.

Cross References:

Point 1: Section 1‑201.

Point 2: Section 2‑608.

Point 4: Sections 1‑204 and 2‑605.

Point 5: Section 2‑318.

Point 6: Section 2‑717.

Point 7: Sections 2‑312 and 3‑803.

Point 8: Section 1‑207.

Definitional Cross References:

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| “Burden of establishing” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Conform” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Notifies” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Remedy” | Section 1‑201. |
| “Seasonably” | Section 1‑204. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑607(1) and (2) state the effect of acceptance. Subsection (1) states the basic duty of the buyer to pay for all goods accepted. In accord, Griggs‑Paxton Shoe Co. v A. Friedheim & Bros., 133 SC 458, 131 SE 620 (1924), even though the buyer had sent the goods back to the seller after acceptance. When the buyer accepts part of the goods under the rule of Commercial Code Section 2‑601(c), the contract price shall be apportioned to the part accepted.

Subsection (2) deals with the effects of acceptance on the buyer’s remedies. While the buyer may not reject the goods accepted, he is not thereby barred from other remedies available against the breaching seller. He may accept the nonconforming goods, or any commercial unit thereof, and still recover damages for the breach. In accord, Liquid Carbonic Co. v Coclin, 161 SC 40, 159 SE 461 (1931), where the court recognized that the buyer could elect to retain the goods and sue for damages.

Subsection (3)(a) states the common law rule that the buyer must communicate his rejection to the seller within a reasonable time after he discovers or should have discovered the defect. Failing this, the buyer will have waived the remedies for breach recognized as available to him by subsection (2). In accord, Richmond Pressed Metal Works v Haley, 157 SC 426, 154 SE 412 (1930) (failure to make a complaint within a reasonable time after opportunity for inspection); L. D. Powell Co. v Levy, 136 SC 387, 134 SE 415 (1925) (retention of law books for four years without objection); C. W. Anderson Hosiery Co. v Dixie Knitting Mills, 204 F2d 503 (4th Cir 1953). The waiver does not apply to the buyer under present case law nor this Commercial Code rule where the defect was not discoverable by ordinary inspection. Williamson Heater Co. v Paxville School District, 102 SC 295, 87 SE 69 (1915).

Subsection (3)(b) imposes the duty of notice to the seller within a reasonable time after the buyer is sued for patent infringement in order to hold the seller liable under the rule of Commercial Code Section 2‑312(3).

Subsection (4) expresses the usual rule that the burden of proof is on the party who by the pleadings makes the assertion and applies it to the buyer who seeks to establish a breach. See, e.g., Hoffman v Greenville County, 242 SC 34, 129 SE2d 757 (1963); Baker v Mutual Loan & Invest. Co., 218 SC 47, 61 SE2d 387 (1950); Sunshine v Furtick, 114 SC 32, 102 SE 784 (1920).

Subsection (5) recognizes and prescribes a more certain rule for the common law procedural device of “vouching in” a seller who is answerable over to a buyer for a breach of warranty or other obligation on which the buyer is being sued. This practice has been recognized in Mauldin v Milford, 127 SC 508, 121 SE 547 (1923), where the court said: “If such seller is notified by his immediate purchaser of a suit against the latter by one claiming the property under the mortgage against which the seller warranted, and is requested and given reasonable opportunity to defend such suit, whether he defends or refuses to defend, the judgment therein will be conclusive against such seller in a subsequent action by the buyer who has been judicially evicted.” The circumstances set out in this section which will bind the seller to the determination of fact seems to be in accord with Newell Contracting Co. v Blankenship, 130 SC 131, 125 SE 420 (1924), where the court said that it must be found that the person was legally bound to at least partially indemnify the defendant in the first action against the recovery suffered by him therein and that he was seasonably notified of the nature and pendency of the action, and of the time and place of trial.

Subsection (5)(b) and (6) supplement the notice requirements for infringement suits under subsection (3)(b). The vouching in procedure is made applicable to such suits and the original seller has the right to demand control of the litigation.

CROSS REFERENCES

Buyer’s recoupment in diminution or extinction of price, see Section 36‑2‑717.

Explicit reservation of rights, see Section 36‑1‑308.

Seller’s remedies for buyer’s breach, see Sections 36‑2‑702 et seq.

Warranty against claim for infringement, etc., see Section 36‑2‑312.

What action is taken seasonably, see Section 36‑1‑205.

When goods are conforming, see Section 36‑2‑106.

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NOTES OF DECISIONS

Notice 1

Remedy 3

Timeliness 2

1. Notice

Any good faith communication that reasonably notifies the seller that the buyer is troubled by a transaction suffices to preserve the buyer’s right to pursue UCC remedies in the event it suffers damages from the defect. U.S. v. Southern Contracting of Charleston, Inc., 1994, 862 F.Supp. 107. Sales 1862

Party to a contract that is subject to sales article of Uniform Commercial Code (UCC) must give seasonable notice of breach to seller in order to recover common‑law remedies for breach of that contract. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc. (S.C. 2005) 366 S.C. 163, 621 S.E.2d 38. Sales 2411

For purposes of section of Uniform Commercial Code (UCC) requiring buyer to notify seller of breach within reasonable time or be barred from any remedy, “any remedy” encompasses all potential remedies for breach of a contract that is subject to UCC’s sales article. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc. (S.C. 2005) 366 S.C. 163, 621 S.E.2d 38. Sales 974

Buyer’s failure to give seasonable notice of breach to seller of goods prevented buyer from pursuing repair‑or‑replace remedy provided in parties’ contract; parties did not opt out of section of Uniform Commercial Code (UCC) requiring seasonable notice of breach. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc. (S.C. 2005) 366 S.C. 163, 621 S.E.2d 38. Sales 2308

A construction company failed to give a supplier the notice required by Section 36‑2‑607(3)(a) of defects in the steel products it had supplied, and therefore the construction company was not entitled to a setoff against the amount due under the contract because of the “unworkmanlike performance” of the supplier, even though the president of the construction company told the supplier about the problems with the defective steel products, where neither the president of the construction company nor anyone else thereafter indicated to the supplier that the transaction remained troublesome. Southeastern Steel Co. v. W.A. Hunt Const. Co., Inc. (S.C.App. 1990) 301 S.C. 140, 390 S.E.2d 475. Sales 1014

2. Timeliness

Buyer’s failure to give seasonable notice of breach to seller of goods prevented buyer from pursuing repair‑or‑replace remedy provided in parties’ contract; parties did not opt out of section of Uniform Commercial Code (UCC) requiring seasonable notice of breach. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc. (S.C. 2005) 366 S.C. 163, 621 S.E.2d 38. Sales 2308

Question whether notice of breach is given within reasonable time, as required by Code Section 36‑2‑607(3)(a), is jury question. Simmons v. Ciba‑Geigy Corp. (S.C. 1983) 279 S.C. 26, 302 S.E.2d 17.

3. Remedy

For purposes of section of Uniform Commercial Code (UCC) requiring buyer to notify seller of breach within reasonable time or be barred from any remedy, “any remedy” encompasses all potential remedies for breach of a contract that is subject to UCC’s sales article. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc. (S.C. 2005) 366 S.C. 163, 621 S.E.2d 38. Sales 974

**SECTION 36‑2‑608.** Revocation of acceptance in whole or in part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller’s assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

HISTORY: 1962 Code Section 10.2‑608; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 69(1)(d), (3), (4) and (5), Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

To make it clear that:

1. Although the prior basic policy is continued, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him. The non‑alternative character of the two remedies is stressed by the terms used in the present section. The section no longer speaks of “rescission,” a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract. The remedy under this section is instead referred to simply as “revocation of acceptance” of goods tendered under a contract for sale and involves no suggestion of “election” of any sort.

2. Revocation of acceptance is possible only where the non‑conformity substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the non‑conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer’s particular circumstances.

3. “Assurances” by the seller under paragraph (b) of subsection (1) can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery. These are the only assurances involved in paragraph (b). Explicit assurances may be made either in good faith or bad faith. In either case any remedy accorded by this Article is available to the buyer under the section on remedies for fraud.

4. Subsection (2) requires notification of revocation of acceptance within a reasonable time after discovery of the grounds for such revocation. Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non‑conformity after acceptance and beyond the time for rejection after tender. The parties may by their agreement limit the time for notification under this section, but the same sanctions and considerations apply to such agreements as are discussed in the comment on manner and effect of rightful rejection.

5. The content of the notice under subsection (2) is to be determined in this case as in others by considerations of good faith, prevention of surprise, and reasonable adjustment. More will generally be necessary than the mere notification of breach required under the preceding section. On the other hand the requirements of the section on waiver of buyer’s objections do not apply here. The fact that quick notification of trouble is desirable affords good ground for being slow to bind a buyer by his first statement. Following the general policy of this Article, the requirements of the content of notification are less stringent in the case of a non‑merchant buyer.

6. Under subsection (2) the prior policy is continued of seeking substantial justice in regard to the condition of goods restored to the seller. Thus the buyer may not revoke his acceptance if the goods have materially deteriorated except by reason of their own defects. Worthless goods, however, need not be offered back and minor defects in the articles reoffered are to be disregarded.

7. The policy of the section allowing partial acceptance is carried over into the present section and the buyer may revoke his acceptance, in appropriate cases, as to the entire lot or any commercial unit thereof.

Cross References:

Point 3: Section 2‑721.

Point 4: Sections 1‑204, 2‑602 and 2‑607.

Point 5: Sections 2‑605 and 2‑607.

Point 7: Section 2‑601.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Buyer” | Section 2‑103. |
| “Commercial unit” | Section 2‑105. |
| “Conform” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Lot” | Section 2‑105. |
| “Notifies” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Rights” | Section 1‑201. |
| “Seasonably” | Section 1‑204. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑608 permits the buyer to “revoke his acceptance” which would replace his right under existing law to rescind for breach of warranty. As a matter of terminology, this is the appropriate remedy since the buyer is precluded from “rejection” of the goods accepted under Commercial Code Section 2‑607. Under existing law the use of the term rescission led to the result that when elected by the buyer he is then precluded from bringing an action for damages since there is no longer a contract on which he can maintain an action. As stated in Ebner v Haverty Furniture Co., 128 SC 151, 122 SE 578 (1924), “While the buyer may, in the event of fraud or default of performance by the seller, at his election stand on the contract and bring an action for damages, or avoid the contract and maintain an action for recovery of the price, he cannot treat the sale as void in order to recover the price, and valid in order to recover damages, the remedies being inconsistent.” In accord, Turner v Carey, 227 SC 298, 87 SE2d 871 (1955); Yancey v Southern Wholesale Lumber Co., 133 SC 369, 131 SE 32 (1925); Gatch v Sears Roebuck & Co., 143 F Supp 937 (1956). The result of these cases would be changed by this Commercial Code section. By the revocation of acceptance, the buyer “has the same rights as if he had rejected” under the provision of subsection (3). Thus the revoking buyer may avail himself of all of the other remedies set out in Commercial Code Section 2‑711.

Under subsection (1), the buyer’s right to revoke his acceptance exists only where there has been a nonconformity which substantially impairs the value of the lot or commercial unit which was accepted. This may be more restrictive than the right to rescission under existing law. See 3 Williston, Sales, Section 608 (rev ed 1948). But the South Carolina court has refused to treat as a breach of a sales contract a slight or temporary defect in the goods. Rivers v Gruget, 2 Nott & McC 265 (1820). Note that the right to revoke is also more restrictive than the right to reject “if the goods or the tender of delivery fail in any respect to conform to the contract,” under Commercial Code Section 2‑601. The right to revoke acceptance of “a lot or commercial unit” is consistent with Commercial Code Sections 2‑601(c) and 2‑606(2) allowing acceptance of any commercial unit and may be a modification of the rule of partial acceptance only when the contract is divisible. See, Williston, Sales, Section 493 (rev ed 1948).

Section 2‑608(1) permits the buyer to revoke his acceptance made on the reasonable assumption that the seller was going to cure under Commercial Code Section 2‑508 or the result of the seller’s assurances regarding the goods. A similar result was reached in Empire Buggy Co. v Moss, 154 SC 424, 153 SE 788 (1930), where the court held that the buyer did not waive his right to object to defects when led by promises of settlement or adjustment by the seller.

Section 2‑608(1)(b) prescribes the other circumstances of revocation of accepted goods where the buyer failed to discover the nonconformity due to the difficulty of discovery before acceptance. This seems consistent with the case of Johnson Mfg. Co. v Wilson Thread Co., 269 Fed 555 (4th Cir 1920) holding that it was a jury question as to whether a buyer should have discovered defects in yarn within three months where it was discoverable only on rewinding. See also, Reliance Varnish Co. v Mullins Lumber Co., 213 SC 84, 48 SE2d 653 (1948), recognizing that the buyer has the right of reasonable inspection to discover defects before he waives any objections.

The principle of subsection (2) with respect to revocation of acceptance is similar to the South Carolina case law requirement that the buyer notify the seller of his election to rescind within a reasonable time after he learns or should have learned of the defect. Southern Brick Co. v McDaniel, 187 SC 243, 186 SE 893 (1938); Southern Coal Co. v Rice, 122 SC 484, 115 SE 815 (1922); Building Supply Co. v Jones, 87 SC 426, 69 SE 881 (1910).

The general common law rule is that the buyer must put the seller in status quo as a condition to the right of rescission. Thus he may not rescind if the goods have been injured or destroyed, except where the injury to the goods was caused by the very defect against which the seller warranted. Also the buyer must tender a return of the goods to the seller. See Williston, Sales, Section 610 (rev ed 1948). A similar result is reached under subsection (2) for revocation of acceptance except that it becomes effective simply upon notification to the seller without the requirement of tender back.

CROSS REFERENCES

Buyers’ remedies, see Section 36‑2‑711.

Remedies for fraud, see Section 36‑2‑721.

When action is taken seasonably, see Section 36‑1‑205.

When goods are conforming, see Section 36‑2‑106.

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NOTES OF DECISIONS

In general 1

Burden of proof 4

Expectation of cure 2

Questions of fact 5

Review 6

Timeliness 3

1. In general

Uniform Commercial Code (UCC) displaces common‑law remedies for breach of warranty, and thus remedies for breaches of warranties that are subject to UCC’s sales article are available exclusively under that article; UCC contains comprehensive system of remedies for breach of warranty. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc. (S.C. 2005) 366 S.C. 163, 621 S.E.2d 38. Sales 1905

Buyer’s remedies for seller’s alleged breach of warranty were limited to those contained in sales article of Uniform Commercial Code (UCC), and thus buyer could not pursue common‑law remedies for breach of warranty; contract was governed by sales article, and UCC’s comprehensive system of remedies displaced common law. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc. (S.C. 2005) 366 S.C. 163, 621 S.E.2d 38. Sales 1905

Causes of action for breach of warranty and for revocation of acceptance contained contradictory elements, and thus jury verdict finding in favor of purchaser of lawn mower on revocation of acceptance claim but denying recovery on breach of warranty claim was not inconsistent and did not require new trial. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. New Trial 60; Sales 2436; Sales 2471

When exclusive or limited warranty fails of its essential purpose, party who purchases product covered by such warranty is not limited to action for breach of warranty, but may seek other remedies, including revocation of acceptance. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 1032; Sales 1905

Breach of warranty is an action affirming contract in which buyer retains goods; revocation of acceptance, on the other hand, requires return of goods and cancellation of terms of contract. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 1032; Sales 1905; Sales 2451

For buyer to revoke acceptance, goods purchased must have a nonconformity that substantially impairs value of goods to buyer. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 1032

Uniform Commercial Code rejects election of remedies as applied to revocation of acceptance and damages for breach. Adams v. Grant (S.C.App. 1986) 292 S.C. 581, 358 S.E.2d 142. Election Of Remedies 3(3)

2. Expectation of cure

Buyer may revoke his acceptance of nonconforming item if his acceptance was based on reasonable assumption nonconformity would be seasonably cured, but it was not. Adams v. Grant (S.C.App. 1986) 292 S.C. 581, 358 S.E.2d 142. Sales 1031

There was evidence which could support jury’s finding that used car purchaser had right to revoke his acceptance, where purchaser and his mother‑in‑law testified about defects in car which substantially impaired its value, purchaser testified seller promised to repair defects, and then refused to repair some defects at all and attempted other repairs which proved unsuccessful. Adams v. Grant (S.C.App. 1986) 292 S.C. 581, 358 S.E.2d 142.

3. Timeliness

A car buyer’s attempted revocation almost 22 months after the date of purchase was not timely in accordance with Section 36‑2‑608(2) where the buyer failed to establish that the seller made reasonable assurances to him that the car’s defects would be cured, thereby delaying his decision to revoke his acceptance. Mockabee v. Wakefield Buick, Inc. (S.C.App. 1989) 298 S.C. 386, 380 S.E.2d 848. Sales 1039

4. Burden of proof

Revocation of acceptance under Section 36‑2‑608 is an affirmative defense on which the burden of proof shifts to the defendant to show that he is not liable. FMI, Inc. v. RMAX, Inc. (S.C.App. 1985) 286 S.C. 343, 333 S.E.2d 360.

5. Questions of fact

Whether the nonconformity of a product substantially impairs its value to a buyer under Section 36‑2‑608 is a question of fact and not one of law. Evidence that a boat sold as a “demonstrator” was in fact a used boat which did not carry a warranty for future repairs supported a jury verdict in favor of the buyer for a rescission of the contract of sale. Burris v. Lake Wylie Marina, Inc. (S.C.App. 1985) 285 S.C. 614, 330 S.E.2d 559.

6. Review

Manufacturer of lawn mower and seller of mower did not preserve for appellate review by Court of Appeals their claim that magistrate at small claims trial improperly denied their motion for directed verdict in action by purchaser of mower that alleged breach of warranty and revocation of acceptance, where circuit court, in its review of small claims trial, did not rule on that issue. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Courts 176.5

**SECTION 36‑2‑609.** Right to adequate assurance of performance.

(1) A contract for sale imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party’s right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

HISTORY: 1962 Code Section 10.2‑609; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: See Sections 53, 54(1)(b), 55 and 63(2), Uniform Sales Act.

Purposes:

1. The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain. If either the willingness or the ability of a party to perform declines materially between the time of contracting and the time for performance, the other party is threatened with the loss of a substantial part of what he has bargained for. A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. Once he has been given reason to believe that the buyer’s performance has become uncertain, it is an undue hardship to force him to continue his own performance. Similarly, a buyer who believes that the seller’s deliveries have become uncertain cannot safely wait for the due date of performance when he has been buying to assure himself of materials for his current manufacturing or to replenish his stock of merchandise.

2. Three measures have been adopted to meet the needs of commercial men in such situations. First, the aggrieved party is permitted to suspend his own performance and any preparation therefor, with excuse for any resulting necessary delay, until the situation has been clarified. “Suspend performance” under this section means to hold up performance pending the outcome of the demand, and includes also the holding up of any preparatory action. This is the same principle which governs the ancient law of stoppage and seller’s lien, and also of excuse of a buyer from prepayment if the seller’s actions manifest that he cannot or will not perform. (Original Act, Section 63(2).).

Secondly, the aggrieved party is given the right to require adequate assurance that the other party’s performance will be duly forthcoming. This principle is reflected in the familiar clauses permitting the seller to curtail deliveries if the buyer’s credit becomes impaired, which when held within the limits of reasonableness and good faith actually express no more than the fair business meaning of any commercial contract.

Third, and finally, this section provides the means by which the aggrieved party may treat the contract as broken if his reasonable grounds for insecurity are not cleared up within a reasonable time. This is the principle underlying the law of anticipatory breach, whether by way of defective part performance or by repudiation. The present section merges these three principles of law and commercial practice into a single theory of general application to all sales agreements looking to future performance.

3. Subsection (2) of the present section requires that “reasonable” grounds and “adequate” assurance as used in subsection (1) be defined by commercial rather than legal standards. The express reference to commercial standards carries no connotation that the obligation of good faith is not equally applicable here.

Under commercial standards and in accord with commercial practice, a ground for insecurity need not arise from or be directly related to the contract in question. The law as to “dependence” or “independence” of promises within a single contract does not control the application of the present section.

Thus a buyer who falls behind in “his account” with the seller, even though the items involved have to do with separate and legally distinct contracts, impairs the seller’s expectation of due performance. Again, under the same test, a buyer who requires precision parts which he intends to use immediately upon delivery, may have reasonable grounds for insecurity if he discovers that his seller is making defective deliveries of such parts to other buyers with similar needs. Thus, too, in a situation such as arose in Jay Dreher Corporation v Delco Appliance Corporation, 93 F2d 275 (2d Cir 1937), where a manufacturer gave a dealer an exclusive franchise for the sale of his product but on two or three occasions breached the exclusive dealing clause, although there was no default in orders, deliveries or payments under the separate sales contract between the parties, the aggrieved dealer would be entitled to suspend his performance of the contract for sale under the present section and to demand assurance that the exclusive dealing contract would be lived up to. There is no need for an explicit clause tying the exclusive franchise into the contract for the sale of goods since the situation itself ties the agreements together.

The nature of the sales contract enters also into the question of reasonableness. For example, a report from an apparently trustworthy source that the seller had shipped defective goods or was planning to ship them would normally give the buyer reasonable grounds for insecurity. But when the buyer has assumed the risk of payment before inspection of the goods, as in a sales contract on C.I.F. or similar cash against documents terms, that risk is not to be evaded by a demand for assurance. Therefore no ground for insecurity would exist under this section unless the report went to a ground which would excuse payment by the buyer.

4. What constitutes “adequate” assurance of due performance is subject to the same test of factual conditions. For example, where the buyer can make use of a defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the defect will not be repeated, is normally sufficient. Under the same circumstances, however, a similar statement by a known corner‑cutter might well be considered insufficient without the posting of a guaranty or, if so demanded by the buyer, a speedy replacement of the delivery involved. By the same token where a delivery has defects, even though easily curable, which interfere with easy use by the buyer, no verbal assurance can be deemed adequate which is not accompanied by replacement, repair, money‑allowance, or other commercially reasonable cure.

A fact situation such as arose in Corn Products Refining Co. v Fasola, 94 NJL 181, 109 Atl 505 (1920) offers illustration both of reasonable grounds for insecurity and “adequate” assurance. In that case a contract for the sale of oils on 30 days’ credit, 2% off for payment within 10 days, provided that credit was to be extended to the buyer only if his financial responsibility was satisfactory to the seller. The buyer had been in the habit of taking advantage of the discount but at the same time that he failed to make his customary 10 day payment, the seller heard rumors, in fact false, that the buyer’s financial condition was shaky. Thereupon, the seller demanded cash before shipment or security satisfactory to him. The buyer sent a good credit report from his banker, expressed willingness to make payments when due on the 30 day terms and insisted on further deliveries under the contract. Under this Article the rumors, although false, were enough to make the buyer’s financial condition “unsatisfactory” to the seller under the contract clause. Moreover, the buyer’s practice of taking the cash discounts is enough, apart from the contract clause, to lay a commercial foundation for suspicion when the practice is suddenly stopped. These matters, however, go only to the justification of the seller’s demand for security, or his “reasonable grounds for insecurity”.

The adequacy of the assurance given is not measured as in the type of “satisfaction” situation affected with intangibles, such as in personal service cases, cases involving a third party’s judgment as final, or cases in which the whole contract is dependent on one party’s satisfaction, as in a sale on approval. Here, the seller must exercise good faith and observe commercial standards. This Article thus approves the statement of the court in James B. Berry’s Sons Co. of Illinois v Monark Gasoline & Oil Co., Inc., 32 F2d 74 (8th Cir 1929), that the seller’s satisfaction under such a clause must be based upon reason and must not be arbitrary or capricious; and rejects the purely personal “good faith” test of the Corn Products Refining Co. case, which held that in the seller’s sole judgment, if for any reason he was dissatisfied, he was entitled to revoke the credit. In the absence of the buyer’s failure to take the 2% discount as was his custom, the banker’s report given in that case would have been “adequate” assurance under this Act, regardless of the language of the “satisfaction” clause. However, the seller is reasonably entitled to feel insecure at a sudden expansion of the buyer’s use of a credit term, and should be entitled either to security or to a satisfactory explanation.

The entire foregoing discussion as to adequacy of assurance by way of explanation is subject to qualification when repeated occasions for the application of this section arise. This Act recognizes that repeated delinquencies must be viewed as cumulative. On the other hand, commercial sense also requires that if repeated claims for assurance are made under this section, the basis for these claims must be increasingly obvious.

5. A failure to provide adequate assurance of performance and thereby to re‑establish the security of expectation, results in a breach only “by repudiation” under subsection (4). Therefore, the possibility is continued of retraction of the repudiation under the section dealing with that problem, unless the aggrieved party has acted on the breach in some manner.

The thirty day limit on the time to provide assurance is laid down to free the question of reasonable time from uncertainty in later litigation.

6. Clauses seeking to give the protected party exceedingly wide powers to cancel or readjust the contract when ground for insecurity arises must be read against the fact that good faith is a part of the obligation of the contract and not subject to modification by agreement and includes, in the case of a merchant, the reasonable observance of commercial standards of fair dealing in the trade. Such clauses can thus be effective to enlarge the protection given by the present section to a certain extent, to fix the reasonable time within which requested assurance must be given, or to define adequacy of the assurance in any commercially reasonable fashion. But any clause seeking to set up arbitrary standards for action is ineffective under this Article. Acceleration clauses are treated similarly in the Articles on Commercial Paper and Secured Transactions.

Cross References:

Point 3: Section 1‑203.

Point 5: Section 2‑611.

Point 6: Sections 1‑203 and 1‑208 and Articles 3 and 9.

Definitional Cross References:

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| “Aggrieved party” | Section 1‑201. |
| “Between merchants” | Section 2‑104. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Party” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Rights” | Section 1‑201. |
| “Writing” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑609 establishes new rights and duties of parties to a sale contract with respect to the right to demand and the duty to give adequate assurance of performance against impending breach. The rules of this section may be viewed as an expansion of the doctrine of anticipatory breach of contract and the seller’s ancient right of stoppage in transit upon the buyer’s insolvency.

When reasonable grounds for insecurity arise as to performance by one party which falls short of actual breach, the other party may demand adequate assurance of due performance. Failing receipt of such assurance, the aggrieved party may suspend his performance under subsection (1). He may also treat the contract as breached if the assurance is not received within thirty days after receipt of a justified demand under subsection (4).

The reasonableness of the grounds for insecurity (and thus the justification for demanding assurance of performance) and the adequacy of any assurance offered are questions of fact. Under subsection (2) these questions shall be determined according to commercial standards between merchants. As is true of any question of fact which involves the standard of reasonableness, there will be uncertainty in the outcome within a range of factual situations. A typical fact where a seller would be justified in believing that the performance by the buyer had been substantially impaired would be his discovery that the buyer was no longer meeting his current obligations. An adequate assurance in such a circumstance would clearly be the posting of a guaranty bond. The responsibility will rest with the court in administering this rule in striking a balance in the difficult cases so that a party may be protected against the results of an impending breach and avoiding use of this right as a weapon of harassment.

Subsection (3) provides that the acceptance of any improper delivery or payment does not prejudice the aggrieved party’s right to demand adequate assurance of future performance.

CROSS REFERENCES

Acceleration of commercial paper, see Sections 36‑3‑109, 36‑3‑304, 36‑3‑503.

Contract providing for acceleration of payment or performance, see Section 36‑1‑309.

Contract requiring payment before inspection, see Section 36‑2‑512.

Delegation of performance, assignment of rights, see Section 36‑2‑210.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Obligations, generally, of buyer and seller, see Section 36‑2‑301.

Payment against tender of required documents, see Sections 36‑2‑319, 36‑2‑320.

Secured transactions, see Sections 36‑9‑101 et seq.

Seller’s resale of goods, see Section 36‑2‑706.

What is reasonable time, see Section 36‑1‑205.

LIBRARY REFERENCES

Sales 152, 184.

Westlaw Key Number Searches: 343k152; 343k184.

C.J.S. Sales Sections 155, 163, 193, 208.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Torts: Misrepresentation. 33 S.C. L. Rev. 159 (August 1981).

NOTES OF DECISIONS

Demand for assurance 2

Mixed contracts 1

Questions of fact 3

1. Mixed contracts

In contractor’s action against subcontractor for breach of contract to install flooring in building, defendant could not escape liability on ground that plaintiff’s breach of prior contract with defendant constituted reasonable grounds for insecurity under UCC Section 2‑609 with respect to plaintiff’s performance of contract in suit, since UCC Article 2 applies only to transactions in goods and contract in suit was primarily contract for performance of services with sale of goods necessary to perform such services being incidental to the service contract. Test for determining whether mixed contract for sale of goods and services constitutes sale of goods under Uniform Commercial Code is whether contract’s predominant purpose is to render services with sale of goods being incidentally involved or to sell goods with rendition of services being incidentally involved. Ranger Const. Co. v. Dixie Floor Co., Inc. (D.C.S.C. 1977) 433 F.Supp. 442.

2. Demand for assurance

Magistrate did not err in determining that buyer was not liable for contract price of fourth installment of goods which seller never delivered, notwithstanding seller’s contention that it made constructive tender of this installment or, alternatively, that buyer repudiated contract with respect to this installment, where letter from buyer to effect that it would be happy to take parts provided they passed inspection and that it could not make any further payments to seller until such time as matter was cleared up, which constituted sole evidence of anticipatory repudiation, could properly be interpreted as demand for assurance to which buyer was entitled under circumstances of case, and where timely and adequate assurance was not given by seller. T & S Brass and Bronze Works, Inc. v. Pic‑Air, Inc. (C.A.4 (S.C.) 1986) 790 F.2d 1098.

3. Questions of fact

Even where defendant’s contract repudiation was not specifically justified by 1962 Code Section 10.2‑609 [Section 36‑2‑609 (1976)] because contract for installation of flooring was predominantly characterized as service contract accompanied by incidental sale of goods, under common‑law theory of anticipatory repudiation there was question of fact for jury to determine whether plaintiff contractor’s refusal to pay defendant subcontractor under prior North Carolina construction contract demonstrated to defendant that plaintiff could not or would not substantially perform his promise under contract. Ranger Const. Co. v. Dixie Floor Co., Inc. (D.C.S.C. 1977) 433 F.Supp. 442.

**SECTION 36‑2‑610.** Anticipatory repudiation.

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 36‑2‑703 or Section 36‑2‑711), even though he has notified the repudiating party that he would await the latter’s performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this chapter on the seller’s right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 36‑2‑704).

HISTORY: 1962 Code Section 10.2‑610; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: See Sections 63(2) and 65, Uniform Sales Act.

Purposes:

To make it clear that:

1. With the problem of insecurity taken care of by the preceding section and with provision being made in this Article as to the effect of a defective delivery under an installment contract, anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance.

Under the present section when such a repudiation substantially impairs the value of the contract, the aggrieved party may at any time resort to his remedies for breach, or he may suspend his own performance while he negotiates with, or awaits performance by, the other party. But if he awaits performance beyond a commercially reasonable time he cannot recover resulting damages which he should have avoided.

2. It is not necessary for repudiation that performance be made literally and utterly impossible. Repudiation can result from action which reasonably indicates a rejection of the continuing obligation. And, a repudiation automatically results under the preceding section on insecurity when a party fails to provide adequate assurance of due future performance within thirty days after a justifiable demand therefor has been made. Under the language of this section, a demand by one or both parties for more than the contract calls for in the way of counter‑performance is not in itself a repudiation nor does it invalidate a plain expression of desire for future performance. However, when under a fair reading it amounts to a statement of intention not to perform except on conditions which go beyond the contract, it becomes a repudiation.

3. The test chosen to justify an aggrieved party’s action under this section is the same as that in the section on breach in installment contracts—namely the substantial value of the contract. The most useful test of substantial value is to determine whether material inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the part or aspect repudiated.

4. After repudiation, the aggrieved party may immediately resort to any remedy he chooses provided he moves in good faith (see Section 1‑203). Inaction and silence by the aggrieved party may leave the matter open but it cannot be regarded as misleading the repudiating party. Therefore the aggrieved party is left free to proceed at any time with his options under this section, unless he has taken some positive action which in good faith requires notification to the other party before the remedy is pursued.

Cross References:

Point 1: Sections 2‑609 and 2‑612.

Point 2: Section 2‑609.

Point 3: Section 2‑612.

Point 4: Section 1‑203.

Definitional Cross References:

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| “Aggrieved party” | Section 1‑201. |
| “Contract” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Remedy” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑610 prescribes the recourse of a party to a sales contract who is notified of refusal to perform by the other party. This is essentially a codification of the common law doctrine of anticipatory repudiation. Subsection (a) gives the aggrieved party the option to await performance but only for a commercially reasonable time after which he cannot recover resulting damages which could have been avoided. South Carolina case law is in accord with the result that a party may refuse to accept repudiation of the other party and await performance. Huguenot Mills v Jempson, 68 SC 363, 47 SE 683 (1903). The Commercial Code requirement of mitigation after a reasonable time is probably in accord with South Carolina law. See Hastings‑Stout Co. v Bennett, 131 SC 364, 127 SE 720 (1925), where it was held that it was reversible error in failing to submit the issue of whether plaintiff, after being notified that defendant would not carry out the contract, failed to minimize the loss by not making a sale to other parties. But see, A. F. Pringle, Inc. v Gresham Fertilizer Co., 132 SC 358, 128 SE 171 (1925), holding that the measure of damages recoverable by the seller when the buyer repudiates before time for performance is based on the market price at the time fixed for delivery. This damage problem is dealt with in more detail in Part 7 of Article 2.

The option in the aggrieved party to treat the contract as breached and resort to his remedies at once, is in accord with the South Carolina rule of anticipatory breach. Brooke v Laurens Milling Co., 78 SC 200, 58 SE 806 (1907).

CROSS REFERENCES

Aggrieved seller’s rights with respect to unfinished goods, see Section 36‑2‑704.

Buyer’s remedies for breach, see Section 36‑2‑711.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Seller’s damages for repudiation, see Section 36‑2‑708.

Seller’s remedies for breach, see Section 36‑2‑703.

LIBRARY REFERENCES

Sales 151, 194.

Westlaw Key Number Searches: 343k151; 343k194.

C.J.S. Sales Sections 156, 208.

**SECTION 36‑2‑611.** Retraction of anticipatory repudiation.

(1) Until the repudiating party’s next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this chapter (Section 36‑2‑609).

(3) Retraction reinstates the repudiating party’s rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

HISTORY: 1962 Code Section 10.2‑611; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

To make it clear that:

1. The repudiating party’s right to reinstate the contract is entirely dependent upon the action taken by the aggrieved party. If the latter has cancelled the contract or materially changed his position at any time after the repudiation, there can be no retraction under this section.

2. Under subsection (2) an effective retraction must be accompanied by any assurances demanded under the section dealing with right to adequate assurance. A repudiation is of course sufficient to give reasonable ground for insecurity and to warrant a request for assurance as an essential condition of the retraction. However, after a timely and unambiguous expression of retraction, a reasonable time for the assurance to be worked out should be allowed by the aggrieved party before cancellation.

Cross References:

Point 2: Section 2‑609.

Definitional Cross References:

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| “Aggrieved party” | Section 1‑201. |
| “Cancellation” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Rights” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑611(1) states the general common law rule that repudiation may be retracted before time for performance has arrived or until the other party has either manifested an election to rescind the contract or changed his position. See, Williston, Sales, Section 585(c) (rev ed 1948); Rest. Contracts, Section 319 (1936). See Swift & Co. v Goldberg, 121 SC 190, 113 SE 358 (1922) which seems to recognize this principle.

Subsection (2) recognizes that the initial repudiation is a justification for the other party to demand adequate assurance of performance under Commercial Code Section 2‑609 as a condition to an effective retraction.

Subsection (3) states the effect of retraction as reinstating the party’s rights under the contract with allowance for any delay occasioned by the repudiation.

LIBRARY REFERENCES

Sales 11, 151, 170, 194.

Westlaw Key Number Searches: 343k11; 343k151; 343k170; 343k194.

C.J.S. Sales Sections 16, 156, 169, 208, 223.

**SECTION 36‑2‑612.** “Installment contract”; breach.

(1) An “installment contract” is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause “each delivery is a separate contract” or its equivalent.

(2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

HISTORY: 1962 Code Section 10.2‑612; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 45(2), Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

To continue prior law but to make explicit the more mercantile interpretation of many of the rules involved, so that:

1. The definition of an installment contract is phrased more broadly in this Article so as to cover installment deliveries tacitly authorized by the circumstances or by the option of either party.

2. In regard to the apportionment of the price for separate payment this Article applies the more liberal test of what can be apportioned rather than the test of what is clearly apportioned by the agreement. This Article also recognizes approximate calculation or apportionment of price subject to subsequent adjustment, for each lot delivered ordinarily means that the price is at least roughly calculable by units of quantity, but such a provision is not essential to an “installment contract.” If separate acceptance of separate deliveries is contemplated, no generalized contrast between wholly “entire” and wholly “divisible” contracts has any standing under this Article.

3. This Article rejects any approach which gives clauses such as “each delivery is a separate contract” their legalistically literal effect. Such contracts nonetheless call for installment deliveries. Even where a clause speaks of “a separate contract for all purposes”, a commercial reading of the language under the section on good faith and commercial standards requires that the singleness of the document and the negotiation, together with the sense of the situation, prevail over any uncommercial and legalistic interpretation.

4. One of the requirements for rejection under subsection (2) is non‑conformity substantially impairing the value of the installment in question. However, an installment agreement may require accurate conformity in quality as a condition to the right to acceptance if the need for such conformity is made clear either by express provision or by the circumstances. In such a case the effect of the agreement is to define explicitly what amounts to substantial impairment of value impossible to cure. A clause requiring accurate compliance as a condition to the right to acceptance must, however, have some basis in reason, must avoid imposing hardship by surprise and is subject to waiver or to displacement by practical construction.

Substantial impairment of the value of an installment can turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and the like. It must be judged in terms of the normal or specifically known purposes of the contract. The defect in required documents refers to such matters as the absence of insurance documents under a C.I.F. contract, falsity of a bill of lading, or one failing to show shipment within the contract period or to the contract destination. Even in such cases, however, the provisions on cure of tender apply if appropriate documents are readily procurable.

5. Under subsection (2) an installment delivery must be accepted if the non‑conformity is curable and the seller gives adequate assurance of cure. Cure of non‑conformity of an installment in the first instance can usually be afforded by an allowance against the price, or in the case of reasonable discrepancies in quantity either by a further delivery or a partial rejection. This Article requires reasonable action by a buyer in regard to discrepant delivery and good faith requires that the buyer make any reasonable minor outlay of time or money necessary to cure an overshipment by severing out an acceptable percentage thereof. The seller must take over a cure which involves any material burden; the buyer’s obligation reaches only to cooperation. Adequate assurance for purposes of subsection (2) is measured by the same standards as under the section on right to adequate assurance of performance.

6. Subsection (3) is designed to further the continuance of the contract in the absence of an overt cancellation. The question arising when an action is brought as to a single installment only is resolved by making such action waive the right of cancellation. This involves merely a defect in one or more installments, as contrasted with the situation where there is a true repudiation within the section on anticipatory repudiation. Whether the non‑conformity in any given installment justifies cancellation as to the future depends, not on whether such non‑conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non‑conformity substantially impairs the value of the whole contract. If only the seller’s security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance but has not an immediate right to cancel the entire contract. It is clear under this Article, however, that defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect “waived.” Prior policy is continued, putting the rule as to buyer’s default on the same footing as that in regard to seller’s default.

7. Under the requirement of seasonable notification of cancellation under subsection (3) a buyer who accepts a non‑conforming installment which substantially impairs the value of the entire contract should properly be permitted to withhold his decision as to whether or not to cancel pending a response from the seller as to his claim for cure or adjustment. Similarly, a seller may withhold a delivery pending payment for prior ones, at the same time delaying his decision as to cancellation. A reasonable time for notifying of cancellation, judged by commercial standards under the section on good faith, extends of course to include the time covered by any reasonable negotiation in good faith. However, during this period the defaulting party is entitled, on request, to know whether the contract is still in effect, before he can be required to perform further.

Cross References:

Point 2: Sections 2‑307 and 2‑607.

Point 3: Section 1‑203.

Point 5: Sections 2‑208 and 2‑609.

Point 6: Section 2‑610.

Definitional Cross References:

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| “Action” | Section 1‑201. |
| “Aggrieved party” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Cancellation” | Section 2‑106. |
| “Conform” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Lot” | Section 2‑105. |
| “Notifies” | Section 1‑201. |
| “Seasonably” | Section 1‑204. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑612 deals with the breach of installment contracts broadly defined in subsection (1) as calling for delivery in separate lots. In contrast with the strict performance rule of Commercial Code Section 2‑601, this section establishes a test of substantial performance for installment contracts. The distinction is probably based on the practical consideration of greater difficulty of perfect tender of each one of multiple deliveries. See Pratt & Co. v Frasier Co., 72 SC 368, 51 SE 983 (1905) where the Court indicated that where the failure of consideration is only partial, a buyer’s right to rescind will depend on whether the contract is entire or not. Followed in Loveland v Collins, 109 SC 294, 96 SE 124 (1917).

Subsection (2) states the substantial performance rule by permitting the buyer to reject any installment only when the non‑conformity substantially impairs the value of that installment and cannot be cured. Otherwise the buyer must accept the installment but may demand adequate assurance of due performance in the future under Commercial Code Section 2‑609. If non‑conformity is a defect in the required documents, the buyer may in any event reject.

If the non‑conformity of an installment would substantially impair the value of the whole contract, subsection (3) permits the aggrieved party to treat the entire contract as breached. See Pratt & Co., cited above, where the failure to ship a showcase in which to display the goods purchased justified the buyer’s repudiation of the entire contract. When there has been such a breach of the whole contract, the aggrieved party waives his right to object by accepting a non‑conforming installment without seasonably notifying of cancellation, or by bringing an action with respect only to past installments or by demanding performance as to future installments. This is in accord with the usual rules of waiver discussed under Commercial Code section 2‑607.

CROSS REFERENCES

Buyer’s remedies, see Section 36‑2‑711.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Seller’s remedies, see Section 36‑2‑703.

Single delivery or delivery in lots, see Section 36‑2‑307.

LIBRARY REFERENCES

Sales 82(4), 163, 180.

Westlaw Key Number Searches: 343k82(4); 343k163; 343k180.

C.J.S. Sales Sections 181, 192, 208.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Contract Law. 38 S.C. L. Rev. 46 (Autumn 1986).

NOTES OF DECISIONS

In general 1

1. In general

Where the new owner of a beer distributorship had consistently refused to furnish financial statements or other material from which his credit rating could be ascertained, and the brewer delayed in shipping beer to the distributor the court stated that under Section 36‑2‑612 the brewers conduct could be likened at worse to the breach in connection with a single delivery on an installment contract, which did not in the ordinary case constitute a breach of the whole. Piedmont Distributing Co., Inc. v. Pearl Brewing Co. (C.A.4 (S.C.) 1984) 737 F.2d 1311.

**SECTION 36‑2‑613.** Casualty to identified goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a “no arrival, no sale” term (Section 36‑2‑324) then

(a) if the loss is total the contract is avoided; and

(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

HISTORY: 1962 Code Section 10.2‑613; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 7 and 8, Uniform Sales Act.

Changes: Rewritten, the basic policy being continued but the test of a “divisible” or “indivisible” sale or contract being abandoned in favor of adjustment in business terms.

Purposes of changes:

1. Where goods whose continued existence is presupposed by the agreement are destroyed without fault of either party, the buyer is relieved from his obligation but may at his option take the surviving goods at a fair adjustment. “Fault” is intended to include negligence and not merely wilful wrong. The buyer is expressly given the right to inspect the goods in order to determine whether he wishes to avoid the contract entirely or to take the goods with a price adjustment.

2. The section applies whether the goods were already destroyed at the time of contracting without the knowledge of either party or whether they are destroyed subsequently but before the risk of loss passes to the buyer. Where under the agreement, including of course usage of trade, the risk has passed to the buyer before the casualty, the section has no application. Beyond this, the essential question in determining whether the rules of this section are to be applied is whether the seller has or has not undertaken the responsibility for the continued existence of the goods in proper condition through the time of agreed or expected delivery.

3. The section on the term “no arrival, no sale” makes clear that delay in arrival, quite as much as physical change in the goods, gives the buyer the options set forth in this section.

Cross References:

Point 3: Section 2‑324.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Conform” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Fault” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Rights” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Sections 2‑613 through 2‑616 deal with various aspects of impossibility of performance of sales contracts.

Section 2‑613 codifies the rule which excuses the parties to a contract to sell specific property from liability where the goods are destroyed without fault of either party and before risk of loss is passed to the buyer. For a collection of the modern cases see, 84 ALR2d 12 (1962). This principle was applied in Pearce‑Young‑Angel Co., Inc. v Charles R. Allen, Inc., 213 SC 578, 50 SE2d 698 (1948), a suit to recover for breach of a sales contract to deliver a quantity of blackeye peas of a certain quality to be grown in a particular locality in Texas. A torrential rainfall fell in that area in Texas at the time the pea crop was about to be harvested ruining the crop. The Court held that, generally, when one by his contract assumes an obligation, he is bound to make it good even though he is unable to do so through accidents or forces over which he has no control. But an exception to this rule, which is this case, is where the contract is with reference to particular property or to something derived from a particular source, and it is destroyed by an act of God, then the destruction of such property excuses performance.

Under subsection (b), the buyer is given the option of avoiding the contract or accepting part of the goods where the loss is partial with due allowance for the deficiency but without further rights against the seller. This rule is consistent with the general common law and the Uniform Sales Act Section 8 (see Williston, Sales, Section 163 (rev ed 1948)), except that this option is usually available only when the contract is divisible which is not required by this Commercial Code section.

CROSS REFERENCES

“No arrival, no sale”, see Section 36‑2‑324.

LIBRARY REFERENCES

Sales 150(2), 172, 217.

Westlaw Key Number Searches: 343k172; 343k150(2); 343k217.

C.J.S. Sales Sections 157, 210 to 212.

**SECTION 36‑2‑614.** Substituted performance.

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.

HISTORY: 1962 Code Section 10.2‑614; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Subsection (1) requires the tender of a commercially reasonable substituted performance where agreed to facilities have failed or become commercially impracticable. Under this Article, in the absence of specific agreement, the normal or usual facilities enter into the agreement either through the circumstances, usage of trade or prior course of dealing.

This section appears between Section 2‑613 on casualty to identified goods and the next section on excuse by failure of presupposed conditions, both of which deal with excuse and complete avoidance of the contract where the occurrence or non‑occurrence of a contingency which was a basic assumption of the contract makes the expected performance impossible. The distinction between the present section and those sections lies in whether the failure or impossibility of performance arises in connection with an incidental matter or goes to the very heart of the agreement. The differing lines of solution are contrasted in a comparison of International Paper Co. v Rockefeller, 161 App Div 180, 146 NYS 371 (1914) and Meyer v Sullivan, 40 Cal App 723, 181 Pac 847 (1919). In the former case a contract for the sale of spruce to be cut from a particular tract of land was involved. When a fire destroyed the trees growing on that tract the seller was held excused since performance was impossible. In the latter case the contract called for delivery of wheat “f.o.b. Kosmos Steamer at Seattle.” The war led to cancellation of that line’s sailing schedule after space had been duly engaged and the buyer was held entitled to demand substituted delivery at the warehouse on the line’s loading dock. Under this Article, of course, the seller would also be entitled, had the market gone the other way, to make a substituted tender in that manner.

There must, however, be a true commercial impracticability to excuse the agreed to performance and justify a substituted performance. When this is the case a reasonable substituted performance tendered by either party should excuse him from strict compliance with contract terms which do not go to the essence of the agreement.

2. The substitution provided in this section as between buyer and seller does not carry over into the obligation of a financing agency under a letter of credit, since such an agency is entitled to performance which is plainly adequate on its face and without need to look into commercial evidence outside of the documents. See Article 5, especially Sections 5‑102, 5‑103, 5‑109, 5‑110, 5‑114.

3. Under subsection (2) where the contract is still executory on both sides, the seller is permitted to withdraw unless the buyer can provide him with a commercially equivalent return despite the governmental regulation. Where, however, only the debt for the price remains, a larger leeway is permitted. The buyer may pay in the manner provided by the regulation even though this may not be commercially equivalent provided that the regulation is not “discriminatory, oppressive or predatory.”

Cross References:

Point 2: Article 5.

Definitional Cross References:

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| “Buyer” | Section 2‑103. |
| “Fault” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑614 is designed to save the contract where failure or impossibility of performance arises in connection with such incidental matters as receiving or carriage facilities. Subsection (1) provides that where a commercially reasonable substitute is available it “must be tendered and accepted.” That is, neither the buyer nor the seller may use such a circumstance to excuse performance. This rule would seem to qualify the strict performance rule of Commercial Code Section 2‑601.

If while the contract is still executory and the prescribed method of payment fails because of government regulation, the buyer may tender a commercially substantial equivalent, and the seller must then deliver the goods; otherwise, the seller may refuse delivery. If the goods have already been delivered, the buyer must pay according to the regulations unless it is “discriminatory, oppressive or predatory.”

CROSS REFERENCES

Obligation of financing agency under letter of credit, see Sections 36‑5‑102, 36‑5‑103, 36‑5‑108, 36‑5‑109.

LIBRARY REFERENCES

Sales 83, 190.

Westlaw Key Number Searches: 343k83; 343k190.

C.J.S. Sales Sections 157, 208.

**SECTION 36‑2‑615.** Excuse by failure of presupposed conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section (Section 36‑2‑614) on substituted performance:

(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller’s capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

HISTORY: 1962 Code Section 10.2‑615; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. This section excuses a seller from timely delivery of goods contracted for, where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting. The destruction of specific goods and the problem of the use of substituted performance on points other than delay or quantity, treated elsewhere in this Article, must be distinguished from the matter covered by this section.

2. The present section deliberately refrains from any effort at an exhaustive expression of contingencies and is to be interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose.

3. The first test for excuse under this Article in terms of basic assumption is a familiar one. The additional test of commercial impracticability (as contrasted with “impossibility,” “frustration of performance” or “frustration of the venture”) has been adopted in order to call attention to the commercial character of the criterion chosen by this Article.

4. Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section. (See Ford & Sons, Ltd., v Henry Leetham & Sons, Ltd., 21 Com Cas 55 (1915, KBD).).

5. Where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. The same holds true where a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting. (See Davis Co. v Hoffmann‑LaRoche Chemical Works, 178 App Div 855, 166 NYS 179 (1917) and International Paper Co. v Rockefeller, 161 App Div 180, 146 NYS 371 (1914).) There is no excuse under this section, however, unless the seller has employed all due measures to assure himself that his source will not fail. (See Canadian Industrial Alcohol Co., Ltd., v Dunbar Molasses Co., 258 NY 194, 179 NE 383, 80 ALR 1173 (1932) and Washington Mfg. Co. v Midland Lumber Co., 113 Wash 593, 194 Pac 777 (1921).).

In the case of failure of production by an agreed source for causes beyond the seller’s control, the seller should, if possible, be excused since production by an agreed source is without more a basic assumption of the contract. Such excuse should not result in relieving the defaulting supplier from liability nor in dropping into the seller’s lap an unearned bonus of damages over. The flexible adjustment machinery of this Article provides the solution under the provision on the obligation of good faith. A condition to his making good the claim of excuse is the turning over to the buyer of his rights against the defaulting source of supply to the extent of the buyer’s contract in relation to which excuse is being claimed.

6. In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of “excuse” or “no excuse,” adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.

7. The failure of conditions which go to convenience or collateral values rather than to the commercial practicability of the main performance does not amount to a complete excuse. However, good faith and the reason of the present section and of the preceding one may properly be held to justify and even to require any needed delay involved in a good faith inquiry seeking a readjustment of the contract terms to meet the new conditions.

8. The provisions of this section are made subject to assumption of greater liability by agreement and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like. Thus the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances. (See Madeirense Do Brasil, S. A. v Stulman‑Emrick Lumber Co., 147 F2d 399 (2d Cir 1945).) The exemption otherwise present through usage of trade under the present section may also be expressly negated by the language of the agreement. Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go.

Agreement can also be made in regard to the consequences of exemption as laid down in paragraphs (b) and (c) and the next section on procedure on notice claiming excuse.

9. The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.

Exemption of the buyer in the case of a “requirements” contract is covered by the “Output and Requirements” section both as to assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raw material makes no specific reference to a particular venture and no such reference may be drawn from the circumstances, commercial understanding views it as a general deal in the general market and not conditioned on any assumption of the continuing operation of the buyer’s plant. Even when notice is given by the buyer that the supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see such a supply contract as conditioned on the continuance of the buyer’s further contract for outlet. On the other hand, where the buyer’s contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

10. Following its basic policy of using commercial practicability as a test for excuse, this section recognizes as of equal significance either a foreign or domestic regulation and disregards any technical distinctions between “law,” “regulation,” “order” and the like. Nor does it make the present action of the seller depend upon the eventual judicial determination of the legality of the particular governmental action. The seller’s good faith belief in the validity of the regulation is the test under this Article and the best evidence of his good faith is the general commercial acceptance of the regulation. However, governmental interference cannot excuse unless it truly “supervenes” in such a manner as to be beyond the seller’s assumption of risk. And any action by the party claiming excuse which causes or colludes in inducing the governmental action preventing his performance would be in breach of good faith and would destroy his exemption.

11. An excused seller must fulfill his contract to the extent which the supervening contingency permits, and if the situation is such that his customers are generally affected he must take account of all in supplying one. Subsections (a) and (b), therefore, explicitly permit in any proration a fair and reasonable attention to the needs of regular customers who are probably relying on spot orders for supplies. Customers at different stages of the manufacturing process may be fairly treated by including the seller’s manufacturing requirements. A fortiori, the seller may also take account of contracts later in date than the one in question. The fact that such spot orders may be closed at an advanced price causes no difficulty, since any allocation which exceeds normal past requirements will not be reasonable. However, good faith requires, when prices have advanced, that the seller exercise real care in making his allocations, and in case of doubt his contract customers should be favored and supplies prorated evenly among them regardless of price. Save for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller.

Cross References:

Point 1: Sections 2‑613 and 2‑614.

Point 2: Section 1‑102.

Point 5: Section 2‑613.

Point 6: Sections 1‑102 and 2‑609.

Point 7: Section 2‑614.

Point 8: Sections 1‑201, 2‑302 and 2‑616.

Point 9: Sections 1‑102, 2‑306 and 2‑613.

Definitional Cross References:

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| “Between merchants” | Section 2‑104. |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Good faith” | Section 1‑201. |
| “Merchant” | Section 2‑104. |
| “Notifies” | Section 1‑201. |
| “Seasonably” | Section 1‑204. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

In addition to the seller’s rights of substantial performance under Commercial Code Section 2‑614 and his rights in the event of casualty to identify goods under Commercial Code Section 2‑613. Section 2‑615 excuses the seller from delay in delivery or partial or complete failure to deliver in certain circumstances.

Section 2‑615(1) expands the excuse for non‑performance on the ground of impossibility to the case where performance has been made “impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made.” (See 3 Williston, Sales, Section 661 (rev ed 1948) on the defense of impossibility). The only reference to the kind of excusing contingency contemplated by this section is where compliance would violate a domestic or foreign law. In accord, McGrath v Isaacs, 1 Nott & McC 563 (1819) where an executory contract to supply import glassware from England was terminated by the non‑intercourse act of Congress and later a state of war prevented delivery. See also, Stein v Xepapas, 204 SC 239, 29 SE2d 257 (1944). The section deliberately refrains from listing other contingencies which are or are not brought within the scope of the rule. Each case necessarily must rest on its own facts. Some further indication of the standard which the Courts are expected to employ are suggested by example in the official comments that the increased cost alone or a rise or a collapse in the market does not excuse performance, but a marked increase in cost or a severe shortage of raw materials caused by a war, a strike, a crop failure or the like, should excuse performance. To the extent that the word “impracticable” differs from “impossibility” this section would result in more circumstances in which the performance would be excused. The South Carolina cases which apply the excuse for non‑performance use the word “impossibility” as distinguished from unforeseen difficulty, hardship or added expense, risks which the parties are deemed to assume when they enter into the contract. See, McPherson v Sirrine, 206 SC 183, 33 SE2d 501 (1944); Hammassopoluo v Hammassopoluo, 134 SC 54, 131 SE 319 (1925); Graham v Goforth, 168 SC 203, 167 SE 404 (1932). The result of these cases should not be changed by this section.

There is apparently some overlap in the circumstances of excuse under this section and Commercial Code Section 2‑613 dealing with casualty to identified goods. The result in Pearce‑Young‑Angel Co. v Charles R. Allen, Inc., discussed in the comments to Commercial Code Section 2‑613 would seem appropriate under either of these sections.

Where the frustration of contract interferes only partially with the seller’s ability to perform, subsection (b) requires allocation of deliveries among his customers which may also include customers not then under contract.

Subsection (c) requires the seller to seasonably notify the buyer of delay or non‑delivery for any estimated quota made available to the buyer.

CROSS REFERENCES

Construction of code to promote underlying purposes and policies, see Section 36‑1‑103.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Output, requirements and exclusive dealings, see Section 36‑2‑306.

Term measuring quantity by seller’s output or buyer’s requirements, see Section 36‑2‑306.

Unconscionable contract or clause, see Section 36‑2‑302.

When action is taken seasonably, see Section 36‑1‑205.

LIBRARY REFERENCES

Sales 85(2), 172.

Westlaw Key Number Searches: 343k85(2); 343k172.

C.J.S. Sales Sections 99, 210 to 212.

RESEARCH REFERENCES

Treatises and Practice Aids

27 Causes of Action 319, Cause of Action for Seller’s Breach of Sales Contract in Which Defense of Commercial Impracticability Under UCC S2‑615 is Asserted.

LAW REVIEW AND JOURNAL COMMENTARIES

Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management. 32 S.C. L. Rev. 241 (December 1980).

**SECTION 36‑2‑616.** Procedure on notice claiming excuse.

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section (Section 36‑2‑615) he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this chapter relating to breach of installment contracts (Section 36‑2‑612), then also as to the whole,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except insofar as the seller has assumed a greater obligation under the preceding section (Section 36‑2‑615).

HISTORY: 1962 Code Section 10.2‑616; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

This section seeks to establish simple and workable machinery for providing certainty as to when a supervening and excusing contingency “excuses” the delay, “discharges” the contract, or may result in a waiver of the delay by the buyer. When the seller notifies, in accordance with the preceding section, claiming excuse, the buyer may acquiesce, in which case the contract is so modified. No consideration is necessary in a case of this kind to support such a modification. If the buyer does not elect so to modify the contract, he may terminate it and under subsection (2) his silence after receiving the seller’s claim of excuse operates as such a termination. Subsection (3) denies effect to any contract clause made in advance of trouble which would require the buyer to stand ready to take delivery whenever the seller is excused from delivery by unforeseen circumstances.

Cross References:

Point 1: Sections 2‑209 and 2‑615.

Definitional Cross References:

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| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Installment contract” | Section 2‑612. |
| “Notification” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Seller” | Section 2‑103. |
| “Termination” | Section 2‑106. |
| “Written” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

When the buyer receives a notification of delay or non‑delivery pursuant to Commercial Code Section 2‑615(c), several options are open to him: (1) terminate the contract as to the delivery concerned, (2) terminate the entire contract if the value of the entire contract is substantially impaired, (3) agree to a modification of the contract according to the seller’s proposed allocation.

Under subsection (2), failure to notify the seller of one of the alternatives results in a lapse of the contract.

The provisions of this section cannot be negated by agreement.

CROSS REFERENCES

Modification of contract, see Section 36‑2‑209.

LIBRARY REFERENCES

Sales 89, 116.

Westlaw Key Number Searches: 343k89; 343k116.

C.J.S. Sales Sections 109 to 114, 117, 125, 127 to 129, 199.

RESEARCH REFERENCES

Treatises and Practice Aids

27 Causes of Action 319, Cause of Action for Seller’s Breach of Sales Contract in Which Defense of Commercial Impracticability Under UCC S2‑615 is Asserted.

Part 7

Remedies

**SECTION 36‑2‑701.** Remedies for breach of collateral contracts not impaired.

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this chapter.

HISTORY: 1962 Code Section 10.2‑701; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

Whether a claim for breach of an obligation collateral to the contract for sale requires separate trial to avoid confusion of issues is beyond the scope of this Article: but contractual arrangements which as a business matter enter vitally into the contract should considered a part thereof in so far as cross‑claims or defenses are concerned.

Definitional Cross References:

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| “Contract for sale” | Section 2‑106. |
| “Remedy” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

The general and rather vague provision of this section is apparently a recognition that such a collateral promise as to repair the goods or non‑sale‑type obligations are not governed by Article 2.

CROSS REFERENCES

Civil remedies and procedures generally, see Title 15.

LIBRARY REFERENCES

Sales 369, 404, 425.

Westlaw Key Number Searches: 343k369; 343k404; 343k425.

C.J.S. Sales Sections 237, 278 to 280, 284 to 286, 288, 325 to 326, 363 to 364, 374 to 376, 395.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

LAW REVIEW AND JOURNAL COMMENTARIES

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

**SECTION 36‑2‑702.** Seller’s remedies on discovery of buyer’s insolvency.

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this chapter (Section 36‑2‑705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer’s fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller’s right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this chapter (Section 36‑2‑403). Successful reclamation of goods excludes all other remedies with respect to them.

HISTORY: 1962 Code Section 10.2‑702; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Subsection (1)—Sections 53(1)(b), 54(1)(c) and 57, Uniform Sales Act; Subsection (2)—none; Subsection (3)—Section 76(3), Uniform Sales Act.

Changes: Rewritten, the protection given to a seller who has sold on credit and has delivered goods to the buyer immediately preceding his insolvency being extended.

Purposes of changes and new matter:

To make it clear that:

1. The seller’s right to withhold the goods or to stop delivery except for cash when he discovers the buyer’s insolvency is made explicit in subsection (1) regardless of the passage of title, and the concept of stoppage has been extended to include goods in the possession of any bailee who has not yet attorned to the buyer.

2. Subsection (2) takes as its base line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller. This Article makes discovery of the buyer’s insolvency and demand within a ten day period a condition of the right to reclaim goods on this ground. The ten day limitation period operates from the time of receipt of the goods.

An exception to this time limitation is made when a written misrepresentation of solvency has been made to the particular seller within three months prior to the delivery. To fall within the exception the statement of solvency must be in writing, addressed to the particular seller and dated within three months of the delivery.

3. Subsection (3) subjects the right of reclamation to certain rights of third parties “under this Article (Section 2‑403).” The rights so given priority of course include the rights given to purchasers from the buyer by Section 2‑403(1) and (2). They also include other rights arising under Article 2, such as the rights of lien creditors of the buyer under Section 2‑326(3) on consignment sales. Moreover, since Section 2‑403(4) incorporates by reference rights given to other purchasers and to lien creditors by Articles 6, 7 and 9, such rights have the same priority. “Lien creditor” here has the same meaning as in Section 9‑301(3). Thus if a seller retains an unperfected security interest, subordinate under Section 9‑301(1)(b) to the rights of a levying creditor of the buyer, his right of reclamation under this section is also subject to the creditor’s rights. Purchasers or lien creditors may also have rights not arising under this Article; under Section 1‑103 such rights may have priority by virtue of supplementary principles not displayed by this Section. See In re Kravitz, 278 F2d 820 (3rd Cir 1960).

Because the right of the seller to reclaim goods under this section constitutes preferential treatment as against the buyer’s other creditors, subsection (3) provides that such reclamation bars all his other remedies as to the goods involved.

Cross References:

Point 1: Sections 2‑402 and 2‑705.

Compare Section 2‑502.

Definitional Cross References:

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| “Buyer” | Section 2‑103. |
| “Buyer in ordinary course of business” | Section 1‑201. |
| “Contract” | Section 1‑201. |
| “Good faith” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Insolvent” | Section 1‑201. |
| “Person” | Section 1‑201. |
| “Purchaser” | Section 1‑201. |
| “Receipt” of goods | Section 2‑103. |
| “Remedy” | Section 1‑201. |
| “Rights” | Section 1‑201. |
| “Seller” | Section 2‑103. |
| “Writing” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

While the buyer’s insolvency does not constitute a breach, the common law cases give the seller the right of stoppage in transitu while the goods are still in the hands of the carrier. In re F. W. Poe Mfg. Co., 96 SC 195, 80 SE 194 (1913); Monaghan Mills v Gilbreath Mfg. Co. 96 SC 195, 80 SE 194 (1912); Parker v McIver, 1 Desaus Eq 274 (1792). Commercial Code Section 2‑702(1) continues the right of the unpaid seller to stop delivery upon discovery of the buyer’s insolvency (See Commercial Code Section 2‑705 on Seller’s stoppage in transit rights) and expands the right to withhold delivery while the goods are in possession of any bailee. Since the buyer’s insolvency is actually a situation of reasonable grounds for insecurity on the part of the seller, his right to demand “cash including payment for all goods theretofore delivered” as a condition to his continued performance is like a demand for adequate assurance of performance under Commercial Code Section 2‑609.

The common law right of stoppage in transitu and the unpaid seller’s lien are terminated once the buyer has acquired possession. See In re F. W. Poe Mfg. Co., 96 SC 195, 80 SE 194 (1913) holding that to deprive the seller of the right of stoppage in transitu by delivery to the buyer, termination of the transit must be clearly shown by the evidence. If the seller can establish a case of fraudulent intent of the buyer not to pay for the goods, however, he can reclaim the goods after delivery on that ground. The mere fact of insolvency of the buyer does not amount to fraud but buying on credit when the degree of insolvency is such that the prospects of being able to pay have vanished, will be sufficient to support the factual inference of fraud. See Vold, Sales Section 79 (2nd ed 1959); Rest, Contracts Section 473 (1936).

Section 2‑702(2) would modify these common law rules by expanding the seller’s opportunity to reclaim delivered goods to include the circumstance where he demands return of the goods within ten days after receipt by the insolvent buyer, thus eliminating the requirements of a factual finding of fraud. If written misrepresentation of solvency has been made to the seller within three months before delivery, the ten day limitation does not apply.

Section 2‑702(3) subordinates the seller’s right of reclamation to the rights of a buyer in ordinary course, good faith purchaser and “lien creditor”. In accord, Willis v Glenwood Cotton Mills, 200 Fed 301 (4th Cir 1912) in which the Federal court applying South Carolina law held that the seller’s right to reclaim the goods was cut off when the goods passed into the hands of a bona fide purchaser for value from the original buyer.

The assertion of the seller’s right to reclaim the goods will frequently be made in the buyer’s bankruptcy proceeding. The trustee in bankruptcy enjoys the position of a hypothetical creditor who has acquired a lien on the bankrupt’s property as of the time of petition under Section 70, subsection (c) of the Bankruptcy Act (11 USCA Section 110). If Commercial Code Section 2‑702(3) means that the seller’s right to reclamation is subject to the rights of lien creditors (Commercial Code Section 9‑301(3) expressly includes a trustee in bankruptcy within the definition of lien creditor), then the seller’s right to reclaim will always be lost once the buyer is adjudged a bankrupt. In The Matter of Kravitz, 278 F2d 820 (3rd Cir 1960) this was the result where the seller’s right of rescission was held to be subject to the right of a lien creditor under the applicable state law of Pennsylvania as expressed in Commercial Code Section 2‑702(c) and thus the trustee in bankruptcy prevailed. Presumably in reaction to the result of Kravitz, the states of New York, Illinois, New Mexico, California and Maine have omitted “or lien creditor” from Commercial Code Section 2‑702(c).

CROSS REFERENCES

Civil remedies and procedures generally, see Title 15.

Continuance of rights acquired by holder of negotiable document of title, notwithstanding stoppage of goods represented by document, see Section 36‑7‑502.

Seller’s insolvency as affecting buyer’s rights with respect to goods not shipped but paid for in whole or in part, see Section 36‑2‑502.

Title to goods, see Section 36‑2‑401.

LIBRARY REFERENCES

Sales 291, 316.

Westlaw Key Number Searches: 343k291; 343k316.

C.J.S. Sales Sections 325 to 326, 333, 339 to 343.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

LAW REVIEW AND JOURNAL COMMENTARIES

The Return of the Reclaiming Seller: New Decisions Under the Bankruptcy Code and the Uniform Commercial Code. 16 UCC L J 187 (Winter 1984).

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

NOTES OF DECISIONS

In general 1

1. In general

Seller failed to establish, as prerequisite to asserting reclamation claim in its buyer’s Chapter 11 case for price of the twelve supersacks of silicomanganese (SMI) that it delivered to debtor‑buyer prepetition, that debtor‑buyer was still in possession of these twelve supersacks at time of its reclamation demand, despite mistake by debtor’s director of purchasing in indicating on inventory list that debtor was in possession of 36 supersacks, or 144,080 pounds, of SMI, given evidence that SMI was readily available from local vendors and was never stockpiled, as well as evidence of rate at which SMI was consumed in production process following this shipment by seller. In re Georgetown Steel Company, LLC (Bkrtcy.D.S.C. 2004) 318 B.R. 336. Bankruptcy 2745

In a collection action, the defendant/contractor’s counterclaim for breach of contract had no merit where (1) the alleged breach was the plaintiff/subcontractor’s refusal to provide supplies to the contractor until the contractor paid for the supplies in cash, (2) the contractor’s account with the subcontractor was overdue, and (3) the subcontractor had reason to believe that the contractor was insolvent. Maddux Supply Co. v. A‑C Elec. Co., Inc. (S.C.App. 1996) 321 S.C. 182, 467 S.E.2d 448, certiorari denied.

**SECTION 36‑2‑703.** Seller’s remedies in general.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 36‑2‑612), then also with respect to the whole undelivered balance, the aggrieved seller may

(a) withhold delivery of such goods;

(b) stop delivery by any bailee as hereafter provided (Section 36‑2‑705);

(c) proceed under the next section (Section 36‑2‑704) respecting goods still unidentified to the contract;

(d) resell and recover damages as hereafter provided (Section 36‑2‑706);

(e) recover damages for nonacceptance (Section 36‑2‑708) or in a proper case the price (Section 36‑2‑709);

(f) cancel.

HISTORY: 1962 Code Section 10.2‑703; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: No comparable index section.

Purposes:

1. This section is an index section which gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer. This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case.

2. The buyer’s breach which occasions the use of the remedies under this section may involve only one lot or delivery of goods, or may involve all of the goods which are the subject matter of the particular contract. The right of the seller to pursue a remedy as to all the goods when the breach is as to only one or more lots is covered by the section on breach in installment contracts. The present section deals only the remedies available after the goods involved in the breach have been determined by that section.

3. In addition to the typical case of refusal to pay or default in payment, the language in the preamble, “fails to make a payment due,” is intended to cover the dishonor of a check on due presentment, or the nonacceptance of a draft, and the failure to furnish an agreed letter of credit.

4. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1‑106).

Cross References:

Point 2: Section 2‑612.

Point 3: Section 2‑325.

Point 4: Section 1‑106.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Aggrieved party” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Cancellation” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Remedy” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

This section is essentially an index of the several remedies of the seller upon the buyer’s breach and will be dealt with in detail in the sections referred to in subsections (b), (c), (d) and (e). The right of the seller to withhold delivery as expressed in subsection (a) is in accord with existing law. Moore v W. R. Grace & Co., 287 Fed 103 (4th Cir 1923).

The right to “cancel” under subsection (f) is defined in Commercial Code Section 2‑106 as occurring “When either party puts an end to the contract for breach by the other”. Existing law recognizes that the seller may likewise terminate the contract upon the buyer’s breach. Neil v Cheves, 1 Bailey 537 (1830).

Note that the several remedies listed in this section are cumulative in nature. As discussed in SC Reporter’s Comments to Code Section 2‑608(3), this rejection of the doctrine of election of remedies, as a fundamental policy, changes the South Carolina Common Law.

CROSS REFERENCES

Breach of installment contract, see Section 36‑2‑612.

Buyer’s failure to furnish agreed letter of credit, see Section 36‑2‑325.

Civil remedies and procedures generally, see Title 15.

Code remedies liberally administered, see Section 36‑1‑305.

LIBRARY REFERENCES

Sales 289, 300, 316, 332, 340, 369.

Westlaw Key Number Searches: 343k289; 343k300; 343k316; 343k332; 343k340; 343k369.

C.J.S. Sales Sections 325 to 326, 328, 333, 339 to 344, 348, 363 to 364.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Contract Law. 38 S.C. L. Rev. 46 (Autumn 1986).

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

NOTES OF DECISIONS

Substantial impairment 1

1. Substantial impairment

An action brought by a grain elevator company against a farmer for breach of a grain sale contract would be remanded for a determination of whether the grain elevator company’s breach substantially impaired the value of the contract so as to justify the farmer’s cancelling the contract under the provisions of Section 36‑2‑703. Glennville Elevators, Inc. v. Beard (S.C.App. 1985) 284 S.C. 335, 326 S.E.2d 185.

**SECTION 36‑2‑704.** Seller’s right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

(1) An aggrieved seller under the preceding section (Section 36‑2‑703) may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

HISTORY: 1962 Code Section 10.2‑704; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 63(3) and 64(4), Uniform Sales Act.

Changes: Rewritten, the seller’s rights being broadened.

Purposes of changes:

1. This section gives an aggrieved seller the right at the time of breach to identify to the contract any conforming finished goods, regardless of their resalability, and to use reasonable judgment as to completing unfinished goods. It thus makes the goods available for resale under the resale section, the seller’s primary remedy, and in the special case in which resale is not practicable, allows the action for the price which would then be necessary to give the seller the value of this contract.

2. Under this Article the seller is given express power to complete manufacture or procurement of goods for the contract unless the exercise of reasonable commercial judgment as to the facts as they appear at the time he learns of the breach makes it clear that such action will result in a material increase in damages. The burden is on the buyer to show the commercially unreasonable nature of the seller’s action in completing manufacture.

Cross References:

Sections 2‑703 and 2‑706.

Definitional Cross References:

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|  |  |
| “Aggrieved party” | Section 1‑201. |
| “Conforming” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Rights” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑704 gives the seller the right to identify goods to the contract upon the buyer’s breach thereof establishing the seller’s rights to resell the goods to fix the damages (Commercial Code Section 2‑706) or to recover the price (Commercial Code Section 2‑709). “Identification” is a necessary prelude to such recovery since the seller must show performance of the contract on his part as by tender of delivery or at least an “appropriation” of the goods to the contract. See Smythe v Goode, 121 SC 270, 113 SE 690 (1922).

Where a buyer of goods to be manufactured by the seller repudiates the contract while the goods are partially completed, the seller is put to a difficult decision. The general duty to mitigate damages may preclude the continuance of performance after notice of the buyer’s anticipatory repudiation. (See Uniform Sales Act, Section 64(4); 3 Williston, Sales, Section 588 (rev ed (1948)). Yet if there is no market for the partially completed goods and the buyer is insolvent, the seller’s loss will be total. In any event, the seller in such a situation is faced with the uncertainty of a future factual determination of whether his decision violates the mitigation of the damage rule where it develops that the added cost of completion was greater than the increased value.

Section 2‑704(2) gives the manufacturer‑seller greater flexibility in deciding whether to complete the manufacture in the above situation. The key standards of this subsection is that he exercise “reasonable commercial judgment”. While this still remains a fact question, it would seem that the manufacturer will not be penalized where he makes the decision either way in the close cases. Also, he is aided by the seemingly correct expression in the official comments to this section that the buyer will have the burden of showing the commercial unreasonableness of the seller’s action in completing manufacture.

CROSS REFERENCES

Repudiation with respect to performance not yet due, see Section 36‑2‑610.

When goods are conforming, see Section 36‑2‑106.

LIBRARY REFERENCES

Sales 332.

Westlaw Key Number Search: 343k332.

C.J.S. Sales Section 344.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

LAW REVIEW AND JOURNAL COMMENTARIES

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

**SECTION 36‑2‑705.** Seller’s stoppage of delivery in transit or otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 36‑2‑702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of possession or control of the document.

(d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

HISTORY: 1962 Code Section 10.2‑705; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 15, eff October 1, 2014.

OFFICIAL COMMENT

Prior uniform statutory provision: Sections 57‑59, Uniform Sales Act; see also Sections 12, 14 and 42, Uniform Bills of Lading Act and Sections 9, 11 and 49, Uniform Warehouse Receipts Act.

Changes: This section continues and develops the above sections of the Uniform Sales Act in the light of the other uniform statutory provisions noted.

Purposes:

To make it clear that:

1. Subsection (1) applies the stoppage principle to other bailees as well as carriers.

It also expands the remedy to cover the situations, in addition to buyer’s insolvency, specified in the subsection. But since stoppage is a burden in any case to carriers, and might be a very heavy burden to them if it covered all small shipments in all these situations, the right to stop for reasons other than insolvency is limited to carload, truckload, planeload or larger shipments. The seller shipping to a buyer of doubtful credit can protect himself by shipping C.O.D.

Where stoppage occurs for insecurity it is merely a suspension of performance, and if assurances are duly forthcoming from the buyer the seller is not entitled to resell or divert.

Improper stoppage is a breach by the seller if it effectively interferes with the buyer’s right to due tender under the section on manner of tender of delivery. However, if the bailee obeys an unjustified order to stop he may also be liable to the buyer. The measure of his obligation is dependent on the provisions of the Documents of Title Article (Section 7‑303). Subsection 3(b) therefore gives him a right of indemnity as against the seller in such a case.

2. “Receipt by the buyer” includes receipt by the buyer’s designated representative, the sub‑purchaser, when shipment is made direct to him and the buyer himself never receives the goods. It is entirely proper under this Article that the seller, by making such direct shipment to the sub‑purchaser, be regarded as acquiescing in the latter’s purchase and as thus barred from stoppage of the goods as against him.

As between the buyer and the seller, the latter’s right to stop the goods at any time until they reach the plane of final delivery is recognized by this section.

Under subsection (3)(c) and (d), the carrier is under no duty to recognize the stop order of a person who is a stranger to the carrier’s contract. But the seller’s right as against the buyer to stop delivery remains, whether or not the carrier is obligated to recognize the stop order. If the carrier does obey it, the buyer cannot complain merely because of that circumstance; and the seller becomes obligated under subsection (3)(b) to pay the carrier any ensuing damages or charges.

3. A diversion of a shipment is not a “reshipment” under subsection (2)(c) when it is merely an incident to the original contract of transportation. Nor is the procurement of “exchange bills” of lading which change only the name of the consignee to that of the buyer’s local agent but do not alter the destination of a reshipment.

Acknowledgment by the carrier as a “warehouseman” within the meaning of this Article requires a contract of a truly different character from the original shipment, a contract not in extension of transit but as a warehouseman.

4. Subsection (3)(c) makes the bailee’s obedience of a notification to stop conditional upon the surrender of possession or control of any outstanding negotiable document.

5. Any charges or losses incurred by the carrier in following the seller’s orders, whether or not he was obligated to do so, fall to the seller’s charge.

6. After an effective stoppage under this section the seller’s rights in the goods are the same as if he had never made a delivery.

Cross References:

Sections 2‑702 and 2‑703.

Point 1: Sections 2‑503 and 2‑609, and Article 7.

Point 2: Section 2‑103 and Article 7.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Contract for sale” | Section 2‑106. |
| “Document of title” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Insolvent” | Section 1‑201. |
| “Notification” | Section 1‑201. |
| “Receipt of goods” | Section 2‑103. |
| “Rights” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

As pointed out in SC Reporter’s Comments to Code Section 2‑702, the South Carolina case law has long recognized the right of an unpaid seller, upon discovery of the buyer’s insolvency, to stop the delivery of goods which are still in the hands of the carrier in transit. This rule is continued and expanded under Commercial Code Section 2‑705(1) which permits the seller to stop delivery of the goods while in the hands of other bailees, e. g., goods in a terminal warehouse. See Monaghan Mills v Gilbreath Mfg. Co., 96 SC 195, 80 SE 194 (1913), where the unpaid seller was allowed to reclaim the goods which were in the possession of a bleaching company to be bleached on account of the buyer. Subsection (1) also extends the seller’s right to reclaim shipping lots when the buyer is in breach in addition to the case of the buyer’s insolvency. This probably extends the seller’s stoppage rights beyond existing law which seems to limit the right to the case of buyer’s insolvency. 3 Williston, Sales Section 520 (Rev ed 1948). See Pool v Columbia and Greenville Ry. Co., 23 SC 286 (1885); Faust v Southern Ry. Co., 74 SC 360, 54 SE 566 (1906); Phillips‑Patterson Co. v Northwestern Ry. Co., 108 SC 166, 935 SE 868 (1917). Apparently in recognition of the heavy burden which the stoppage order places on the carrier, the expanded right to stop for reasons other than insolvency is limited to carload, truckload, planeload or larger shipments.

The common law rule that the right of stoppage terminates upon receipt of the goods by the buyer is continued by subsection (2)(a). In accord, John Frazier & Co. v Hilliard, 2 Strob 309 (1848).

Under subsections (2)(b) and (c) the right of stoppage would be ended where a bailee acknowledges to the buyer that it holds the goods for him or a carrier makes such acknowledgment by reshipment or as warehouseman. This would be the probable result under existing case law which holds that the deposit of goods in a warehouse, subject to the order and control of the buyer, is an executed delivery, which defeats the right of stoppage. John Frazier & Co. v Hilliard, 2 Strob 309 (1848). Cf. Monaghan Mills v Gilbreath Mfg. Co., 96 SC 195, 80 SE 194 (1913), where the right of stoppage was not defeated by placing the goods in a warehouse which was not under the buyer’s order and control.

Since negotiation to the buyer of a negotiable document of title covering the goods constitutes constructive delivery, this terminates the seller’s stoppage right under subsection (1)(d). (See SC Code Section 58‑1765 providing that negotiation of a negotiable bill to a good faith purchaser cuts off the seller’s right of stoppage with respect to goods shipped represented by such bill.).

Section 2‑705(3)(a) states the obvious rule that seller must give reasonable notice to the bailee to stop delivery. Phillips‑Patterson Co. v Northwestern Ry. Co., 108 SC 166, 93 SE 868 (1917), holding that the seller’s letter to the carrier stating “we will thank you to hold up delivery until you receive our telegraphic instructions . . .” was sufficient notice to stop delivery, is consistent with this rule.

Also presumably in accord as to what constitutes adequate notice is Faust v Southern Ry. Co., 74 SC 360, 54 SE 566 (1906), holding that parol notice given to an officer in a freight depot of the railroad company not to deliver freight in transit is binding where the officer collected freight charges and gave orders to deliver cars at different points.

Pool v Columbia and Greenville Ry. Co., 23 SC 286 (1885), held that as between the seller and the carrier, the latter must obey the stop order without the necessity of the seller first showing proper grounds. This seems to be the meaning of subsection (3)(b) which imposes an absolute duty on the bailee to obey the stop order with the seller assuming the liability to the buyer should the order turn out to be improper.

Where there is an outstanding negotiable document of title representing the goods, the bailee is under a duty to deliver to the holder of such document representing the goods. SC Code Sections 69‑184, 58‑1734; Uniform Commercial Code Section 7‑303 (1)(a). Therefore, under subsection (3)(c), the bailee may refuse to obey a stoppage order until surrender of such document.

Where the goods are represented by a non‑negotiable bill of lading, the carrier will take his instructions from the consignor. Thus under subsection (3)(d), the carrier is under a duty to obey a stop order only from the consignor.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 15, in subsection (3)(c), inserted “possession or control of”.

CROSS REFERENCES

Assurance of due performance, see Section 36‑2‑609.

Bills of lading, see Section 36‑7‑301 et seq.

Carrier’s obligations with respect to delivery, see Section 36‑7‑303.

Obligation of bailee to deliver, excuse, see Section 36‑7‑403.

Public carriers, generally, see Section 58‑1‑10 et seq.

Rights acquired in the absence of due negotiation, effect of diversion, seller’s stoppage of delivery, see Section 36‑7‑504.

Tender of delivery, generally, see Section 36‑2‑503.

LIBRARY REFERENCES

Sales 289.

Westlaw Key Number Search: 343k289.

C.J.S. Sales Sections 325 to 326, 333.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

LAW REVIEW AND JOURNAL COMMENTARIES

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

**SECTION 36‑2‑706.** Seller’s resale including contract for resale.

(1) Under the conditions stated in Section 36‑2‑703 on seller’s remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this chapter (Section 36‑2‑710), but less expenses saved in consequence of the buyer’s breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 36‑2‑707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 36‑2‑711).

HISTORY: 1962 Code Section 10.2‑706; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 60, Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

To simplify the prior statutory provision and to make it clear that:

1. The only condition precedent to the seller’s right of resale under subsection (1) is a breach by the buyer within the section on the seller’s remedies in general or insolvency. Other meticulous conditions and restrictions of the prior uniform statutory provision are disapproved by this Article and are replaced by standards of commercial reasonableness. Under this section the seller may resell the goods any breach by the buyer. Thus, an anticipatory repudiation by the buyer gives rise to any of the seller’s remedies for breach, and to the right of resale. This principle is supplemented by subsection (2) which authorizes a resale of goods which are not in existence or were not identified to the contract before the breach.

2. In order to recover the damages prescribed in subsection (1) the seller must act “in good faith and in a commercially reasonable manner” in making the resale. This standard is intended to be more comprehensive than that of “reasonable care and judgment” established by the prior uniform statutory provision. Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2‑708.

Under this Article the seller resells by authority of law, in his own behalf, for his own benefit and for the purpose of fixing his damages. The theory of a seller’s agency is thus rejected.

3. If the seller complies with the prescribed standard of duty in making the resale, he may recover from the buyer the damages provided for in subsection (1). Evidence of market or current prices at any particular time or place is relevant only on the question of whether the seller acted in a commercially reasonable manner in making the resale.

The distinction drawn by some courts between cases where the title had not passed to the buyer and the seller had resold as owner, and cases where the title had passed and the seller had resold by virtue of his lien on the goods, is rejected.

4. Subsection (2) frees the remedy of resale from legalistic restrictions and enables the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances. By “public” sale is meant a sale by auction. A “private” sale may be effected by solicitation and negotiation conducted either directly or through a broker. In choosing between a public and private sale the character of the goods must be considered and relevant trade practices and usages must be observed.

5. Subsection (2) merely clarifies the common law rule that the time for resale is a reasonable time after the buyer’s breach, by using the language “commercially reasonable.” What is such a reasonable time depends upon the nature of the goods, the condition of the market and the other circumstances of the case; its length cannot be measured by any legal yardstick or divided into degrees. Where a seller contemplating resale receives a demand from the buyer for inspection under the section of preserving evidence of goods in dispute, the time for resale may be appropriately lengthened.

On the question of the place for resale, subsection (2) goes to the ultimate test, the commercial reasonableness of the seller’s choice as to the place for an advantageous resale. This Article rejects the theory that the seller is required to resell at the agreed place for delivery and that a resale elsewhere can be permitted only in exceptional cases.

6. The purpose of subsection (2) being to enable the seller to dispose of the goods to the best advantage, he is permitted in making the resale to depart from the terms and conditions of the original contract for sale to any extent “commercially reasonable” in the circumstances.

7. The provision of subsection (2) that the goods need not be in existence to be resold applies when the buyer is guilty of anticipatory repudiation of a contract for future goods, before the goods or some of them have come into existence. In such a case the seller may exercise the right of resale and fix his damages by “one or more contracts to sell” the quantity of conforming future goods affected by the repudiation. The companion provision of subsection (2) that resale may be made although the goods were not identified to the contract prior to the buyer’s breach, likewise contemplates an anticipatory repudiation by the buyer but occurring after the goods are in existence. If the goods so identified conform to the contract, their resale will fix the seller’s damages quite as satisfactorily as if they had been identified before the breach.

8. Where the resale is to be by private sale, subsection (3) requires that reasonable notification of the seller’s intention to resell must be given to the buyer. The length of notification of a private sale depends upon the urgency of the matter. Notification of the time and place of this type of sale is not required.

Subsection (4)(b) requires that the seller give the buyer reasonable notice of the time and place of a public resale so that he may have an opportunity to bid or to secure the attendance of other bidders. An exception is made in the case of goods “which are perishable or threaten to decline speedily in value.”

9. Since there would be no reasonable prospect of competitive bidding elsewhere, subsection (4) requires that a public resale “must be made at a usual place or market for public sale if one is reasonably available;” i.e., a place or market which prospective bidders may reasonably be expected to attend. Such a market may still be “reasonably available” under this subsection, though at a considerable distance from the place where the goods are located. In such a case the expense of transporting the goods for resale is recoverable from the buyer as part of the seller’s incidental damages under subsection (1). However, the question of availability is one of commercial reasonableness in the circumstances and if such “usual” place or market is not reasonably available, a duly advertised public resale may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for goods of the kind.

Paragraph (a) of subsection (4) qualifies the last sentence of subsection (2) with respect to resales of unidentified and future goods at public sale. If conforming goods are in existence the seller may identify them to the contract after the buyer’s breach and then resell them at public sale. If the goods have not been identified, however, he may resell them at public sale only as “future” goods and only where there is a recognized market for public sale of futures in goods of the kind.

The provisions of paragraph (c) of subsection (4) are intended to permit intelligent bidding.

The provision of paragraph (d) of subsection (4) permitting the seller to bid and, of course, to become the purchaser, benefits the original buyer by tending to increase the resale price and thus decreasing the damages he will have to pay.

10. This Article departs in subsection (5) from the prior uniform statutory provision in permitting a good faith purchaser at resale to take a good title as against the buyer even though the seller fails to comply with the requirements of this section.

11. Under subsection (6), the seller retains profit, if any, without distinction based on whether or not he had a lien since this Article divorces the question of passage of title to the buyer from the seller’s right of resale or the consequences of its exercise. On the other hand, where “a person in the position of a seller” or a buyer acting under the section on buyer’s remedies, exercises his right of resale under the present section he does so only for the limited purpose of obtaining cash for his “security interest” in the goods. Once that purpose has been accomplished any excess in the resale price belongs to the seller to whom an accounting must be made as provided in the last sentence of subsection (6).

Cross References:

Point 1: Sections 2‑610, 2‑702 and 2‑703.

Point 2: Section 1‑201.

Point 3: Sections 2‑708 and 2‑710.

Point 4: Section 2‑328.

Point 8: Section 2‑104.

Point 9: Section 2‑710.

Point 11: Sections 2‑401, 2‑707 and 2‑711(3).

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Good faith” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Merchant” | Section 2‑104. |
| “Notification” | Section 1‑201. |
| “Person in position of seller” | Section 2‑707. |
| “Purchase” | Section 1‑201. |
| “Rights” | Section 1‑201. |
| “Sale” | Section 2‑106. |
| “Security interest” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑706 authorizes the seller to establish damages by making a “commercially reasonable” resale of the goods which the buyer wrongfully refuses to accept and recover the wrongfully refuses to accept and recover the difference between the resale and contract price from the breaching buyer. In accord, Heller v Charleston Phosphate Co., 28 SC 224, 5 SE 611 (1888); Wilson v Gregory, 189 SC 62, 200 SE 358 (1938).

Since the defaulting buyer’s damages are determined by the resale price, the seller owes a duty to the buyer to “exercise reasonable care and judgment in making a resale”. Uniform Sales Act, Section 60(5). See Williston, Sales, Section 547 (rev ed 1948). This Commercial Code Section continues the basic duty of fair play on the seller under the broad standard of the term “commercially reasonable”. Subsections (2), (3) and (4) implement this requirement by setting out a number of guidelines relating to the time, place, and notice of resale. While the question of whether the resale is properly conducted remains a question of fact, the more specific prescriptions would settle a number of general common law conflicts. See Williston, Sales, Sections 547‑550 (rev ed 1948). Once there has been a commercially reasonable resale under this section, the seller may recover the contract price‑resale differential. This may be a modification of existing law which treats the resale price as only evidence of the market value standard of damages. See Brooke v Laurens Milling Co., 78 SC 20, 58 SE 806 (1907), where the purchaser notified the seller before the day fixed for acceptance that he would not accept the goods and the seller then sold them. The court held resale price was not the proper measure of damages but rather the market price at the time prescribed in the contract for delivery. See also Swift Co. v Goldberg, 121 SC 190, 113 SE 358 (1921), where the court permitted the jury to consider the resale price as evidence of market value.

Under the Uniform Sales Act, Section 60(2), a resale buyer acquires a good title as against the original buyer only if the resale was conducted properly. While there are no South Carolina cases in point, this was undoubtedly the majority view at common law. Subsection (5) would modify this rule by protecting such a buyer at resale by protecting such a buyer at resale by protecting his title as against the original buyer even though the resale was not properly conducted. This change will make the sale more attractive to purchasers, and thus increase the resale price and decrease the damages the buyer will have to pay.

In the unusual case where the resale price is greater than the original contract price, the general common law rule is that the original buyer is not entitled to the profit. See Williston, Sales Section 553 (rev ed 1948); 78 C.J.S., Sales Section 431 (1952). This rule is continued by subsection (6). The subsection also requires a “person in the position of a seller” (Commercial Code Section 2‑707), or a rejecting buyer to exercise his right of resale to forecloSe his lien (Commercial Code Section 2‑711(3)) to account to the seller for any excess from the resale price over the amount of their security interest.

CROSS REFERENCES

Anticipatory repudiation, see Section 36‑2‑610.

Right of parties to inspect goods for purpose of ascertaining facts and preserving evidence, see Section 36‑2‑515.

Sale by auction, see Section 36‑2‑328.

Title to goods, see Section 36‑2‑401.

LIBRARY REFERENCES

Sales 332.

Westlaw Key Number Search: 343k332.

C.J.S. Sales Section 344.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Auctions and Auctioneers Section 24, Rights and Liabilities of Seller and Buyer.

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

LAW REVIEW AND JOURNAL COMMENTARIES

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

**SECTION 36‑2‑707.** “Person in the position of a seller”.

(1) A “person in the position of a seller” includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this chapter withhold or stop delivery (Section 36‑2‑705) and resell (Section 36‑2‑706) and recover incidental damages (Section 36‑2‑710).

HISTORY: 1962 Code Section 10.2‑707; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 52(2), Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

To make it clear that:

In addition to following in general the prior uniform statutory provision, the case of a financing agency which has acquired documents by honoring a letter of credit for the buyer or by discounting a draft for the seller has been included in the term “a person in the position of a seller.”

Cross References:

ARTICLE 5, Section 2‑506.

Definitional Cross References:

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| “Consignee” | Section 7‑102. |
| “Consignor” | Section 7‑102. |
| “Goods” | Section 2‑105. |
| “Security interest” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

As a matter of general common law, the term “unpaid seller” has a sufficiently broad meaning so as to include an agent (factor) who has advanced money or has made himself liable for the purchase price (surety) for his principal. See Williston, Sales, Section 503 (rev ed 1948). Commercial Code Section 2‑707 continues this definition of a “person in the position of a seller” and expands it to include anyone having a right in goods similar to that of a seller to clearly include a financing agency which acquires a security interest in goods for which it pays the purchase price. See e.g., SC Code Section 45‑407, which validates a factor’s lien on goods to secure the advance for the purchase price. Such a person may exercise the right of stoppage and resale.

CROSS REFERENCES

Letters of credit, see Sections 36‑5‑101 et seq.

Rights of financing agency, see Section 36‑2‑506.

LIBRARY REFERENCES

Sales 292, 332, 370.

Westlaw Key Number Searches: 343k292; 343k332; 343k370.

C.J.S. Sales Sections 334, 344, 363 to 364.

LAW REVIEW AND JOURNAL COMMENTARIES

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

**SECTION 36‑2‑708.** Seller’s damages for nonacceptance or repudiation.

(1) Subject to subsection (2) and to the provisions of this chapter with respect to proof of market price (Section 36‑2‑723), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (Section 36‑2‑710), but less expenses saved in consequence of the buyer’s breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (Section 36‑2‑710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

HISTORY: 1962 Code Section 10.2‑708; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 64, Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

To make it clear that:

1. The prior uniform statutory provision is followed generally in setting the current market price at the time and place for tender as the standard by which damages for non‑acceptance are to be determined. The time and place of tender is determined by reference to the section on manner of tender of delivery, and to the sections on the effect of such terms as F.O.B., F.A.S., C.I.F., C. & F., Ex. Ship and No arrival, No Sale.

In the event that there is no evidence available of the current market price at the time and place of tender, proof of a substitute market may be made under the section on determination and proof of market price. Furthermore, the section on the admissibility of market quotations is intended to ease materially the problem of providing competent evidence.

2. The provision of this section permitting recovery of expected profit including reasonable overhead where the standard measure of damages is inadequate, together with the new requirement that price actions may be sustained only where resale is impractical, are designed to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved. This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods. The normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer. It is not necessary to a recovery of “profit” to show a history of earnings, especially if a new venture is involved.

3. In all cases the seller may recover incidental damages.

Cross References:

Point 1: Sections 2‑319 through 2‑324, 2‑503, 2‑723 and 2‑724.

Point 2: Section 2‑709.

Point 3: Section 2‑710.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

The right of the seller to resell goods improperly refused by the buyer in order to establish his damages (Commercial Code Section 2‑706) is alternative to the seller’s right to recover damages based on the difference between the contract price and market price. In accord Swift & Co. v Goldberg, 121 SC 190, 113 SE 358 (1922); Huguenot Mills v George F. Jempson & Co., 68 SC 363, 47 SE 687 (1904). This right and formula for measuring seller’s damages are continued by Commercial Code Section 2‑708(1).

Where the goods are to be specially manufactured by the seller and the buyer repudiates the contract, the common law cases usually permit the seller to recover the profits he would have received had the buyer complied with his part of the contract. This would be based on the contract price‑cost of production differential. Gibbes Machinery Co. v Johnson, 81 SC 10, 61 SE 1027 (1908); Smoothing Iron Company v Blakely, 94 SC 224, 77 SE 945 (1913). In markets of standard‑priced goods of unlimited supply, the market value‑contract price differential formula for measuring the seller’s damages, however, has led to the result in a number of jurisdictions that if the market value of the goods equals or exceeds the contract price, the seller cannot recover more than nominal damages. 3 Williston, Sales, Section 582 (rev ed 1948). Even though the dealer‑seller is able to resell the goods, had the breaching buyer performed the seller would have had two sales instead of one. It is this loss profit which subsection (2) would allow to the seller in such a situation where the subsection (1) formula would be inadequate to put the seller in the same position as though the buyer had performed.

CROSS REFERENCES

“Delivery of goods ex‑ship”, see Section 36‑2‑322.

Delivery overseas under F.O.B. contracts, see Section 36‑2‑323.

Delivery under F.A.S. contracts, see Section 36‑2‑319.

Manner, time and place for tender, see Section 36‑2‑503.

Seller’s duties and tender under “no arrival, no sale” term, see Section 36‑2‑324.

Seller’s duties under C.I.F. and C. & F. contracts, see Sections 36‑2‑320 to 36‑2‑323.

LIBRARY REFERENCES

Sales 384.

Westlaw Key Number Search: 343k384.

C.J.S. Sales Section 363.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

S.C. Jur. Logs and Timber Section 8, Estates in Land.

LAW REVIEW AND JOURNAL COMMENTARIES

Collins Entertainment Corp. v Coats & Coats Rental Amusement opens the door for lost volume sellers, but does not fully invite them in: an examination of the adoption of the lost volume seller doctrine in South Carolina, 56 S.C. L. Rev. 693 (Summer 2005).

Market price damages under UCC Article 2: Some suggestions for the next revision. Henry Mather, 65 S.C. L. Rev. 275 (Autumn 2013).

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

**SECTION 36‑2‑709.** Action for the price.

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section (Section 36‑2‑710), the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 36‑2‑610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under the preceding section (Section 36‑2‑708).

HISTORY: 1962 Code Section 10.2‑709; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 63, Uniform Sales Act.

Changes: Rewritten, important commercially needed changes being incorporated.

Purposes of changes:

To make it clear that:

1. Neither the passing of title to the goods nor the appointment of a day certain for payment is now material to a price action.

2. The action for the price is now generally limited to those cases where resale of the goods is impracticable except where the buyer has accepted the goods or where they have been destroyed after risk of loss has passed to the buyer.

3. This section substitutes an objective test by action for the former “not readily resalable” standard. An action for the price under subsection (1)(b) can be sustained only after a “reasonable effort to resell” the goods “at reasonable price” has actually been made or where the circumstances “reasonably indicate” that such an effort will be unavailing.

4. If a buyer is in default not with respect to the price, but on an obligation to make an advance, the seller should recover not under this section for the price as such, but for the default in the collateral (though coincident) obligation to finance the seller. If the agreement between the parties contemplates that the buyer will acquire, on making the advance, a security interest in the goods, the buyer on making the advance has such an interest as soon as the seller has rights in the agreed collateral. See Section 9‑204.

5. “Goods accepted” by the buyer under subsection (1)(a) include only goods as to which there has been no justified revocation of acceptance, for such a revocation means that there has been a default by the seller which bars his rights under this section. “Goods lost or damaged” are covered by the section on risk of loss. “Goods identified to the contract” under subsection (1)(b) are covered by the section on identification and the section on identification notwithstanding breach.

6. This section is intended to be exhaustive in its enumeration of cases where an action for the price lies.

7. If the action for the price fails, the seller may nonetheless have proved a case entitling him to damages for non‑acceptance. In such a situation, subsection (3) permits recovery of those damages in the same action.

Cross References:

Point 4: Section 1‑106.

Point 5: Sections 2‑501, 2‑509, 2‑510 and 2‑704.

Point 7: Section 2‑708.

Definitional Cross References:

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| “Action” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Conforming” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Under the majority common law rule as codified in the Uniform Sales Act, Section 63, the seller could maintain an action to recover the full contract price from the breaching buyer in three situations: (1) title has passed, (2) price is payable on a certain day without regard to delivery or transfer of title and (3) the goods are not readily resalable. 3 Williston, Sales, Sections 561, 575; 78 C.J.S., Sales, Section 439 (1952). The South Carolina court has allowed recovery of the purchase price by the seller when the sales contract has become executed by delivery of the goods to and acceptance by the buyer. Oxweld Acetylene Co. v Davis, 115 SC 426, 106 SE 157 (1920); Griggs‑Paxton Shoe Co. v A. Friedheim & Bros., 133 SC 458, 131 SE 620 (1926). The seller may also recover the price where the goods have been destroyed after risk of loss passes to the buyer. E. C. DeWitt & Co. v Culpepper, 66 SC 467, 45 SE 1 (1903).

Section 2‑709(1)(a) continues this South Carolina case law of allowing the seller to recover the price when the goods have been accepted by or risk of loss has passed to the buyer. In line with the Commercial Code’s general approach of de‑emphasizing the passing of title as a factor in determining the outcome, this would no longer affect the price remedy. The general common law and Uniform Sales Act Rule that the seller may recover the price when he is unable to resell the goods is continued under subsection (1)(b). Since the seller’s action for the price is his remedial equivalent to the buyer’s action for specific performance, this remedy is limited to such cases where the damages and resale remedies are inadequate.

Section 2‑709(2) states an obvious rule that the seller who sues for the price must hold the goods for the buyer. See Smythe v Goode, 121 SC 270, 113 SE 690 (1922) for the general proposition consistent with this rule that the seller must tender the property at time of performance as a condition to maintaining an action for the price.

Section 2‑709(3) authorizes the seller’s recovery of damages under Commercial Code Section 2‑708 where he brings an action for the price but is unable to meet the conditions of this section.

CROSS REFERENCES

Code remedies liberally administered, see Section 36‑1‑305.

Identification of goods to contract, see Sections 36‑2‑501, 36‑2‑704.

Risk of loss, see Sections 36‑2‑509, 36‑2‑510.

When security interest attaches, see Section 36‑9‑203.

LIBRARY REFERENCES

Sales 340.

Westlaw Key Number Search: 343k340.

C.J.S. Sales Sections 325 to 326, 348.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

Treatises and Practice Aids

8 Causes of Action 333, Cause of Action by Seller to Recover Price of Goods Under UCC S2‑709.

LAW REVIEW AND JOURNAL COMMENTARIES

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

NOTES OF DECISIONS

In general 1

Effort to resell goods 3

Holding goods identified to the contract 2

1. In general

In an action brought under Section 36‑2‑709(1), the full price of the goods was due the seller within 12 months on a release program where (1) 12 months was both the industry standard, per Section 36‑1‑205(3), and the common course of dealing between the parties, per Section 36‑1‑208(1), (2) the purchaser did not object within a reasonable time to the express provision of 12 months in the contract, and (3) the imposition of a 12 month limit would not have been a material alteration to the agreement since it conformed to trade usage and the parties’ prior dealings. Weisz Graphics Div. of Fred B. Johnson Co., Inc. v. Peck Industries, Inc. (S.C.App. 1991) 304 S.C. 101, 403 S.E.2d 146.

2. Holding goods identified to the contract

Under Section 36‑2‑709(2), requiring that the seller must hold for the buyer any goods which have been identified to the contract and which are still in the seller’s control, there was evidence from which the jury could infer that the seller had made the necessary showing under the statute where it appeared that the seller stored the goods in a warehouse of one of its associates, and although the warehouse had been sold as a result of a bankruptcy proceeding, there was no evidence that the goods had been removed from the warehouse. FMI, Inc. v. RMAX, Inc. (S.C.App. 1985) 286 S.C. 343, 333 S.E.2d 360.

3. Effort to resell goods

Ample evidence supported the trial court’s finding that any attempt to resell goods as required by Section 36‑2‑709(1) would have been unavailing where the goods were custom manufactured to the buyer’s specifications, the seller had to order special dies to cut characters in the style the buyer chose, these dies were used to produce goods for this buyer only, and the seller’s corporate sales manager and chief financial officer testified that the goods could not be marketed to another buyer; thus, these goods were not marketable in any commercially reasonable manner. Weisz Graphics Div. of Fred B. Johnson Co., Inc. v. Peck Industries, Inc. (S.C.App. 1991) 304 S.C. 101, 403 S.E.2d 146.

Under Section 36‑2‑709(1)(b), providing that the seller may recover if the circumstances reasonably indicate that an effort to resell the goods would be unavailing, a jury’s verdict in favor of a seller was supported by evidence that the seller had modified his machinery to produce material for the buyer which differed greatly from the seller’s normal products, that the goods manufactured were of odd size and were such that the seller had no other customer to whom they could be sold, and that the goods were unmarketable to anyone. FMI, Inc. v. RMAX, Inc. (S.C.App. 1985) 286 S.C. 343, 333 S.E.2d 360.

In action by seller for price of balance of order of building‑insulation felt, which was specially made for buyer and which buyer refused to accept, court held (1) that buyer’s contention that seller had made no effort to resell felt, which was of odd size and for which seller had no other customer, could not be sustained because UCC Section 36‑2‑709(1)(b) does not require seller to try to resell if circumstances indicate that such effort would be unavailing; (2) that evidence showed that goods were still in seller’s control, as required by UCC Section 36‑2‑709(2); and (3) that buyer failed to plead affirmative defense of revocation of acceptance of felt (UCC Section 36‑2‑608(1)). FMI, Inc. v. RMAX, Inc. (S.C.App. 1985) 286 S.C. 343, 333 S.E.2d 360.

**SECTION 36‑2‑710.** Seller’s incidental damages.

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer’s breach, in connection with return or resale of the goods or otherwise resulting from the breach.

HISTORY: 1962 Code Section 10.2‑710; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: See Sections 64 and 70, Uniform Sales Act.

Purposes:

To authorize reimbursement of the seller for expenses reasonably incurred by him as a result of the buyer’s breach. The section sets forth the principal normal and necessary additional elements of damage flowing from the breach but intends to allow all commercially reasonable expenditures made by the seller.

Definitional Cross References:

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| “Aggrieved party” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

As an implementation of the Commercial Code’s basic policy of putting the aggrieved party in the same position as though the breaching party had actually performed, Code Section 2‑701 broadly defines and authorizes the award of incidental damages. Incidental damages would include such expenses as resale storage and notice charges. In accord, Smoothing Iron Heater Co. v Blakely, 94 SC 224, 77 SE 945 (1913) (seller’s damages include storage and insurance cost); Woods v Cramer, 34 SC 508, 13 SE 660 (1891) (seller recovered storage and resale expenses). Note that the incidental damages authorized by this section are distinct from consequential damages of Commercial Code Section 2‑715.

LIBRARY REFERENCES

Sales 384.

Westlaw Key Number Search: 343k384.

C.J.S. Sales Section 363.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

LAW REVIEW AND JOURNAL COMMENTARIES

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

**SECTION 36‑2‑711.** Buyer’s remedies in general; buyer’s security interest in rejected goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 36‑2‑612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) “cover” and have damages under the next section (Section 36‑2‑712) as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for nondelivery as provided in this chapter (Section 36‑2‑713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this chapter (Section 36‑2‑502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this chapter (Section 36‑2‑716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 36‑2‑706).

HISTORY: 1962 Code Section 10.2‑711; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: No comparable index section; Subsection (3)—Section 69(5), Uniform Sales Act.

Changes: The prior uniform statutory provision is generally continued and expanded in Subsection (3).

Purposes of changes and new matter:

1. To index in this section the buyer’s remedies, subsection (1) covering those remedies permitting the recovery of money damages, and subsection (2) covering those which permit reaching the goods themselves. The remedies listed here are those available to a buyer who has not accepted the goods or who has justifiably revoked his acceptance. The remedies available to a buyer with regard to goods finally accepted appear in the section dealing with breach in regard to accepted goods. The buyer’s right to proceed as to all goods when the breach is as to only some of the goods is determined by the section on breach in installment contracts and by the section on partial acceptance.

Despite the seller’s breach, proper retender of delivery under the section on cure of improper tender or replacement can effectively preclude the buyer’s remedies under this section, except for any delay involved.

2. To make it clear in subsection (3) that the buyer may hold and resell rejected goods if he has paid a part of the price or incurred expenses of the type specified. “Paid” as used here includes acceptance of a draft or other time negotiable instrument or the signing of a negotiable note. His freedom of resale is coextensive with that of a seller under this Article except that the buyer may not keep any profit resulting from the resale and is limited to retaining only the amount of the price paid and the costs involved in the inspection and handling of the goods. The buyer’s security interest in the goods is intended to be limited to the items listed in subsection (3), and the buyer is not permitted to retain such funds as he might believe adequate for his damages. The buyer’s right to cover, or to have damages for non‑delivery is not impaired by his exercise of his right of resale.

3. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1‑106).

Cross References:

Point 1: Sections 2‑508, 2‑601(c), 2‑608, 2‑612 and 2‑714.

Point 2: Section 2‑706.

Point 3: Section 1‑106.

Definitional Cross References:

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|  |  |
| “Aggrieved party” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Cancellation” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Cover” | Section 2‑712. |
| “Goods” | Section 2‑105. |
| “Notifies” | Section 1‑201. |
| “Receipt of goods” | Section 2‑103. |
| “Remedy” | Section 1‑201. |
| “Security interest” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑711 is an index of the buyer’s remedies treated in more detail in the sections which follow. This section allows the buyer to “revoke acceptance” which is the Commercial Code’s equivalent of the buyer’s right to “rescind” under existing law. In accord, Liquid Carbonic Co. v Coclin, 161 SC 506, 149 SE 271 (1929). Under existing law the rescission by the buyer is held to void the contract leaving no basis for recovery of damages for breach of contract. Yancey v Southern Wholesale Lumber Co., 133 SC 369, 131 SE 32 (1925); Ebner v Haverty Furniture Co., 128 SC 151, 122 SE 578 (1924); Builder’s Supply Co. v Jones, 875 SC 426, 69 SE 881 (1911). As pointed out in the South Carolina Reporter’s Comments to Code Section 2‑608, this election of remedies doctrine is rejected by the Commercial Code, and the buyer may recover damages after he revokes his acceptance.

Section 2‑711(3) gives the buyer a security interest in the goods in his possession to insure the recovery of payments made and expenses incurred which are recoverable from the breaching seller. A similar result was reached in Liquid Carbonic Co. v Coclin, 161 SC 40, 159 SE 461 (1931) which recognized the buyer’s right to retain possession of goods sold as security for sums paid to the breaching seller.

CROSS REFERENCES

Buyer’s options on nonconforming tender or delivery, see Section 36‑2‑601.

Cure or replacement by seller in case of nonconforming tender or delivery, see Section 36‑2‑508.

Liberal administration of code remedies, see Section 36‑1‑305.

Revocation of acceptance, see Section 36‑2‑608.

Security interest subject to Chapter 9, see Section 36‑9‑110

LIBRARY REFERENCES

Sales 113, 390, 399, 404, 425.

Westlaw Key Number Searches: 343k113; 343k390; 343k399; 343k404; 343k425.

C.J.S. Sales Sections 121, 123, 128 to 129, 199, 237, 278 to 280, 284 to 286, 288, 374 to 376, 379, 389, 395.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

S.C. Jur. Fraud Section 17, Damages in Relation to a Contract.

LAW REVIEW AND JOURNAL COMMENTARIES

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

NOTES OF DECISIONS

In general 1

1. In general

Under South Carolina law, if a plaintiff who was induced to enter into contract by fraud elects to sue in contract, he may seek his expectancy damages under the contract or rescission and restitution of the contract price. Enhance‑It, L.L.C. v. American Access Technologies, Inc., 2006, 413 F.Supp.2d 626. Fraud 32

**SECTION 36‑2‑712.** “Cover”; buyer’s procurement of substitute goods.

(1) After a breach within the preceding section (Section 36‑2‑711) the buyer may “cover” by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 36‑2‑715), but less expenses saved in consequence of the seller’s breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

HISTORY: 1962 Code Section 10.2‑712; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. This section provides the buyer with a remedy aimed at enabling him to obtain the goods he needs thus meeting his essential need. This remedy is the buyer’s equivalent of the seller’s right to resell.

2. The definition of “cover” under subsection (1) envisages a series of contracts or sales, as well as a single contract or sale; goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case; and contracts on credit or delivery terms differing from the contract in breach, but again reasonable under the circumstances. The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method or cover used was not the cheapest or most effective.

The requirement that the buyer must cover “without unreasonable delay” is not intended to limit the time necessary for him to look around and decide as to how he may best effect cover. The test here is similar to that generally used in this Article as to reasonable time and seasonable action.

3. Subsection (3) expresses the policy that cover is not a mandatory remedy for the buyer. The buyer is always free to choose between cover and damages for non‑delivery under the next section.

However, this subsection must be read in conjunction with the section which limits the recovery of consequential damages to such as could not have been obviated by cover. Moreover, the operation of the section on specific performance of contracts for “unique” goods must be considered in this connection for availability of the goods to the particular buyer for his particular needs is the test for that remedy and inability to cover is made an express condition to the right of the buyer to replevy the goods.

4. This section does not limit cover to merchants, in the first instance. It is the vital and important remedy for the consumer buyer as well. Both are free to use cover: the domestic or non‑merchant consumer is required only to act in normal good faith while the merchant buyer must also observe all reasonable commercial standards of fair dealing in the trade, since this falls within the definition of good faith on his part.

Cross References:

Point 1: Section 2‑706.

Point 2: Section 1‑204.

Point 3: Sections 2‑713, 2‑715 and 2‑716.

Point 4: Section 1‑203.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Good faith” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Purchase” | Section 1‑201. |
| “Remedy” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑712(1) and (2) authorizes the buyer to “cover” after seller’s breach by making a reasonable purchase of substitute goods and then recovering the difference between the contract price and cost of cover. This is a counterpart of the seller’s right of resale after the buyer’s breach (Commercial Code Section 2‑706). While the courts have not been in complete agreement on this point, the majority rule is that at least the cover price is evidence of market value which forms the base for computation of buyer’s damages if he bought at the cheapest price. See 3 Williston, Sales, Section 599 (rev ed 1948); 78 C.J.S., Sales, Section 439 (1952). The South Carolina decisions are in accord. Maybank and Co. v Rogers, 88 SC 572, 71 SE 48 (1911); Union Bleaching & Finishing Co. v Barker Fuel Co., 124 SC 458, 117 SE 735 (1923); McCown‑Clarke Co. v Muldraw, 116 SC 54, 106 SE 771 (1921). This commercial Code Section would probably give greater weight to cover in fixing the buyer’s damages.

Section 2‑712(3) resolves a common law conflict as to whether the buyer is under a duty to cover at pain of losing other remedies available to him. Under the general duty to mitigate damages, a majority of jurisdictions have imposed this duty on the buyer under some circumstances. There seem to be conflicting statements in the South Carolina decisions on this point. In McCown‑Clarke Co. v Muldraw, 116 SC 54, 106 SE 771 (1920), the court said, “One who suffers injury from the violation of his contract must minimize his loss by going into the market and purchasing goods to supply his need”. On the other hand, in Maybank & Co. v Rogers, 88 SC 572, 576, 71 SE 48 (1911), the court said, “This rule (buyer’s right to recover difference between contract price and market price) does not contemplate that the vendee, to avail himself of it, shall buy upon the market articles to replace those contracted for”. The latest decision and presumably the present law in this state is Swift & Co. v Sullivan, 149 SC 424, 147 SE 315 (1929) where the Court held that it is a jury question as to whether the buyer should have minimized damages by purchasing substitute goods. In adopting the view that cover is optional with the buyer, this subsection would seem to modify the present case law. This change is more modest when Commercial Code Section 2‑715 (2)(a) is read with this section which prevents the buyer from recovering consequential damages if the loss could have been prevented by cover.

CROSS REFERENCES

Obligation of good faith, see Section 36‑1‑304.

When action taken within reasonable time or seasonably, see Section 36‑1‑205.

LIBRARY REFERENCES

Sales 418(7).

Westlaw Key Number Search: 343k418(7).

C.J.S. Sales Sections 391 to 393, 403.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

LAW REVIEW AND JOURNAL COMMENTARIES

Contract Modification Under Duress. 33 S.C. L. Rev. 615 (May 1982).

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

**SECTION 36‑2‑713.** Buyer’s damages for nondelivery or repudiation.

(1) Subject to the provisions of this chapter with respect to proof of market price (Section 36‑2‑723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter (Section 36‑2‑715), but less expenses saved in consequence of the seller’s breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

HISTORY: 1962 Code Section 10.2‑713; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 67(3), Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

To clarify the former rule so that:

1. The general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief. So the place for measuring damages is the place of tender (or the place of arrival if the goods are rejected or their acceptance is revoked after reaching their destination) and the crucial time is the time at which the buyer learns of the breach.

2. The market or current price to be used in comparison with the contract price under this section is the price for goods of the same kind and in the same branch of trade.

3. When the current market price under this section is difficult to prove the section on determination and proof of market price is available to permit a showing of a comparable market price or, where no market price is available, evidence of spot sale prices is proper. Where the unavailability of a market price is caused by a scarcity of goods of the type involved, a good case is normally made for specific performance under this Article. Such scarcity conditions, moreover, indicate that the price has risen and under the section providing for liberal administration of remedies, opinion evidence as to the value of the goods would be admissible in the absence of a market price and a liberal construction of allowable consequential damages should also result.

4. This section carries forward the standard rule that the buyer must deduct from his damages any expenses saved as a result of the breach.

5. The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered.

Cross References:

Point 3: Sections 1‑106, 2‑716 and 2‑723.

Point 5: Section 2‑712.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Contract” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Since the buyer has an option to either make a cover purchase of substitute goods or sue for damages, an exercise of the latter choice under Commercial Code Section 2‑713(1) measures the damages by the contract price‑market value difference as of the time when the buyer learned of the breach. This is a modification of the present case law which measures buyer’s damages by the difference in contract price and market value at time and place of delivery under the contract. Union Bleaching & Finishing Co. v Barker Fuel Co., 124 SC 458, 117 SE 735 (1923); Medlin v Adams Grain & Provisions Co., 100 SC 359, 84 SE 867 (1915); Leesville Mfg. Co. v Morgan Wood & Iron Works, 75 SC 342, 55 SE 768 (1906). The only situation where this change will result in a different amount of recovery is where the seller repudiates before time set for performance and the market price at that time is different from the market price at time and place of performance under the contract.

Section 2‑713(2) prescribes the place for computation of market price as the place for tender or arrival. In accord that buyer’s damages for seller’s failure to deliver are measured by market value of goods at time and place of delivery. Clinton Oil & Mfg. Co. v Carpenter, 113 SC 10, 101 SE 47 (1919).

CROSS REFERENCES

Liberal administration of code remedies, see Section 36‑1‑305.

LIBRARY REFERENCES

Sales 418.

Westlaw Key Number Search: 343k418.

C.J.S. Sales Sections 396 to 397, 399 to 400.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

LAW REVIEW AND JOURNAL COMMENTARIES

Market price damages under UCC Article 2: Some suggestions for the next revision. Henry Mather, 65 S.C. L. Rev. 275 (Autumn 2013).

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

**SECTION 36‑2‑714.** Buyer’s damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 36‑2‑607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller’s breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section (Section 36‑2‑715) may also be recovered.

HISTORY: 1962 Code Section 10.2‑714; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 69(6) and (7), Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

1. This section deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by. In general this section adopts the rule of the prior uniform statutory provision for measuring damages where there has been a breach of warranty as to goods accepted, but goes further to lay down an explicit provision as to the time and place for determining the loss.

The section on deduction of damages from price provides an additional remedy for a buyer who still owes part of the purchase price, and frequently the two remedies will be available concurrently. The buyer’s failure to notify of his claim under the section on effects of acceptance, however, operates to bar his remedies under either that section or the present section.

2. The “non‑conformity” referred to in subsection (1) includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract. In the case of such non‑conformity, the buyer is permitted to recover for his loss “in any manner which is reasonable.”

3. Subsection (2) describes the usual, standard and reasonable method of ascertaining damages in the case of breach of warranty but it is not intended as an exclusive measure. It departs from the measure of damages for non‑delivery in utilizing the place of acceptance rather than the place of tender. In some cases the two may coincide, as where the buyer signifies his acceptance upon the tender. If, however, the non‑conformity is such as would justify revocation of acceptance, the time and place of acceptance under this section is determined as of the buyer’s decision not to revoke.

4. The incidental and consequential damages referred to in subsection (3), which will usually accompany in action brought under this section, are discussed in detail in the comment on the next section.

Cross References:

Point 1: Compare Section 2‑711; Sections 2‑607 and 2‑717.

Point 2: Section 2‑106.

Point 3: Sections 2‑608 and 2‑713.

Point 4: Section 2‑715.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Buyer” | Section 2‑103. |
| “Conform” | Section 2‑106. |
| “Goods” | Section 1‑201. |
| “Notification” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑714 applies where the buyer elects to keep non‑conforming goods and recover damages for their deficiencies. Subsection (1) sets out the general test for determining damages as “any manner which is reasonable”.

Section 2‑714(2) specifically prescribes the measure of damages for breach of warranty as the difference between the value of the goods accepted and the value as warranted. This is the usual formula for measuring damages for breach of warranty as well as all other cases where there is a breach and the buyer elects to accept the goods and seeks damages under subsection (1). In accord, Spartanburg Hotel Corp. v Alexander Smith, Inc., 231 SC 1, 97 SE2d 199 (1957); Cannon v Pulliam Motor Co., 230 SC 131, 94 SE2d 397 (1956).

Section 2‑714(3) makes it clear that the recovery of damages under this section does not preclude the buyer from recovering incidental and consequential damages under Commercial Code Section 2‑715.

CROSS REFERENCES

Buyer’s acceptance of goods and incidental rights and liabilities, see Section 36‑2‑607.

“Goods” within scope of sales transactions, see Section 36‑2‑105.

Warranties by seller, see Sections 36‑2‑312 et seq.

When goods are conforming, see Section 36‑2‑106.

When revocation of acceptance must occur, see Section 36‑2‑608.

LIBRARY REFERENCES

Sales 418.

Westlaw Key Number Search: 343k418.

C.J.S. Sales Sections 396 to 397, 399 to 400.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

LAW REVIEW AND JOURNAL COMMENTARIES

Consumer Product Warranty Litigation in South Carolina. 31 S.C. L. Rev. 293.

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

The Statute of Limitations, Prospective Warranties, and Problems of Interpretation in Article 2 of the UCC. 52 Geo Wash L Rev 67 (November 1983).

NOTES OF DECISIONS

In general 1

Incidental and consequential damages 2

Oral express warranty 3

Proof of damages 6

Punitive damages 5

Special circumstances 4

1. In general

Uniform Commercial Code (UCC) displaces common‑law remedies for breach of warranty, and thus remedies for breaches of warranties that are subject to UCC’s sales article are available exclusively under that article; UCC contains comprehensive system of remedies for breach of warranty. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc. (S.C. 2005) 366 S.C. 163, 621 S.E.2d 38. Sales 1905

Buyer’s remedies for seller’s alleged breach of warranty were limited to those contained in sales article of Uniform Commercial Code (UCC), and thus buyer could not pursue common‑law remedies for breach of warranty; contract was governed by sales article, and UCC’s comprehensive system of remedies displaced common law. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc. (S.C. 2005) 366 S.C. 163, 621 S.E.2d 38. Sales 1905

In an action for breach of warranty in a sale of a motor vehicle, the proper measure of damages under Section 36‑2‑714 was the difference between the fair market value of the van in its alleged defective condition at the time of the sale and the van’s fair market value if it had been as warranted. Ellison v. Heritage Dodge, Inc. (S.C.App. 1984) 283 S.C. 21, 320 S.E.2d 716. Sales 2212(8)

2. Incidental and consequential damages

Farm was entitled to recover value of damaged tobacco crop, rather than only the cost of pesticide, as damages for pesticide manufacturer’s breach of warranty, though farm and manufacturer had contractually agreed to exclude consequential and incidental damages. Triple E, Inc. v. Hendrix and Dail, Inc. (S.C.App. 2001) 344 S.C. 186, 543 S.E.2d 245, 93 A.L.R.5th 727, rehearing denied. Sales 2307

Under express oral warranty running directly from manufacturer to buyer, limited only in duration, buyer could recover from manufacturer any damages proximately caused by breach, including consequential damages. McClary v. Massey Ferguson, Inc. (S.C.App. 1987) 291 S.C. 506, 354 S.E.2d 405.

3. Oral express warranty

In consolidated action involving (1) manufacturer’s suit against buyer for balance due under retail‑installment contract for purchase of defective combine, and (2) buyer’s suit against manufacturer and dealer for breach of contract and breach of warranty, court held, with respect to buyer’s breach‑of‑warranty claims and manufacturer’s warranty disclaimer and limited express warranty, (1) that written and implied warranties (UCC Sections 2‑313(1), 2‑314(1), and 2‑315) were not only possible bases for jury verdict in favor of buyer; (2) that if jury believed buyer’s testimony that he had never received manufacturer’s written warranty, it could then have found that oral agreement of manufacturer’s sales representative with buyer constituted express oral warranty that ran directly from manufacturer to buyer and was limited only in duration; and (3) that under theory of breach of oral express warranty, jury, under UCC Section 2‑714, was free to award buyer any damages proximately caused by manufacturer’s breach, including consequential damages. McClary v. Massey Ferguson, Inc. (S.C.App. 1987) 291 S.C. 506, 354 S.E.2d 405.

4. Special circumstances

In a breach of warranty case involving an alleged herbicide failure which caused crop damage, the inability of the court to ascertain with certainty the value of a herbicide as warranted and as accepted created a special circumstance within the meaning of Section 36‑2‑714(2), which removed the case from the Section 36‑2‑714(2) measure of damages into subd (1), and, thus, the measure of actual damages would be the value the crop would have had if the product had conformed to the warranty less the value of the crop actually produced and less the expense of preparing for market the portion of the probable crop prevented from maturing. Hill v. BASF Wyandotte Corp. (S.C. 1984) 280 S.C. 174, 311 S.E.2d 734.

5. Punitive damages

Punitive damages are not available in breach of warranty cases. Rhodes v. McDonald (S.C.App. 2001) 345 S.C. 500, 548 S.E.2d 220.

6. Proof of damages

Evidence was sufficient to support jury’s use of the valuation of boat at the time purchasers revoked acceptance as the value of the boat at the time of acceptance for purposes of calculating damages for breach of warranty; at the time of revocation, the boat had been in purchasers’ possession for only five months and was used on two occasions, and boat retailer had possession of the boat for approximately eight months while it made repairs. Chapman v. Upstate RV & Marine (S.C.App. 2005) 364 S.C. 82, 610 S.E.2d 852. Sales 2212(1)

The absence of proof of one of the two values necessary to determine damages in a breach of warranty action, which damages are based on the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, normally bars recovery and warrants the granting of a new trial. Chapman v. Upstate RV & Marine (S.C.App. 2005) 364 S.C. 82, 610 S.E.2d 852. New Trial 68.4(2)

**SECTION 36‑2‑715.** Buyer’s incidental and consequential damages.

(1) Incidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller’s breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

HISTORY: 1962 Code Section 10.2‑715; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provisions: Subsection (2) (b)—Sections 69(7) and 70, Uniform Sales Act.

Changes: Rewritten.

Purposes of changes and new matter:

1. Subsection (1) is intended to provide reimbursement for the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked, or in connection with effecting cover where the breach of the contract lies in non‑conformity or non‑delivery of the goods. The incidental damages listed are not intended to be exhaustive but are merely illustrative of the typical kinds of incidental damage.

2. Subsection (2) operates to allow the buyer, in an appropriate case, any consequential damages which are the result of the seller’s breach. The “tacit agreement” test for the recovery of consequential damages is rejected. Although the older rule at common law which made the seller liable for all consequential damages of which he had “reason to know” in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise. Subparagraph (2) carries forward the provisions of the prior uniform statutory provision as to consequential damages resulting from breach of warranty, but modifies the rule by requiring first that the buyer attempt to minimize his damages in good faith, either by cover or otherwise.

3. In the absence of excuse under the section on merchant’s excuse by failure of presupposed conditions, the seller is liable for consequential damages in all cases where he had reason to know of the buyer’s general or particular requirements at the time of contracting. It is not necessary that there be a conscious acceptance of an insurer’s liability on the seller’s part, nor is his obligation for consequential damages limited to cases in which he fails to use due effort in good faith.

Particular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge.

Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy.

4. The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.

5. Subsection (2) (b) states the usual rule as to breach of warranty, allowing recovery for injuries “proximately” resulting from the breach. Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of “proximate” cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.

6. In the case of sale of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know within the meaning of subsection (2)(a).

Cross References:

Point 1: Section 2‑608.

Point 3: Sections 1‑203, 2‑615 and 2‑719.

Point 4: Section 1‑106.

Definitional Cross References:

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| “Cover” | Section 2‑712. |
| “Goods” | Section 1‑201. |
| “Person” | Section 1‑201. |
| “Receipt of goods” | Section 2‑103. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

As a counterpart of the seller’s right to recover incidental damages from the breaching buyer (Commercial Code Section 2‑710), Commercial Code Section 2‑715(1) authorizes the buyer to recover incidental damages from the breaching seller. This is generally in accord with existing South Carolina case law which has allowed the buyer to recover expenses incurred which can be treated directly and naturally to a breach, National Tire & Rubber Co. v Hoover, 128 SC 344, 122 SE 858 (1924), and reasonable expense endeavoring to remedy the defects in the goods, Smith & Furbush Machine Co. v Johnston, 102 SC 130, 86 SE 489 (1915).

Section 2‑715(2) authorizing the recovery of consequential damages is consistent with South Carolina case law which has awarded the buyer “Special” damages for loss of profits reasonably anticipated from a resale of the goods. W. T. Rawleigh Co. v Wilson, 141 SC 182, 139 SE 395 (1927). J. A. Fay & Egan Co. v Mims, 151 SC 484, 149 SE 246 (1929) (loss resulting from interruption of plant operation). Standard Supply Co. v Cotter & Harris, 81 SC 181, 62 SE 150 (1908) (damages to buyer’s cotton seed resulting from the seller’s failure to deliver machinery for cooling according to the contract). Also consistent with the rule of this section are South Carolina cases which have permitted a buyer to recover consequential damages proximately caused by the seller’s breach of warranty of quality. E.g., Georgetown Towing Co. v Nat. Supply Co., 204 SC 445, 29 SE2d 765 (1944); Liquid Carbonic Co. v Coclin, 166 SC 400, 164 SE 895 (1932).

In all of the South Carolina cases in which consequential damages were recovered by the buyer, the court either expressly or inferentially expressed the condition to such recovery found in subsection (2)(a) that the loss resulted from needs “of which the seller at the time of contracting had reason to know”. This expresses the common law foreseeability test stemming from the leading 1854 English case of Hadley v Baxendale (9 Exch 341). The further limitation on the recovery of consequential damages that they “could not reasonably be prevented by cover or otherwise” is in accord with the South Carolina case law requiring the parties to take reasonable steps to minimize the damages and the refusal to avoid such damages as might have been averted. Westinghouse Electric & Mfg. Co. v Glencoe Cotton Mills, 106 SC 133, 90 SE 526 (1916); Smith & Furbush Machine Co. v Johnston, 102 SC 130, 86 SE 489 (1915). (Cf. Commercial Code Section 2‑712 (3) which is limited by this section).

Section 2‑715(2)(a) authorizes the buyer’s recovery of personal and property damages which are the natural and probable result of the breach. This rule seemed to be recognized by the South Carolina court in Ellis v Montgomery & Crawford, 189 SC 72, 200 SE 82 (1939), although it was held not a proper case for its application since the plaintiff knew of the danger involved and did not guard against it. The result of denying recovery under the facts of that case should be the same under this Commercial Code Section since the damages would not be proximately due to the breach of the warranty.

CROSS REFERENCES

Liberal administration of code remedies, see Section 36‑1‑305.

Merchant’s excuse by failure of presupposed conditions, see Section 36‑2‑615.

Obligation of good faith in performance or enforcement of contract or duty, see Section 36‑1‑304.

Revocation of acceptance, see Sections 36‑2‑608, 36‑2‑703.

LIBRARY REFERENCES

Sales 418.

Westlaw Key Number Search: 343k418.

C.J.S. Sales Sections 396 to 397, 399 to 400.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

Treatises and Practice Aids

19 Causes of Action 2d 337, Cause of Action for Defective Mobile Home.

LAW REVIEW AND JOURNAL COMMENTARIES

Consumer Product Warranty Litigation in South Carolina. 31 S.C. L. Rev. 293.

Contract Modification Under Duress. 33 S.C. L. Rev. 615 (May 1982).

The Shadow Code. 56 S.C. L. Rev. 93 (Autumn 2004).

NOTES OF DECISIONS

In general 1

Attorney fees 3

Breach of warranty 5

Evidence of value of goods 2

Punitive damages 4

1. In general

Trial judge directed on retrial to determine whether evidence entitled defendant to benefit of more liberal rule set out in Section 36‑2‑715, or to traditional measure of damages consisting of difference in value of product as accepted and value it would have had if as warranted, where defendant claimed breach due to inability of plaintiff’s product to process carpet backing at warranted rates. Marshall & Williams Co. v. General Fibers & Fabrics, Inc. (S.C. 1978) 270 S.C. 247, 241 S.E.2d 888.

2. Evidence of value of goods

It is proper for an owner to estimate the reasonable value of his or her household goods in an action to recover consequential damages under Section 36‑2‑715. Thus, in an action for breach of an implied warranty of merchantability arising from the destruction by fire of a mobile home purchased from the defendant, the evidence was sufficient to submit the value of the contents of the mobile home for the jury’s consideration where the plaintiffs testified that they undertook a mental inventory of the contents of each room and referred to mail order catalogs to estimate values, when needed, if the items were replaceable, and the plaintiffs provided the actual purchase prices for recently purchased items. Doty v. Parkway Homes Co. (S.C. 1988) 295 S.C. 368, 368 S.E.2d 670.

3. Attorney fees

Attorney fees do not constitute incidental or consequential damages under Section 36‑2‑715. Mockabee v. Wakefield Buick, Inc. (S.C.App. 1989) 298 S.C. 386, 380 S.E.2d 848.

4. Punitive damages

Punitive damages are not available in breach of warranty cases. Rhodes v. McDonald (S.C.App. 2001) 345 S.C. 500, 548 S.E.2d 220.

5. Breach of warranty

Under any products liability theory, a plaintiff must prove the product defect was the proximate cause of the injury sustained. Rife v. Hitachi Const. Machinery Co., Ltd. (S.C.App. 2005) 363 S.C. 209, 609 S.E.2d 565, rehearing denied, certiorari denied. Products Liability 147

**SECTION 36‑2‑716.** Buyer’s right to specific performance or replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

HISTORY: 1962 Code Section 10.2‑716; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 68, Uniform Sales Act.

Changes: Rephrased.

Purposes of changes:

To make it clear that:

1. The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court’s sound discretion in the matter, this Article discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.

2. In view of this Article’s emphasis on the commercial feasibility of replacement, a new concept of what are “unique” goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted “in other proper circumstances” and inability to cover is strong evidence of “other proper circumstances”.

3. The legal remedy of replevin is given the buyer in cases in which cover is reasonably unavailable and goods have been identified to the contract. This is in addition to the buyer’s right to recover identified goods on the seller’s insolvency (Section 2‑502).

4. This section is intended to give the buyer rights to the goods comparable to the seller’s rights to the price.

5. If a negotiable document of title is outstanding, the buyer’s right of replevin relates of course to the document not directly to the goods. See Article 7, especially Section 7‑602.

Cross References:

Point 3: Section 2‑502.

Point 4: Section 2‑709.

Point 5: Article 7.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Goods” | Section 1‑201. |
| “Rights” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Under the ancient rule that equity jurisdiction may not be invoked unless the legal remedy is inadequate, a decree ordering specific performance of a sales contract has been usually limited to the case of unique goods where money damages would not put the buyer in the same position as performance. See Williston, Sales, Section 602 (rev ed 1948). This principle was invoked in a number of early South Carolina cases involving contracts for the sale of slaves, as illustrated by the following language from one of the cases: “If he has contracted for specific slaves, he has a right to a specific delivery. But if the contrary appears that he contracted for slaves generally, with no view to any particular individuals, or if they were contracted for as merchandise, to sell again, the remedy is at law”. Harry v Glover, 2 Hill Eq 515 (1837). In accord, Sarter v Gordon, 2 Hill Eq 121 (1835); Skrime v Walker, 3 Rich Eq 262 (1851); Sims v Shelton, 2 Strob Eq 221 (1848). It is on the principle that equity will specifically enforce a contract for sale of land on the assumption that it is unique, and money damages would be inadequate. E.g., Armstrong v Henson, 139 SC 156, SE 439 (1927); Shannon v Freeman, 117 SC 480, 109 SE 405 (1921). See Taylor v Highland Park Corp., 210 SC 254, 42 SE2d 335 (1947) where the court specifically enforced a contract for the sale of real and personal property even though the personalty was not unique.

Section 2‑716(1) expands the buyer’s remedy of specific performance beyond the situation where the goods are unique to include “other proper circumstances”. This latter phrase would allow considerable latitude in deciding whether this remedy is appropriate under a given set of facts. This seems to be consistent with the statement made in Bull v Fallow, 109 SC 306, 310, 96 SE 47 (1917) that “it is a matter of discretion lodged in the court, in all actions for specific performance whether or not the court will decree specific performance”. In construing this language which is no where further explained in the Commercial Code, the courts should continue to apply the principle of limiting this remedy to situations where money damages will not make the buyer whole, even though the goods are not in themselves unique. An appropriate test, or at least strong evidence of “other proper circumstances” suggested in the official comments to this section is where the buyer is unable to cover. Modern applications of such situations suggested by the comments are “output and requirement contracts involving a particular or peculiarly available source or market”.

The specific performance decree may include other relief such as money damages under subsection (2). To the same effect where the action was for specific performance of a contract for the sale of land, see White v Felkel, 225 SC 453, 82 SE2d 813 (1954); Taylor v Highland Park Corp., 210 SC 254, 42 SE2d 335 (1947).

The general common law rule was said to have been enacted in Section 66 of the Uniform Sales Act which gives the buyer the remedy of replevin if title has passed to him. See 3 Williston, Sales, Section 595 (rev ed 1948). As another illustration of the Commercial Code’s deemphasis of title passing (see SC Reporter’s Comments to Code Section 2‑401), this requirement is eliminated. Under subsection (3) the buyer’s right to replevin is limited to a situation where the goods have been identified to the contract (Commercial Code Section 2‑501) and cover is not possible. Also if the goods were shipped under reservation, the buyer must tender satisfaction of the security interest.

CROSS REFERENCES

Buyer’s rights on seller’s insolvency with respect to goods not shipped but paid for in whole or in part, see Section 36‑2‑502.

Documents of title, see Section 36‑7‑101 et seq.

Negotiable document of title outstanding, see Section 36‑7‑602.

Recovery of personal property, generally, see Section 15‑69‑10 et seq.

Rights of unsecured creditors as subject to buyer’s rights to recover goods, see Section 36‑2‑402.

LIBRARY REFERENCES

Sales 399.

Specific Performance 67.

Westlaw Key Number Searches: 343k399; 358k67.

C.J.S. Sales Sections 374, 389.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

Forms

Am. Jur. Pl. & Pr. Forms Specific Performance Section 2 , Introductory Comments.

**SECTION 36‑2‑717.** Deduction of damages from the price.

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

HISTORY: 1962 Code Section 10.2‑717; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: See Section 69(1)(a), Uniform Sales Act.

Purposes:

1. This section permits the buyer to deduct from the price damages resulting from any breach by the seller and does not limit the relief to cases of breach of warranty as did the prior uniform statutory provision. To bring this provision into application the breach involved must be of the same contract under which the price in question is claimed to have been earned.

2. The buyer, however, must give notice of his intention to withhold all or part of the price if he wishes to avoid a default within the meaning of the section of insecurity and right to assurances. In conformity with the general policies of this Article, no formality of notice is required and any language which reasonably indicates the buyer’s reason for holding up his payment is sufficient.

Cross References:

Point 2: Section 2‑609.

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103. |
| “Notifies” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑717 permits the buyer to deduct any amount of damages from seller’s breach from the price due under the contract if he notifies the seller of his intention to do so. South Carolina case law has allowed the buyer to discount or set off damages resulting from breach of contract in the seller’s action for the price. Williamson Heater Co. v Paxville School Dist. No. 19, 102 SC 295, 87 SE 69 (1915); Carter & Hardin v Walker, 2 Rich 40 (1845). And where a contract for the sale of fertilizer provided that should the analysis fall below 58% of bone phosphate of lime, a reduction of the purchase price shall be allowed, the court permitted the buyer to make such reduction. Stono Mines v Southern States Phosphate & Fertilizer Co., 76 SC 327, 56 SE 982 (1907). Also see 1‑XL Eastern Furniture Co. v Holly Hill Lumber Company, 251 F2d 228 (4th Cir 1958) recognizing the principle of abatement and deductions from the purchase price as a matter of South Carolina law.

CROSS REFERENCES

Assurance of due performance, see Section 36‑2‑609.

LIBRARY REFERENCES

Sales 188, 348.

Westlaw Key Number Searches: 343k188; 343k348.

C.J.S. Sales Sections 209, 351.

RESEARCH REFERENCES

ALR Library

15 ALR 7th 7 , Applicability of UCC Article 2 to Mixed Contracts for Sale of Business Goods and Services: Manufacturing, Construction, and Similar Contracts.

NOTES OF DECISIONS

Notice 1

1. Notice

While a buyer must give notice of its intention to deduct damages resulting from a breach of contract from the price still due under the contract, such notice need not be formal. Any language that reasonably indicates the buyer’s reason for holding up payment is sufficient. U.S. v. Southern Contracting of Charleston, Inc., 1994, 862 F.Supp. 107.

Notice of a contractor’s intent to deduct damages from the price due to a subcontractor was sufficient where the subcontractor sent a facsimile authorizing the contractor to make repairs to the machine and deduct the cost of the work from the balance owed to the subcontractor, and the contractor withheld payment and sent an invoice listing its damages from the alleged breach of contract. U.S. v. Southern Contracting of Charleston, Inc., 1994, 862 F.Supp. 107.

**SECTION 36‑2‑718.** Liquidation or limitation of damages; deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer’s breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller’s damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty percent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer’s right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this chapter other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer’s breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this chapter on resale by an aggrieved seller (Section 36‑2‑706).

HISTORY: 1962 Code Section 10.2‑718; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Under subsection (1) liquidated damages clauses are allowed where amount involved is reasonable in the light of the circumstances of the case. The subsection sets forth explicitly the elements to be considered in determining the reasonableness of a liquidated damage clause. A term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.

2. Subsection (2) refuses to recognize a forfeiture unless the amount of the payment so forfeited represents a reasonable liquidation of damages as determined under subsection (1). A special exception is made in the case of small amounts (20% of the price or $500, whichever is small) deposited as security. No distinction is made between cases in which the payment is to be applied on the price and those in which it is intended as security for performance. Subsection (2) is applicable to any deposit or down or part payment. In the case of a deposit or turn in of goods resold before the breach, the amount actually received on the resale is to be viewed as the deposit rather than the amount allowed the buyer for the trade in. However, if the seller knows of the breach prior to the resale of the goods turned in, he must make reasonable efforts to realize their true value, and this is assured by requiring him to comply with the conditions laid down in the section on resale by an aggrieved seller.

Cross References:

Point 1: Section 2‑302.

Point 2: Section 2‑706.

Definitional Cross References:

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| “Aggrieved party” | Section 1‑201. |
| “Agreement” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Goods” | Section 2‑105. |
| “Notice” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Remedy” | Section 1‑201. |
| “Seller” | Section 2‑103. |
| “Term” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑718(1) condones the liquidated damage clause in sales contracts so long as the amount is reasonable. The common law rule is generally in accord with the courts refusing to enforce the agreement as penal when the amount fixed is so great as to exceed any reasonable forecast of compensation. See 3 Williston, Sales, Section 599L (rev ed 1948). Thus in William & Co. v Vance & Moseley, 9 SC 344 (1877), a clause in a contract for the sale of cotton calling for liquidated damages of $2.00 per bale for every bale of cotton less than 500 bales which was not consigned and shipped as stipulated, was held to be valid liquidated damages. Also, approving liquidated damage clauses in South Carolina are the cases of Witte v Weinberg, 375 SC 579, 17 SE 681 (1891); Norwood & Co. v Faulkner, 22 SC 367 (1884). On the other hand it was held in Murray & Co. v Ouzts, 117 SC 388, 109 SE 122 (1921) that a clause in the contract calling for reimbursement of all expenses and 20 per cent of the purchase price to be paid in the event of breach was a penalty and unenforceable. These cases can be reconciled on the basis that the provisions for liquidated damages in the Williams case was not at such variance with the actual damages, while in the Murray case it was. The additional standards of this Commercial Code Section in measuring the reasonableness of the liquidated damages by considering the difficulties of proof of loss and obtaining an adequate remedy would seem to be proper standards which the courts would employ in addition to the more frequently stated test of relationship to actual damages.

Where a buyer pays in part of the purchase price for goods and then defaults, the courts have not been in agreement as to whether the buyer can recover such payments. Where the amount paid on the purchase price is in excess of the damages which the seller suffers by the breach, many courts employ an equitable principle to prevent a forfeiture by requiring an accounting for such amount. See 3 Williston, Sales, Section 599m (rev ed 1948). But see Hansbrough v Peck, 72 US (5 Wall) 520 (1867) in which the United States Supreme Court took the position that the breaching party will not be permitted to recover back what he has advanced. This Commercial Code Section takes the position that the buyer should not be made to forfeit an amount of payments which would be so unreasonably large that it amounts to a penalty. Under subsection (2)(a), the buyer may recover back any amount of payments called for as liquidated damages in excess of a reasonable amount as measured by subsection (1). In the absence of such terms, subsection (2)(b) prescribes the outside limits of the amount which may be retained by the seller as twenty percent of the value of the total performance or $500, whichever is smaller. This formula follows the spirit of those cases which prevent a penalty but by a more certain, albeit arbitrary, standard.

Section 2‑718(3) qualifies the above by allowing the seller to offset against the buyer’s claim the actual damages suffered, and the value of any benefits received by the buyer.

Section 2‑718(4) requires compliance with the resale standards of Commercial Code Section 2‑706 by a seller who receives goods in part performance and learns of the buyer’s breach prior to disposing of such goods.

CROSS REFERENCES

Limitation of remedies for breach of warranty, see Section 36‑2‑316.

Unconscionable contract or clause, see Section 36‑2‑302.

LIBRARY REFERENCES

Damages 78(6).

Westlaw Key Number Search: 115k78(6).

C.J.S. Damages Section 113.

RESEARCH REFERENCES

ALR Library

1 ALR 7th 3 , Applicability of UCC Article 2 to Mixed Contracts for Sale of Consumer Goods and Services.

Encyclopedias

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

Treatises and Practice Aids

American Law of Products Liability 3d Section 22:37, State Statutes Adopting U.C.C. S2‑718.

NOTES OF DECISIONS

Construction and application 1

1. Construction and application

There was no error in the refusal to charge Section 36‑2‑718 in an action for breach of contract accompanied by a fraudulent act since the statute is quite lengthy and contains many provisions that were inapplicable to the case. Floyd v. Country Squire Mobile Homes, Inc. (S.C.App. 1985) 287 S.C. 51, 336 S.E.2d 502. Trial 252(12)

**SECTION 36‑2‑719.** Contractual modification or limitation of remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section (Section 36‑2‑718) on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

HISTORY: 1962 Code Section 10.2‑719; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

2. Subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed.

3. Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2‑316.

Cross References:

Point 1: Section 2‑302.

Point 3: Section 2‑316.

Definitional Cross References:

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| --- | --- |
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| “Agreement” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Conforming” | Section 2‑106. |
| “Contract” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Remedy” | Section 1‑201. |
| “Seller” | Section 2‑103. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑719(1)(a) expresses a policy in favor of freedom of contract with respect to contractual modification of limitation of remedies. This principle is generally in accord with several South Carolina cases which have recognized the validity of terms in a contract for the sale of goods limiting the seller’s liability for breach of warranty to replacement or correction of defective parts. Deiter v Frick Co., 169 SC 480, 169 SE 297 (1933); Westinghouse Electric & Mfg. Co. v Glencoe Cotton Mills, 105 SC 133, 90 SE 526 (1916). See also Livingston v Reid‑Hart Parr Co., 117 SC 391, 109 SE 106 (1921); Stono Mines v Southern States Phosphate & Fertilizer Co., 76 SC 327, 56 SE 982 (1907). Note that this policy of freedom of contract is limited by Commercial Code Sections 2‑718 with regard to liquidation of damages, 2‑302 relating to “unconscionability” of contract provisions, and subsections (2) and (3) of this section.

Under subsection (1)(b) resort could be had alternatively to other remedies provided in the Code unless the contract expressly provides that the limited or modified remedy is exclusive.

Subsection (2) permits resort to other remedies when a limitation of remedies clause “fails of its essential purpose” by subsequent developments. Subsection (3) repeats the “unconscionable” rule of Commercial Code Section 2‑302 and renders limitation of damages for injury to person prima facie unconscionable. These restrictions on freedom of contract reflect a public policy decision aimed at avoiding unfair limitations or liability. See Deiter v Frick Co., 169 SC 480, 169 SE 297 (1932) where the contract term limiting seller’s liability to furnishing duplicate parts did not save the seller from consequential damages resulting from failure to supply replacement parts forcing the buyer to shut down plant operations.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

CROSS REFERENCES

Contractual limitations as restricting buyer’s rights on improper delivery, see Section 36‑2‑601.

Unconscionable contract or clause, see Section 36‑2‑302.

LIBRARY REFERENCES

Sales 418(6), 426.

Westlaw Key Number Searches: 343k418(6); 343k426.

C.J.S. Sales Sections 237, 281 to 284, 376, 402.

RESEARCH REFERENCES

Encyclopedias

12 Am. Jur. Proof of Facts 2d 145, Good Faith and Commercial Reasonableness of Buyer’s Cover Following Seller’s Breach of Sales Contract.

37 Am. Jur. Proof of Facts 2d 681, Buyer’s Dissatisfaction With Goods.

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

Treatises and Practice Aids

American Law of Products Liability 3d Section 22:38, State Statutes Adopting U.C.C. S2‑719; Variations.

LAW REVIEW AND JOURNAL COMMENTARIES

Am Law Prod Liab 3d, Waiver, Exclusion, or Modification of Warranties Sections 22:1 to 22:52.

Annual Survey of South Carolina Law: Contract Law. 38 S.C. L. Rev. 54 (Autumn 1986).

Annual Survey of South Carolina Law: Contracts: Specific performance. 27 S.C. L. Rev. 353.

Consequential Damages When Exclusive Repair Remedies Fail: Uniform Commercial Code Section 2‑719. 38 S.C. L. Rev. 673.

NOTES OF DECISIONS

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1. In general

Under South Carolina law, parties to a commercial sales agreement may provide for remedies in addition to those provided by the Uniform Commercial Code (UCC), or limit themselves to specified remedies in lieu of those provided by the UCC. Figgie Intern., Inc. v. Destileria Serralles, Inc. (C.A.4 (S.C.) 1999) 190 F.3d 252. Sales 2301

Under South Carolina law, where proper exclusion of consequential and incidental damages is contractually agreed to, plaintiff’s remedy is limited by terms of that exclusion. Eaton Corp. v. Trane Carolina Plains, 2004, 350 F.Supp.2d 699. Sales 2310

Any public policy exception to economic loss doctrine did not apply under state law to permit tort recovery for cleanup costs and litigation expenses. Fact that state statutes required buyer to clean up spill did not operate to impose liability on seller who manufactured failed part. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Products Liability 156; Products Liability 235

Causes of action for breach of warranty and for revocation of acceptance contained contradictory elements, and thus jury verdict finding in favor of purchaser of lawn mower on revocation of acceptance claim but denying recovery on breach of warranty claim was not inconsistent and did not require new trial. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. New Trial 60; Sales 2436; Sales 2471

When exclusive or limited warranty fails of its essential purpose, party who purchases product covered by such warranty is not limited to action for breach of warranty, but may seek other remedies, including revocation of acceptance. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 1032; Sales 1905

2. Remedies under contract or tort law

South Carolina’s “economic loss rule” provides that where a buyer’s expectations in a sale are frustrated because the product does not work properly, the buyer’s remedies are limited to those prescribed by the law of contract; the rule distinguishes between transactions involving the sale of goods, where contract law protects economic expectations, and transactions involving the sale of defective products to individual consumers, whose injuries are traditionally remedied by the law of torts. Palmetto Linen Service, Inc. v. U.N.X., Inc. (C.A.4 (S.C.) 2000) 205 F.3d 126. Products Liability 156

Installer of a computerized pump system in linen service’s washers to regulate the injection of chemicals supplied by the same company, and manufacturer of components used by installer in the dispensing system, did not breach a legal duty of care separate and apart from their contractual obligations, so as to allow linen service to pursue tort remedies when system injected excessive chemicals and destroyed linens; no special relationship existed between linen service and either defendant, linen service pointed to no professional duty on the part of defendants and did not claim that defendants violated any code provision or contravened any industry standard, and, instead, the relationship was merely one of vendor‑vendee. Palmetto Linen Service, Inc. v. U.N.X., Inc. (C.A.4 (S.C.) 2000) 205 F.3d 126. Products Liability 156; Products Liability 235

As exception to South Carolina’s economic loss rule, if there is a special relationship between the parties that is independent of the contract, there exists a duty of care, the breach of which will support a tort action. Midland Mortg. Corp. v. Wells Fargo Bank, N.A., 2013, 926 F.Supp.2d 780, affirmed 545 Fed.Appx. 194, 2013 WL 5814682. Negligence 463; Torts 118

South Carolina’s economic loss rule bars a negligence action where duties are created solely by contract. Midland Mortg. Corp. v. Wells Fargo Bank, N.A., 2013, 926 F.Supp.2d 780, affirmed 545 Fed.Appx. 194, 2013 WL 5814682. Negligence 463

South Carolina’s economic loss rule distinguishes between transactions involving the sale of goods, where contract law protects economic expectations, and transactions involving the sale of defective products to individual consumers, whose injuries are traditionally remedied by the law of torts. Midland Mortg. Corp. v. Wells Fargo Bank, N.A., 2013, 926 F.Supp.2d 780, affirmed 545 Fed.Appx. 194, 2013 WL 5814682. Products Liability 156

South Carolina’s “economic loss rule” provides that where a buyer’s expectations in a sale are frustrated because the product does not work properly, the buyer’s remedies are limited to those prescribed by the law of contract. Midland Mortg. Corp. v. Wells Fargo Bank, N.A., 2013, 926 F.Supp.2d 780, affirmed 545 Fed.Appx. 194, 2013 WL 5814682. Products Liability 156

Plaintiff has no tort claim as state law has long recognized the principle that no tort claim will lie where the parties’ duties are defined by contract. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125.

Other property exception to economic loss doctrine did not apply so as to permit buyer of component part to secure tort recovery for litigation expenses and cleanup costs incurred when part failed and damaged was caused to government property. Damage to other property was contemplated risk which was allocated to buyer by contract. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Products Liability 156; Products Liability 235

Any public policy exception to economic loss doctrine did not apply under state law to permit tort recovery for cleanup costs and litigation expenses. Fact that state statutes required buyer to clean up spill did not operate to impose liability on seller who manufactured failed part. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Products Liability 156; Products Liability 235

Warranty fails of its essential purpose if seller is unwilling or unable to repair or replace product or if there is unreasonable delay in repair or replacement of product. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Sales 2308

3. Express contract provisions

Where parties to distribution agreement bargain for exclusive repair or replacement warranty which specifically and conspicuously disclaims all implied warranties of fitness and merchantability, the express limited warranty controls and precludes cause of action for incidental and consequential damages. Valtrol, Inc. v. General Connectors Corp. (C.A.4 (S.C.) 1989) 884 F.2d 149, rehearing denied.

In breach‑of‑warranty action by buyer of herbicide for product’s failure to control weed problem, court held (1) that under UCC Section 2‑313(2), oral statement of seller’s salesman that herbicide would control weed problem was simply seller’s opinion and did not create any warranty; (2) that buyer was bound by printed disclaimer on herbicide’s label, which buyer had read, of all warranties except those expressly stated in disclaimer (see UCC Section 2‑316(1) and (2)); (3) that under UCC Section 2‑202, salesman’s oral statement could not vary terms of conditions of sale and warranty on product’s label; (4) that seller’s limitation‑of‑remedies clause, which was printed on product’s label, was authorized by UCC Section 2‑719; (5) that such limitation was intended to be buyer’s exclusive remedy (UCC Section 2‑719(1)(b)); and (6) that such remedy did not fail in its essential purpose within meaning of UCC Section 2‑719(2). Hill v. BASF Wyandotte Corp. (C.A.4 (S.C.) 1982) 696 F.2d 287.

Primary objective of limited remedy is to provide seller an opportunity to tender conforming goods and thereby limit his exposure to risk for other damages, while simultaneously providing buyer with benefit of his bargain, ie. conforming goods. Thus, repair or replacement remedy seeks to perform contract as intended by parties. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2308

4. Modification of contract

Under South Carolina law, communications of seller, to effect that it remained committed to ensuring satisfactory performance of its bottle‑labeling equipment, was committed to success of project, and took full responsibility for resolving problems, while it was attempting to make repairs to equipment in accordance with limited, exclusive remedy of repair, replacement or return under original sales agreement, could not reasonably be interpreted as creating new contract specifying additional remedies in event of failure of seller’s repair efforts or as evidence of seller’s waiver of existing limitation on remedies. Figgie Intern., Inc. v. Destileria Serralles, Inc. (C.A.4 (S.C.) 1999) 190 F.3d 252. Sales 2308

5. Oral representations

In an action brought by a farmer against a manufacturer of an agricultural herbicide alleging breach of warranty and seeking compensation for crop damages, oral representations made by a sales person for the manufacturer did not amount to a warranty binding upon the manufacturer where there appeared on the product’s label an express disclaimer of any express or implied warranties other than those expressed on the label, and any oral statements could not, under Section 36‑2‑202, be allowed to vary the terms of the conditions of sale and warranty on the product label. Furthermore, the court improperly allowed the jury to award consequential damages in the face of the express limitation of remedies on the label since those limitations were not determined to be unconscionable, exclusively intended, or to have failed of their essential purpose. Hill v. BASF Wyandotte Corp. (C.A.4 (S.C.) 1982) 696 F.2d 287.

6. Explicit exclusive remedy

Under South Carolina law, limited remedy for breach of commercial sales agreement may be exclusive under Uniform Commercial Code (UCC) even though imposed by usage of trade. Figgie Intern., Inc. v. Destileria Serralles, Inc. (C.A.4 (S.C.) 1999) 190 F.3d 252. Customs And Usages 10; Sales 2301

UCC requires that the exclusivity of limited remedy be made explicit or failure to do so will result in limited remedy being construed as optional additional remedy and will not preclude availability of other remedies under Code. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2306

Unless limited remedy failed of its essential purpose, limitation of remedy that provided that repair or replacement was “the exclusive remedy available” should product prove defective was sufficiently exclusive to limit buyer to such remedy. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2308

UCC requires that the exclusivity of limited remedy be made explicit or failure to do so will result in limited remedy being construed as optional additional remedy and will not preclude availability of other remedies under Code. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2306

7. Consequential damages

The South Carolina economic loss rule generally does not apply where other property damage is proven, but in the context of a commercial transaction between sophisticated parties, injury to other property is not actionable in tort if the injury was or should have been reasonably contemplated by the parties to the contract, so that where failure of a product to perform as expected will necessarily cause damage to other property, the other property damage is inseparable from the defect in the product itself, and the exception does not apply. Palmetto Linen Service, Inc. v. U.N.X., Inc. (C.A.4 (S.C.) 2000) 205 F.3d 126. Products Liability 156

Under South Carolina law, under contractual provision limiting computer installer’s liability to repair or replacement, operator of hazardous waste incineration facility received only remedy to which it was entitled when installer remedied alleged errors; computer system did not self‑destruct, destroy property, or injure any persons, and exclusion of consequential and incidental damages was not unconscionable. Laidlaw Environmental Services, (TOC), Inc. v. Honeywell, Inc., 1996, 966 F.Supp. 1401, affirmed 113 F.3d 1232. Sales 2303; Sales 2308

Exclusion of consequential damages is separate inquiry from determining whether limited remedy has failed its essential purpose. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2307

Examination of preclusion of consequential damages must be assessed based on the circumstances surrounding formation of the contract. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2307

8. Usage of trade

Under South Carolina law, usage of trade supplemented commercial sales agreement under Uniform Commercial Code (UCC) between bottler and seller of bottle‑labeling equipment with exclusive remedy of repair, replacement, or return. Figgie Intern., Inc. v. Destileria Serralles, Inc. (C.A.4 (S.C.) 1999) 190 F.3d 252. Customs And Usages 16

9. Timeliness of notice of limited remedy

In action by seller on open account against buyer to recover amount due for farming products, including corn seed sold to buyer, seller’s limitation of its liability (see UCC Section 36‑2‑719(1)(a)) for defective seed to seed’s purchase price, which limitation was contained in express‑and‑implied‑warranty disclaimer printed on seed bags delivered to buyer, was ineffective because (1) it was not brought to buyer’s attention at time sale contract was entered into, and (2) parties did not subsequently modify sale contract under UCC Section 36‑2‑209(1) to include disclaimer among its provisions. Gold Kist, Inc. v. Citizens and Southern Nat. Bank of South Carolina (S.C.App. 1985) 286 S.C. 272, 333 S.E.2d 67.

10. Mixed contracts

South Carolina economic loss rule barred any negligence claim by linen service against company which installed system which dispensed excessive chemicals, thereby destroying linens, where linen service contracted for the supply of chemicals and the installation of the chemical dispensing system by the same company, and the predominant thrust of the transaction was to provide the chemicals and equipment, so that any services involved in the transaction, such as the design and maintenance of the equipment, were merely incidental to the sale of goods. Palmetto Linen Service, Inc. v. U.N.X., Inc. (C.A.4 (S.C.) 2000) 205 F.3d 126. Products Liability 156; Products Liability 217; Products Liability 235

11. Failure of limited remedy

Under South Carolina law, limited, exclusive remedy of repair, replacement or return did not fail of its essential purpose, so as to entitle bottler to avail itself of other remedies under Uniform Commercial Code (UCC), when seller of bottle‑labeling equipment elected to attempt to repair equipment when bottler encountered immediate problems and resorted to return and refund after six‑month effort proved unsuccessful; seller did not eliminate remedy of refund simply by electing to attempt to repair equipment, and failure to repair machines thus did not result in exclusive remedy failing of its purpose. Figgie Intern., Inc. v. Destileria Serralles, Inc. (C.A.4 (S.C.) 1999) 190 F.3d 252. Sales 2308

Under South Carolina law, a limited remedy of repair or replacement can fail of its essential purpose for purposes of Uniform Commercial Code (UCC) where the seller’s repair or replacement is unsuccessful. Figgie Intern., Inc. v. Destileria Serralles, Inc. (C.A.4 (S.C.) 1999) 190 F.3d 252. Sales 2308

Although tractor warranty limited seller’s obligation to repair and replacement of parts and excluded seller liability for consequential damages, seller is nevertheless liable for lost profits which resulted from tractor’s serious hydraulic failures, where, notwithstanding that parties to contract contemplated certain repair of tractor, seller failed to repair it and refused to replace it. Waters v. Massey‑Ferguson, Inc. (C.A.4 (S.C.) 1985) 775 F.2d 587.

Court must determine whether limited remedy as provided for by parties fails of its purpose, not whether limited remedy constitutes appropriate relief or, with hindsight, objectively served purpose of contract law. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2306

Limited remedy of repair or replacement fails of its essential purpose if seller will not or cannot repair or replace defective product with conforming product or if there is unreasonable delay in repair or replacement. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2308

Factors considered to determine whether limited warranty failed of its essential purpose: (1) facts and circumstances surrounding contract, (2) nature of the basic obligations of party, (3) nature of goods involved, (4) uniqueness or experimental nature of the item, (5) general availability of the items, and (6) the good faith and reasonableness of the provision. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2308

Limited exclusive remedy of repair or replacement contained in contract did not fail of its essential purpose so as to permit buyer to recover consequential damages where sale involved commercial transaction between sophisticated corporate entities who entered into contract on equal footing, product was not a common one and was specifically manufactured to specifications of buyer’s engineer and seller made itself ready to repair or replace failed part. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2308

12. Unconscionability

Under South Carolina law, limitation of remedies provision in sales contract for air conditioning units was not unconscionable, and thus buyer could not recover incidental or consequential damages resulting from seller’s allegedly negligent servicing of units, where buyer’s injuries were entirely commercial in nature and did not involve personal injury, buyer was substantial business concern that negotiated at arm’s length with seller, and seller made clear that it agreed to furnish services in accordance with limitation of remedies provision. Eaton Corp. v. Trane Carolina Plains, 2004, 350 F.Supp.2d 699. Sales 2303

Under South Carolina law, factors that guide court in determining unconscionability of excluding incidental and consequential damages include nature of injuries suffered by complaining party, whether complaining party is a substantial business concern, disparity in party’s bargaining power, parties’s relative sophistication, whether there is an element of surprise in exclusion, and conspicuousness of clause. Laidlaw Environmental Services, (TOC), Inc. v. Honeywell, Inc., 1996, 966 F.Supp. 1401, affirmed 113 F.3d 1232. Sales 2303

Under South Carolina law, contractual provision excluding incidental and consequential damages in contract between computer system installer and operator of hazardous waste incineration facility was not unconscionable; operator’s injuries were commercial in nature, operator was a substantial business concern that negotiated at arm’s length with installer, both parties were represented by counsel, installer had sought to disclaim warranties and limit remedies since inception of negotiations, and exclusion was conspicuous, being printed in large, capital letters. Laidlaw Environmental Services, (TOC), Inc. v. Honeywell, Inc., 1996, 966 F.Supp. 1401, affirmed 113 F.3d 1232. Sales 2303; Sales 2307

Factors to be used in assessing unconscionability include the nature of the injuries suffered by plaintiff, whether plaintiff is a substantial business concern, disparity in parties’ bargaining power, parties’ relative sophistication, whether there is an element of surprise in the exclusion, and the conspicuousness of the clause. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2307

Exclusion of consequential damages by reason of exclusive, limited repair and replacement remedy contained in contract to buy component part was not unconscionable so as to permit buyer to recover cleanup and litigation costs incurred when part failed, causing fuel to spill from fuel metering system. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 1993, 843 F.Supp. 1027, affirmed 46 F.3d 1125. Sales 2307

A contract for the sale of goods in express language, precluding purchaser from recovering any incidental or consequential damages, providing that the defendant should not be held liable in any event for any more than the exchange of equipment under the express warranty, and including in the agreement the clause that the purchaser there under expressly waived incidental or consequential damages was authorized by state statute and was not unconscionable. Investors Premium Corp. v. Burroughs Corp. (D.C.S.C. 1974) 389 F.Supp. 39.

13. Fraud

Where subcontractor fraudulently induced contractor to purchase particular equipment for sewage heat treatment system, which system subcontractor knew would not operate properly, subcontractor is liable to municipality which contracted for sewage treatment plant, and proper measure of damages is replacement cost. Aiken County v. BSP Div. of Envirotech Corp., 1986, 657 F.Supp. 1339, affirmed in part, reversed in part 866 F.2d 661, rehearing denied.

Buyer can show that contract of sale was induced by seller’s fraud, notwithstanding fact sale was made as is, even though written contract contains covenants waiving warranties or disclaiming or limiting liabilities. George Robberecht Seafood, Inc. v. Maitland Bros. Co., Inc., 1979, 220 Va. 109, 255 S.E.2d 682. Evidence 434(11)

13.5. Summary judgment

Genuine issues of material fact existed as to whether roofing shingle manufacturer’s limited warranty failed its essential purpose and whether limitation of damages was unconscionable, precluding summary judgment in manufacturer’s favor on homeowners’ claim for breach of limited warranties under South Carolina law. Brooks v. GAF Materials Corp., 2014, 41 F.Supp.3d 474. Federal Civil Procedure 2510

14. Review

Manufacturer of lawn mower and seller of mower did not preserve for appellate review by Court of Appeals their claim that magistrate at small claims trial improperly denied their motion for directed verdict in action by purchaser of mower that alleged breach of warranty and revocation of acceptance, where circuit court, in its review of small claims trial, did not rule on that issue. Herring v. Home Depot, Inc. (S.C.App. 2002) 350 S.C. 373, 565 S.E.2d 773, rehearing denied. Courts 176.5

**SECTION 36‑2‑720.** Effect of “cancellation” or “rescission” on claims for antecedent breach.

Unless the contrary intention clearly appears, expressions of “cancellation” or “rescission” of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

HISTORY: 1962 Code Section 10.2‑720; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purpose:

This section is designed to safeguard a person holding a right of action from any unintentional loss of rights by the ill‑advised use of such terms as “cancellation”, “rescission”, or the like. Once a party’s rights have accrued they are not to be lightly impaired by concessions made in business decency and without intention to forego them. Therefore, unless the cancellation of a contract expressly declares that it is “without reservation of rights”, or the like, it cannot be considered to be a renunciation under this section.

Cross References:

Section 1‑107.

Definitional Cross References:

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| “Cancellation” | Section 2‑106. |
| “Contract” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

When a party to a sale contract notifies the breaching party of “cancellation”, “rescission” or the like, this may result in an inadvertent forfeiture of remedies for such breach. Having expressed an “election” to terminate the contract, the aggrieved party may be considered to have renounced other remedies under the election of remedies doctrine followed by the common law decisions of South Carolina. (See South Carolina Reporter’s Comments to Code Sections 2‑608 and 2‑711 for a more complete discussion and citation of authorities on this point).

Section 2‑720 would change this result by preserving the usual remedies for breach, despite expressions of cancellation of the contract, unless it is clearly the intention to forego them.

CROSS REFERENCES

Waiver or renunciation of claim or right arising out of breach, see Section 36‑1‑306.

LIBRARY REFERENCES

Sales 94, 111, 131, 370, 405.

Westlaw Key Number Searches: 343k94; 343k111; 343k131; 343k370; 343k405.

C.J.S. Sales Sections 114, 147 to 149, 205, 363 to 364, 395.

**SECTION 36‑2‑721.** Remedies for fraud.

Remedies for material misrepresentation or fraud include all remedies available under this chapter for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

HISTORY: 1962 Code Section 10.2‑721; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

To correct the situation by which remedies for fraud have been more circumscribed than the more modern and mercantile remedies for breach of warranty. Thus the remedies for fraud are extended by this section to coincide in scope with those for non‑fraudulent breach. This section thus makes it clear that neither rescission of the contract for fraud nor rejection of the goods bars other remedies unless the circumstances of the case make the remedies incompatible.

Definitional Cross References:

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| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 1‑201. |
| “Remedy” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑721 is another application of rejection of the election of remedies doctrine. Under this section, when the aggrieved party rescinds for fraud, the other consistent remedies are not thereby lost (See South Carolina Reporter’s Comments to Code Sections 2‑608 and 2‑711). This section also makes it clear that remedies for fraud or misrepresentation shall be at least as liberal as those for non‑fraudulent breach. See Aaron v Hampton Motors, Inc., 240 SC 26, 124 SE2d 585; Culbreath v Investor’s Syndicate, 203 SC 213, 26 SE2d 809 (1943).

CROSS REFERENCES

Civil remedies and procedures generally, see Title 15.

LIBRARY REFERENCES

Fraud 31, 32.

Sales 37.

Westlaw Key Number Searches: 184k32; 184k31; 343k37.

C.J.S. Franchises Sections 86 to 89.

C.J.S. Sales Sections 50, 52.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Fraud Section 17, Damages in Relation to a Contract.

NOTES OF DECISIONS

Rescission 1

1. Rescission

Under South Carolina law, if a plaintiff who was induced to enter into contract by fraud elects to sue in contract, he may seek his expectancy damages under the contract or rescission and restitution of the contract price. Enhance‑It, L.L.C. v. American Access Technologies, Inc., 2006, 413 F.Supp.2d 626. Fraud 32

In tort action by buyer for seller’s fraud in sale of used truck, which had previously been wrecked and allegedly had not been rebuilt with properly overhauled engine, court held (1) that Uniform Commercial Code rule that buyer can rescind contract of sale and retain goods already in his possession as security for seller’s restitution of purchase price and incidental expenses (see UCC Section 2‑711(1) and (3)) applies, under UCC Section 2‑721, to both fraudulent and nonfraudulent breach; and (2) that such rule was inapplicable to present case because buyer, instead of electing to rescind contract in suit, had affirmed transaction and was seeking damages for seller’s fraud. Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc. (S.C.App. 1983) 279 S.C. 468, 309 S.E.2d 763.

**SECTION 36‑2‑722.** Who can sue third parties for injury to goods.

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

(a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract; but such plaintiff shall promptly notify the other party of the institution of such action, and the other party shall have the right to intervene in such action; provided, however, that neither party shall have the right to settle the claim or right of action without the consent in writing of the other party;

(c) either party may with the consent of the other sue for the benefit of whom it may concern.

HISTORY: 1962 Code Section 10.2‑722; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

To adopt and extend somewhat the principle of the statutes which provide for suit by the real party in interest. The provisions of this section apply only after identification of the goods. Prior to that time only the seller has a right of action. During the period between identification and final acceptance (except in the case of revocation of acceptance) it is possible for both parties to have the right of action. Even after final acceptance both parties may have the right of action if the seller retains possession or otherwise retains an interest.

Definitional Cross References:

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|  |  |
| “Action” | Section 1‑201. |
| “Buyer” | Section 2‑103. |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Rights” | Section 1‑201. |
| “Security interest” | Section 1‑201. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑722 would establish more definite and liberal rules as to the “real party in interest” (See SC Code Section 10‑207) in a suit against a third party for wrongful injury to goods which form the subject matter of a contract for sale. After goods have been identified to the contract (Commercial Code Section 2‑501), and prior to final acceptance without the right to revoke, both parties would be able to sue in most situations since this section prescribes so many different bases for standing to sue. These include title (2‑401), security interest (2‑204), special property (2‑501), Risk of loss (2‑509, 2‑510). In addition, subsection (c) allows the parties to agree that one may maintain an action for the benefit of the other.

When the party who recovers for the injury to the goods does not bear the risk of loss, under subsection (b) he holds the proceeds as a fiduciary for the other party.

LIBRARY REFERENCES

Sales 224, 232.

Westlaw Key Number Searches: 343k224; 343k232.

C.J.S. Sales Section 222.

**SECTION 36‑2‑723.** Proof of market price; time and place.

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 36‑2‑708 or 36‑2‑713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this chapter is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this chapter offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

HISTORY: 1962 Code Section 10.2‑723; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

To eliminate the most obvious difficulties arising in connection with the determination of market price, when that is stipulated as a measure of damages by some provision of this Article. Where the appropriate market price is not readily available the court is here granted reasonable leeway in receiving evidence of prices current in other comparable markets or at other times comparable to the one in question. In accordance with the general principle of this Article against surprise, however, a party intending to offer evidence of such a substitute price must give suitable notice to the other party.

This section is not intended to exclude the use of any other reasonable method of determining market price or of measuring damages if the circumstances of the case make this necessary.

Definitional Cross References:

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| “Action” | Section 1‑201. |
| “Aggrieved party” | Section 1‑201. |
| “Goods” | Section 2‑105. |
| “Notifies” | Section 1‑201. |
| “Party” | Section 1‑201. |
| “Reasonable time” | Section 1‑204. |
| “Usage of trade” | Section 1‑205. |

SOUTH CAROLINA REPORTER’S COMMENTS

An aggrieved buyer may cover (Commercial Code Section 2‑712) and the aggrieved seller may resell (Commercial Code Section 2‑706) at the time they learn of the breach. Alternatively, they may recover damages as the difference between the contract price and the market value at the time they learn of the breach. (See Commercial Code Section 2‑713 and South Carolina Reporter’s Comments where it is pointed out that this modifies South Carolina case law which measures the market value as of the time for performance). Consistent with this approach, Commercial Code Section 2‑723(1) prescribes the “time when the aggrieved party learned of the repudiation” as the time for measuring market value in an action based on anticipatory repudiation.

Section 2‑723(2) authorizes the court to use market price in a substitute market where the appropriate market price is not available. This seems to be consistent with Union Bleaching & Finishing Co. v Barker Fuel Co., 124 SC 458, 117 SE 735 (1923) where in buyer’s action for seller’s failure to deliver coal, market price at most available markets was a proper basis for damages where there was no market price available at time and place where contract called for delivery. Also in accord, Clinton Oil & Mfg. Co. v Carpenter, 113 SC 10, 101 SE 47 (1919) where market price was measured at nearest market place to point of delivery plus cost of shipment to delivery point.

Section 2‑723(3) establishes a procedural requirement of notice to avoid surprise when evidence of a substitute market is going to be offered.

LIBRARY REFERENCES

Sales 384(2), 418(2).

Westlaw Key Number Searches: 343k384(2); 343k418(2).

C.J.S. Sales Sections 363, 365 to 366, 397 to 398.

**SECTION 36‑2‑724.** Admissibility of market quotations.

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

HISTORY: 1962 Code Section 10.2‑724; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

To make market quotations admissible in evidence while providing for a challenge of the material by showing the circumstances of its preparation.

No explicit provision as the weight to be given to market quotations is contained in this section, but such quotations, in the absence of compelling challenge, offer an adequate basis for a verdict.

Market quotations are made admissible when the price or value of goods traded “in any established market” is in issue. The reason of the section does not require that the market be closely organized in the manner of a produce exchange. It is sufficient if transactions in the commodity are frequent and open enough to make a market established by usage in which one price can be expected to affect another and in which an informed report of the range and trend of prices can be assumed to be reasonably accurate.

This section does not in any way intend to limit or negate the application of similar rules of admissibility to other material, whether by action of the courts or by statute. The purpose of the present section is to assure a minimum of mercantile administration in this important situation and not to limit any liberalizing trend in modern law.

Definitional Cross References:

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| “Goods” | Section 2‑105. |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2‑724 resolves a conflict in the law of evidence in favor of the admissibility of reports of market prices even though they may not have been made in the regular course of business. (See 6 Wigmore, Evidence, Section 1704 (3rd ed 1940). In Kirkpatrick v Hardeman, 123 SC 21, 115 SE 905 (1923), an action for failure to deliver mill stocks, it was held to be no error in admitting newspaper copies of the price of the stock at various times.

LIBRARY REFERENCES

Evidence 361.

Westlaw Key Number Search: 157k361.

C.J.S. Evidence Sections 1003 to 1004, 1009.

**SECTION 36‑2‑725.** Statute of limitations in contracts for sale.

(1) An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued.

(2) A cause of action accrues for breach of warranty when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.

HISTORY: 1962 Code Section 10.2‑725; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

To introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This Article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping periods.

Subsection (1) permits the parties to reduce the period of limitation. The minimum period is set at one year. The parties may not, however, extend the statutory period.

Subsection (2), providing that the cause of action accrues when the breach occurs, states an exception where the warranty extends to future performance.

Subsection (3) states the saving provision included in many state statutes and permits an additional short period for bringing new actions, where suits begun within the four year period have been terminated so as to leave a remedy still available for the same breach.

Subsection (4) makes it clear that this article does not purport to alter or modify in any respect the law on tolling of the Statute of Limitations as it now prevails in the various jurisdictions.

Definitional Cross References:

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| “Action” | Section 1‑201. |
| “Aggrieved party” | Section 1‑201. |
| “Agreement” | Section 1‑201. |
| “Contract for sale” | Section 2‑106. |
| “Goods” | Section 2‑105. |
| “Party” | Section 1‑201. |
| “Remedy” | Section 1‑201. |
| “Term” | Section 1‑201. |
| “Termination” | Section 2‑106. |

SOUTH CAROLINA REPORTER’S COMMENTS

The existing South Carolina statute of limitations requires an action upon a contract not under seal and not secured by a real property mortgage to be commenced within six years after the accrual of the cause of action. SC Code Section 10‑143. This period is reduced to four years by Commercial Code Section 2‑725(1), apparently on the ground that this period is more appropriate to present business practice and is within the normal commercial record‑keeping period. The subsection also contains the novel provision that the parties may by “the original agreement” reduce the four‑year period to not less than one year, but cannot extend the period beyond four years. This rule would modify SC Code Section 10‑166 as it applies to contract for the sale of goods which presently provides that an agreement in “any contract” which seeks to reduce the period prescribed by the statute of limitations, is totally ineffective for that purpose.

There has been some confusion in the decisions in the other jurisdictions as to when the statute of limitations begins to run for breach of contract or warranty. There is some authority for the conclusion that the statute of limitations does not begin to run in warranty cases until the buyer has discovered the breach or ought to have discovered it. E.g., Puretex Lemon Juice, Inc. v S. Riekes & Sons, 351 SW2d 119 (Tex Civ App 1961). This minority view based on the analogy of an action for fraud is criticized by the leading authorities on the ground that it fails to recognize the underlying policy of the statute of limitations as a statute of repose. See Vold, Sales, Section 95 (2nd ed 1959); Williston, Sales, Section 212a (rev ed 1948). For a collection of the cases see annotation in 75 ALR 1086 (1931). The early South Carolina case of Motley v Montgomery, 2 Bailey 544 (1831), an action for breach of warranty of soundness of a slave, indicates that the statute of limitations began to run from the date that the vendor warranted that he had not sold the slave knowing that it was unsound, and not from the date of the vendee’s discovery of the vendor’s knowledge of the unsoundness. See also Livingston v Sims, 197 SC 458, 15 SE2d 770 (1941) where the court recognized that the statute of limitations begins to run at the time of the breach, and its operation is not delayed until substantial or consequential damage accrued. Whatever doubt exists today on this point is clarified by the rule of subsection (2) that the cause of action accrues when the breach occurs, which is at time of tender of delivery with regard to a breach of a present warranty. When the warranty is prospective, however, and discovery of the breach depends on “the time of such performance”, the cause of action accrues when the breach is or should have been discovered.

Where there are alternative remedies and one is unsuccessfully pursued, subsection (3) permits an action for the remedy if commenced within six months after termination of the first action.

Subsection (4) expressly preserves the South Carolina law relating to tolling of the statute of limitations. E.g., SC Code Sections 10‑102 (absence from the state), 10‑104 (Persons under disability of infancy, insanity and imprisonment).

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

CROSS REFERENCES

Limitations of civil actions generally, see Sections 15‑3‑20 et seq.

Twenty year statute of limitations, see Section 15‑3‑520.

LIBRARY REFERENCES

Limitation of Actions 24(4), 46(9).

Sales 350, 374, 394, 409, 431.

Westlaw Key Number Searches: 241k24(4); 241k46(9); 343k350; 343k374; 343k394; 343k409; 343k431.

C.J.S. Limitations of Actions Sections 61, 140.

C.J.S. Sales Sections 290, 327, 377.

RESEARCH REFERENCES

ALR Library

49 ALR 5th 1 , Causes of Action Governed by Limitations Period in UCC Section 2‑725.

Encyclopedias

S.C. Jur. Limitation of Actions Section 42, Contracts of Sale and Bulk Transfers.

Treatises and Practice Aids

American Law of Products Liability 3d Section 47:12, When Does Breach of Warranty Cause of Action Accrue.

American Law of Products Liability 3d Section 47:36, Breach of Warranty.

American Law of Products Liability 3d PS STATESTATS, State Statutes.

LAW REVIEW AND JOURNAL COMMENTARIES

Contracts: Implied Warranties in Home Construction: Subsequent Purchasers. 33 S.C. L. Rev. 33 (August 1981).

Sections 2‑725 and 2‑318, of the Uniform Commercial Code—Their Implications in South Carolina. 23 S.C. L. Rev. 308.

NOTES OF DECISIONS

Law governing 1

1. Law governing

Debtor’s action seeking relief for secured creditor’s alleged failure to comply with Uniform Commercial Code’s (UCC) notice requirements in connection with sale of repossessed truck was subject to one or three‑year limitations period applicable to actions upon statutes for a penalty, not the six‑year limitations period applicable to actions for breach of contract for a sale of goods; debtor never alleged a breach of contract, and the relief requested by debtor, a finance charge and 10% of the principal amount of the obligation, was a mandatory, pre‑determined amount of “damages” that a debtor could obtain if a secured party failed to comply with the UCC’s notice requirements and thus constituted a statutory penalty. Delaney v. First Financial of Charleston, Inc. (S.C.App. 2016) 418 S.C. 209, 791 S.E.2d 546, rehearing denied. Penalties 1

Repeal by implication is disfavored, and is found only when 2 statutes are incapable of any reasonable reconcilement; Sections 36‑2‑725 and 15‑3‑530(1) are not in conflict, and thus actions arising under Article 2 of the UCC are governed by Section 36‑2‑725’s statute of limitations as opposed to the later‑enacted Section 15‑3‑530(1). Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp. (S.C. 1995) 319 S.C. 556, 462 S.E.2d 858.

Part 8

Further Remedies

**SECTION 36‑2‑801.** Definitions.

As used in this chapter “person” includes an individual, his executor, administrator or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of this State and whether or not organized under the laws of this State.

HISTORY: 1962 Code Section 10.2‑801; 1966 (54) 2716.

Editor’s Note

Part 8 of this chapter was re‑enacted without change by 1972 Act No. 1343 (1972 (57) 2518), the preamble to which act reads as follows:

“Whereas, Part 8 of Article 2 of Act 1065 of 1966 was added to the act by amendment from the floor during its debate and passage in the General Assembly and the amendment was not reflected in the title of the act and has been held in the circuit courts of the State to be invalid because the amendment did not meet the requirements of Section 17 of Article III of the Constitution of this State which states ‘Every act or resolution having the force of law shall relate to but one subject and that shall be expressed in the title’, and.

“Whereas, in order to make the provisions of Part 8 of Article 2 valid, the members of the General Assembly believe that Part 8 of Article 2 as reenacted herein shall cure any constitutional invalidity and that after passage of this act no constitutional question shall attach to the provisions thereof.”

RESEARCH REFERENCES

Forms

South Carolina Litigation Forms and Analysis Section 2:26 , Long Arm Jurisdiction.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: practice and procedure: personal jurisdiction. 28 S.C. L. Rev. 369.

Annual Survey of South Carolina Law: practice and procedure: South Carolina long arm statute. 27 S.C. L. Rev. 518.

NOTES OF DECISIONS

In general 1

Long‑arm jurisdiction 3

Reenactment 2

1. In general

Code 1962 Sections 10.2‑801 through 10.2‑809 do not appear in the Official Uniform Commercial Code. These sections, which allow the South Carolina court to exercise personal jurisdiction of nonresident defendants in connection with certain tort claims, and also provide for the service on these defendants by “any form of mail address to the person to be served and requiring a signed receipt,” were added by the South Carolina legislature and no notice thereof is given in the title of the Act. Tention v. Southern Pac. R. Co. (D.C.S.C. 1972) 336 F.Supp. 25.

2. Reenactment

This part, as reenacted, falls within the definition of a curative statute, legislation whose purpose is to cure past errors, omissions, and neglects, and thus to make valid what, before its enactment, was invalid. Such an act by nature is retrospective, for it intends to give legal effect to some past act or transaction which was ineffective because of neglect to comply with some requirement of law. Segars v. Gomez (D.C.S.C. 1972) 360 F.Supp. 50.

3. Long‑arm jurisdiction

Where all parties knew, by the terms of a contract for design and manufacture of steel joists within the state, that significant portions were to be performed in the state, they were subject to the jurisdiction of the courts by virtue of the long‑arm statutes. Nucor Corp. v. Faneuil Const. Inc. (S.C. 1975) 264 S.C. 458, 215 S.E.2d 634.

**SECTION 36‑2‑802.** Personal jurisdiction based upon enduring relationship.

A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action.

HISTORY: 1962 Code Section 10.2‑802; 1966 (54) 2716.

CROSS REFERENCES

Exercise of personal jurisdiction over nonresident principals who contract with sales representatives, see Section 39‑65‑50.

LAW REVIEW AND JOURNAL COMMENTARIES

Jurisdiction Over a Foreign Corporation. 19 S.C. L. Rev. 806.

South Carolina’s Uniform Commercial Code—The Demise of its Long Arm Provisions. 24 S.C. L. Rev. 474.

Stravitz, Personal jurisdiction in cyberspace: Something more is required on the electronic stream of commerce, 49 S.C. L. Rev. 925, Summer 1998.

United States Supreme Court Annotations

State regulation of judicial proceedings as violating commerce clause (Art I, Section 8, cl 3) of Federal Constitution—Supreme Court cases. 100 L Ed 2d 1049.

NOTES OF DECISIONS

In general 1

Construction and application 2

Due process 3

Enduring relationship 9

Individuals 5

Location of contract negotiation or sale 8

Out‑of‑state corporations 6

Practice and procedure 4

Trusts and trustees 7

1. In general

The criteria which mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742.

The test for jurisdiction is whether or not the subjection to suit would offend traditional notions of fair play and substantial justice. Other considerations include a sensible application of the doctrine forum non conveniens and the corporation’s “nexus” with the State. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742.

“General jurisdiction” is the state’s right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant’s contacts with the forum. Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E.2d 476. Courts 13.3(7)

2. Construction and application

Jurisdiction under the long arm statute has been extended to the outermost limits possible under the due process clause. Foremost Pipeline Const. Co., Inc. v. Ford Motor Co., Inc. (D.C.S.C. 1976) 420 F.Supp. 647. Courts 13.2

This section [Code 1962 Section 10.2‑802] and Code 1962 Section 10.2‑803 were intended to afford and do afford the courts of South Carolina the full reach of jurisdiction permitted by the due process clause of the United States Constitution. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742. Courts 13.2

The United States District Court in the district of South Carolina, in deciding if it has personal jurisdiction over a foreign corporation, must first consider whether jurisdiction exists under the law of South Carolina, and if that question is answered in the affirmative, whether the exercise of jurisdiction would violate due process. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742. Federal Courts 2732

3. Due process

Under the due process clause a court may assume jurisdiction over the person of a foreign corporation if that foreign corporation has certain “minimum contacts” with the forum state, such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742.

Whether due process is satisfied must depend upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742.

To establish general jurisdiction, a nonresident defendant’s contacts with the forum must satisfy the due process clause. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Constitutional Law 3964

Due process as applied to personal jurisdiction requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state. Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E.2d 476. Constitutional Law 3964

4. Practice and procedure

Where sole shareholder did not except to finding that court had personal jurisdiction under statute over person doing business in State, finding became law of the case. Fields v. INA Filtration Corp. (S.C.App. 1987) 292 S.C. 614, 358 S.E.2d 160.

5. Individuals

Where a corporate vice‑president’s contacts with the state were limited to part‑ownership of a South Carolina warehouse rented to the corporation and infrequent visits to the state, they were not substantial and continuous enough to allow the exercise of general jurisdiction. Sheppard v. Jacksonville Marine Supply, Inc., 1995, 877 F.Supp. 260.

Defendants have insufficient contacts with South Carolina to support jurisdiction over them for cause of action arising outside of state and unrelated to their contacts of state, where defendant husband’s only contact with state is limited interest in South Carolina partnership, and defendant wife’s contact is mortgaged piece of real estate within state. Nelepovitz v. Boatwright (D.C.S.C. 1977) 442 F.Supp. 1336. Federal Courts 2724(2)

6. Out‑of‑state corporations

Federal prisoner failed to allege facts satisfying the threshold for minimum contacts with South Carolina for exercise of general or specific jurisdiction over Bureau of Prisons (BOP) official with respect to Bivens claim; fact that official, a resident of Washington, D.C., made a decision in his official capacity concerning an inmate located in South Carolina, without more, did not show that official purposely availed himself of the privileges of South Carolina, or that exercise of specific jurisdiction would be constitutionally reasonable, and prisoner did not allege facts showing that official had continuous or systematic contacts with South Carolina or conducted any activities in or established any contacts with South Carolina so as to support exercise of general jurisdiction. Starling v. U.S., 2009, 664 F.Supp.2d 558. Constitutional Law 3965(11); Federal Courts 2756(8)

The exercise personal jurisdiction over an out‑of‑state corporation was appropriate despite the lack of a rational nexus between the corporation’s in‑state activities and the transaction in question, where the corporation had maintained a warehouse in South Carolina for several years and continued to operate it at the time of suit, where the warehouse was used as its base for its sales forces and as one of three major shipping facilities, and where a significant amount of the corporation’s inventory was located at and distributed from the warehouse. Sheppard v. Jacksonville Marine Supply, Inc., 1995, 877 F.Supp. 260.

Non‑resident physician and fertility clinic did not do business in state and were not subject to general personal jurisdiction in suit brought by patients whose baby conceived through in vitro fertilization (IVF) and implanted as an embryo was born with Down Syndrome, alleging failure to inform patients of availability of pre‑implantation genetic testing, even though clinic performed services for several South Carolina patients and received referrals from South Carolina health‑care providers; physician was not licensed to practice in South Carolina, he and his clinic lacked substantial, continuous, and systematic contacts with South Carolina, clinic did not target South Carolina patients, and its passive website providing information did not direct business activities to a particular forum. Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E.2d 476. Courts 13.5(11)

In addition to having personal jurisdiction over railroad, which was a foreign corporation, under long‑arm statute, trial court also had jurisdiction over railroad under statute allowing jurisdiction over person doing business in state, and thus trial court had discretionary authority to change venue based on convenience of witnesses and ends of justice in locomotive engineer’s action, which was brought under Federal Employer’s Liability Act (FELA) and federal Locomotive Inspection Act (LIA) and which arose from injuries that engineer allegedly suffered as result of exposure to excessive heat in locomotive cab; evidence indicated that railroad conducted business in state, owned property in state, and had agent for service of process in state. Whaley v. CSX Transp., Inc. (S.C. 2005) 362 S.C. 456, 609 S.E.2d 286, rehearing denied. Courts 13.5(1); Venue 52(1)

Foreign food‑processing corporation was subject to in personam jurisdiction where business consisted of shipment of over 25,000 cases of food stuffs to wholesale and retail distributors in South Carolina, and a substantial portion of this business was negotiated by a broker in this state. Troy H. Cribb & Sons, Inc. v. Cliffstar Corp. (S.C. 1979) 273 S.C. 623, 258 S.E.2d 108.

7. Trusts and trustees

In action charging trust mismanagement, allegations that trust received rents and profits from real estate in South Carolina on which it held mortgage from corporation of which trustees were officers, directors, and controlling shareholders, that trust made several loans to South Carolina residents which might be involved in charges of mismanagement at trial, and that one trustee made a number of trips to South Carolina involving combination of trust and corporate business, were insufficient to satisfy “doing business” test of Code 1976 Section 36‑2‑802. Long v. Baldt (D.C.S.C. 1979) 464 F.Supp. 269.

8. Location of contract negotiation or sale

Where a Georgia dealer allegedly sold defective tractors to South Carolina plaintiff, but the dealer had no place of business, agents or personnel in South Carolina, and where most of the contacts were initiated by plaintiff, and the only contacts initiated by the dealer were a few telephone calls and mailing a financing statement to the plaintiff for signing, the cause of action arose out of the plaintiff’s purchase of equipment in Georgia, and the dealer had insufficient contact with South Carolina to submit to South Carolina’s long arm jurisdiction. Foremost Pipeline Const. Co., Inc. v. Ford Motor Co., Inc. (D.C.S.C. 1976) 420 F.Supp. 647.

Negotiations taking place within a given state and looking toward the formation of a contract constitute a significant contact with that state and are a significant factor to be considered in determining whether the nonresident individual or corporation is subject to the jurisdiction of the courts of that state. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742.

9. Enduring relationship

To satisfy the enduring relationship requirement of general jurisdiction, the nonresident defendant’s contacts must be continuous and systematic as well as so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely different from those activities. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Courts 13.3(7)

If an individual has an enduring relationship with the forum state, he may be sued there pursuant to a court’s general jurisdiction even if the cause of action did not arise in the forum state. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Courts 13.3(7)

A court may assert general jurisdiction if the nonresident defendant has an enduring relationship with the forum state. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Courts 13.3(7)

General jurisdiction is based upon an enduring relationship with the state; an enduring relationship is indicated by contacts that are substantial, continuous, and systematic. Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E.2d 476. Courts 13.3(7)

**SECTION 36‑2‑803.** Personal jurisdiction based upon conduct.

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person’s:

(1) transacting any business in this State;

(2) contracting to supply services or things in the State;

(3) commission of a tortious act in whole or in part in this State;

(4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;

(5) having an interest in, using, or possessing real property in this State;

(6) contracting to insure any person, property, or risk located within this State at the time of contracting;

(7) entry into a contract to be performed in whole or in part by either party in this State; or

(8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

(B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

HISTORY: 1962 Code Section 10.2‑803; 1966 (54) 2716; 2005 Act No. 27, Section 8, eff July 1, 2005, applicable to causes of action arising after that date.

Effect of Amendment

The 2005 amendment redesignated subsection (1) as subsection (A), subsections (1)(a) to (1)(h) as subsections (B)(1) to (B)(8), and subsection (2) as subsection (B); and in subsection (B), deleted at the end “, and such action, if brought in this State, shall not be subject to the provisions of Section 15‑7‑100(3)”.

CROSS REFERENCES

Exercise of personal jurisdiction over nonresident principals who contract with sales representatives, see Section 39‑65‑50.

Provisions of South Carolina Probate Code relative to jurisdiction of courts of this State with respect to foreign personal representative, see Sections 62‑4‑301, 62‑4‑302.

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78 ALR 6th 151 , in Personam Jurisdiction, Under Long‑Arm Statute, Over Nonresident Attorney in Legal Malpractice Action.

28 ALR 5th 664 , Execution, Outside of Forum, of Guaranty of Obligations Under Contract to be Performed Within Forum State as Conferring Jurisdiction Over Non‑Resident Guarantors Under “Long‑Arm” Statute or Rule of...

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1. In general

This section [Code 1962 Section 10.2‑803] does not create a new remedy but merely makes procedurally possible the plaintiff’s exercise of her existing rights in the forums of her home state. Howard v. Allen (D.C.S.C. 1973) 368 F.Supp. 310, affirmed 487 F.2d 1397, certiorari denied 94 S.Ct. 2611, 417 U.S. 912, 41 L.Ed.2d 216.

The determination of whether a forum state may exercise specific jurisdiction over a non‑resident defendant involves a two‑step analysis, whereby a trial court must determine: (1) whether the state’s long‑arm statute applies, and (2) whether the defendant’s in‑state contacts are sufficient to satisfy due process. Delta Apparel, Inc. v. Farina (S.C.App. 2013) 406 S.C. 257, 750 S.E.2d 615. Constitutional Law 3964

“Specific jurisdiction” is the state’s right to exercise personal jurisdiction because the cause of action arises specifically from a defendant’s contacts with the forum. Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E.2d 476. Courts 13.3(8)

2. Validity

Subsection (1) subdivision (g), is valid under the Fourteenth Amendment to the United States Constitution. Ellison v. Rock Hill Printing & Finishing Co. (D.C.S.C. 1972) 347 F.Supp. 436.

Subsection (1) subdivision (g), is valid under SC Const, Art 3, Section 17. Tention v Southern Pac. R.R., 336 F Supp 25 (D SC 1972). Ellison v. Rock Hill Printing & Finishing Co. (D.C.S.C. 1972) 347 F.Supp. 436.

Subdivisions (c) and (d) of subsection (1) of this section [Code 1962 Section 10.2‑803] are unconstitutional under SC Const, Art 3, Section 17, but this holding does not suggest the invalidity of any other part or portion of the South Carolina Uniform Commercial Code. McGee v. Holan Division of Ohio Brass Co. (D.C.S.C. 1972) 337 F.Supp. 72.

Subsection (1), subdivisions (c) and (d), violate the requirements of SC Const, Art 3, 17. Tention v. Southern Pac. R. Co. (D.C.S.C. 1972) 336 F.Supp. 25.

This section [Code 1962 Section 10.2‑803] is properly embraced in the language of the “title” of the act of which it is a part and thus, does not offend the requirements of SC Const, Art 3, Section 17, and is within “the general subject” of the legislation in question. Deering Milliken Research Corp. v. Textured Fibres, Inc. (D.C.S.C. 1970) 310 F.Supp. 491, 165 U.S.P.Q. 56.

3. Construction and application

Code 1962 Section 10.2‑803(1) [Code 1976 Section 36‑2‑803(1)] grants as broad a reach of jurisdiction as is constitutionally permissible. Hardy v. Pioneer Parachute Co., Inc. (C.A.4 (S.C.) 1976) 531 F.2d 193. Federal Courts 2721

South Carolina’s long‑arm statute confers jurisdiction over a person who breaches a contract after the effective date of the statute, although the contract was made before that date. Deering Milliken Research Corp. v. Textured Fibres, Inc. (C.A.4 (S.C.) 1969) 415 F.2d 875, 163 U.S.P.Q. 69, on remand 310 F.Supp. 491, 165 U.S.P.Q. 56. Federal Courts 2740

Two conditions must be met for personal jurisdiction to exist over nonresident in South Carolina: the plaintiff must (1) satisfy the applicable long‑arm statute; and (2) establish that the exercise of jurisdiction does not overstep the bounds of due process. Butler v. Ford Motor Co., 2010, 724 F.Supp.2d 575. Constitutional Law 3964; Federal Courts 2721; Federal Courts 3025(4)

South Carolina’s long‑arm statute extends to constitutional limits imposed by due process clause. Fallon Luminous Products Corp. v. Multi Media Electronics, Inc., 2004, 343 F.Supp.2d 502. Courts 13.2

The South Carolina long arm statute extends jurisdiction to the limits allowed by the Due Process Clause; the court’s inquiry is limited to whether an exercise of jurisdiction over each defendant is consistent with Due Process. Sheppard v. Jacksonville Marine Supply, Inc., 1995, 877 F.Supp. 260. Constitutional Law 3964; Courts 13.2

The long arm statute extends South Carolina’s jurisdiction as far as due process allows. Orangeburg Pecan Co., Inc. v. Farmers Inv. Co., 1994, 869 F.Supp. 351, supplemented 869 F.Supp. 359. Courts 13.2

The South Carolina long arm statute has been interpreted to reach the outer limits of due process; therefore, the determination of personal jurisdiction in South Carolina compresses into a due process assessment of minimum contacts and fair play. Sonoco Products Co. v. Inteplast Corp., 1994, 867 F.Supp. 352. Constitutional Law 3964; Federal Courts 2724(1)

South Carolina’s long‑arm statute extends to the constitutional limits imposed by due process clause, and, as a result, state law analysis collapses into constitutional analysis; thus, jurisdictional question with respect to nonresident defendant simply becomes whether defendant has sufficient “minimum contacts” with South Carolina such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Young v. Jones, 1992, 816 F.Supp. 1070, affirmed 103 F.3d 1180, certiorari denied 118 S.Ct. 329, 522 U.S. 928, 139 L.Ed.2d 255.

Long‑arm statute is construed in South Carolina to extend jurisdiction to limits of due process; therefore, since extent of statute and relevant constitutional tests are the same, in declaratory judgment action involving non‑infringement and invalidity of patent, court’s inquiry with respect to patent holder’s assertion that court lacked personal jurisdiction was simply whether exercise of jurisdiction over patent holder would violate his rights to due process. Ryobi America Corp. v. Peters, 1993, 815 F.Supp. 172, 26 U.S.P.Q.2d 1878.

South Carolina has interpreted long‑arm statute to grant as broad a reach of jurisdiction as is constitutionally permissible, for which reason long‑arm statute question “collapses into” due process analysis providing that a nonresident defendant cannot be subjected to personal jurisdiction in forum state unless he has sufficient “minimum contacts” with it. Eagle Aviation, Inc. v. Galin, 1989, 761 F.Supp. 405.

Long arm statute extends South Carolina’s jurisdiction to the limits imposed by the due process clause. Anthony v. Drovers Nat. Bank of Chicago (D.C.S.C. 1975) 405 F.Supp. 626.

Traditional notions of fair play and substantial justice would be offended if a foreign corporation is allowed to entice residents of this state across the border to enter into contracts governed by foreign law and thereafter avoid liability for any breaches arising therefrom when presented to a forum in this state. Bass v. Harbor Light Marina, Inc. (D.C.S.C. 1974) 372 F.Supp. 786.

The criteria which mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742.

The long‑arm statute affords broad power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina. Sullivan v. Hawker Beechcraft Corp. (S.C.App. 2012) 397 S.C. 143, 723 S.E.2d 835, rehearing denied, certiorari dismissed. Courts 13.5(4)

To establish general jurisdiction, a nonresident defendant’s contacts with the forum must satisfy the due process clause. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3964

A judgment is void if a court acts without personal jurisdiction. Ex parte South Carolina Dept. of Revenue (S.C.App. 2002) 350 S.C. 404, 566 S.E.2d 196. Judgment 16

While primarily viewed as a due process concept, the concept of minimum contacts regarding the exercise of personal jurisdiction also acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. Builder Mart of America, Inc. v. First Union Corp. (S.C.App. 2002) 349 S.C. 500, 563 S.E.2d 352. Constitutional Law 3964; Courts 13.3(2)

In determining whether exercise of long‑arm jurisdiction over defendants in a civil conspiracy case satisfies due process, it is not enough that other members of the alleged conspiracy have numerous contacts with South Carolina. The court is required to examine each defendant’s own contacts with South Carolina. The contacts of one alleged conspirator will not be attributed to another alleged conspirator. Allen v. Columbia Financial Management, Ltd. (S.C.App. 1988) 297 S.C. 481, 377 S.E.2d 352. Constitutional Law 3965(1)

As a matter of policy, Section 36‑2‑803 is intended to extend the jurisdiction of the courts as far as due process allows; accordingly, an appellate court would hold that South Carolina, rather than Georgia, had jurisdiction over an action brought by a patron against the Georgia Department of Industry and Trade for injuries received in a fall in front of a Georgia tourist exhibit in South Carolina. Newberry v. Georgia Dept. of Industry and Trade (S.C.App. 1984) 283 S.C. 312, 322 S.E.2d 212, certiorari granted 285 S.C. 274, 328 S.E.2d 345, quashed 286 S.C. 574, 336 S.E.2d 464.

3.5. Construction with other laws

While choice of law analysis is separate and distinct from personal jurisdiction analysis, which State’s law controls is a factor to be considered under the fairness prong of the due process inquiry regarding the exercise of personal jurisdiction pursuant to the long‑arm statute. Builder Mart of America, Inc. v. First Union Corp. (S.C.App. 2002) 349 S.C. 500, 563 S.E.2d 352. Constitutional Law 3964

4. Legislative intent

The South Carolina “long‑arm” statute was intended to extent the jurisdiction of the courts of that State as far as due process allows. Deering Milliken Research Corp. v Textured Fibres, Inc., 310 F Supp 491 (D SC 1970). Bass v Harbor Light Marina, Inc., 372 F Supp 786 (D SC 1974).

This section [Code 1962 Section 10.2‑803] and Code 1962 Section 10.2‑802 were intended to afford and do afford the courts of South Carolina the full reach of jurisdiction permitted by the due process clause of the United States Constitution. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742. Courts 13.2

This section [Code 1962 Section 10.2‑803] clearly shows a legislative intent to broaden the concept of what constitutes transacting business in the State of South Carolina and to extend South Carolina’s jurisdiction accordingly. Triplett v. R. M. Wade & Co. (S.C. 1973) 261 S.C. 419, 200 S.E.2d 375.

5. Insurance

Personal jurisdiction was proper under either Section 36‑2‑803(1)(f) or (g) in a declaratory judgment action arising from a contract to insure an automobile while it moved through the eastern United States, including South Carolina. Parker v. Fireman’s Ins. Co. of Newark, N.J. (S.C.App. 1988) 297 S.C. 166, 375 S.E.2d 325.

Court may exercise personal jurisdiction over defendant under Section 36‑2‑803, where action against him arises out of suretyship agreement which plaintiff insurer entered into with defendant when he was employed as Town Clerk and Treasurer, which obligated insurer, as surety for defendant as principal, to Town in penal sum of $10,000, conditioned upon defendant’s faithful performance of his duties, and where insurer was subsequently notified by Town of irregularities and discrepancies in amount of public funds being handled by and under charge of defendant and was ultimately required by terms of agreement to pay Town full amount of its obligation. Aetna Cas. & Sur. Co. v. Jenkins (S.C.App. 1984) 282 S.C. 107, 317 S.E.2d 460.

6. Retroactive application of reenacted section

Where defendants had no vested right not to be sued in South Carolina and Code 1962 Section 10.2‑803 [Code 1976 Section 36‑2‑803] afforded defendants adequate notice and reasonable opportunity to appear and defend suit, retroactive application of long‑arm statute did not deprive defendants of due process of law. Hardy v. Pioneer Parachute Co., Inc. (C.A.4 (S.C.) 1976) 531 F.2d 193.

This section [Code 1962 Section 10.2‑803] may be applied retrospectively since it is procedural or jurisdictional and it is not a statute based on implied consent. Howard v. Allen (D.C.S.C. 1973) 368 F.Supp. 310, affirmed 487 F.2d 1397, certiorari denied 94 S.Ct. 2611, 417 U.S. 912, 41 L.Ed.2d 216.

This part, as reenacted, falls within the definition of a curative statute, legislation whose purpose is to cure past errors, omissions, and neglects, and thus to make valid what, before its enactment, was invalid. Such an act by nature is retrospective, for it intends to give legal effect to some past act or transaction which was ineffective because of neglect to comply with some requirement of law. Segars v. Gomez (D.C.S.C. 1972) 360 F.Supp. 50.

7. Sales within state

No real legal distinction exists between publisher who causes publication (which allegedly harmed plaintiff) to be distributed in state, and manufacturer who ships allegedly defective product into state, since in both cases foreign corporation is knowingly selling its wares within South Carolina and should reasonably be expected to travel there to defend suits brought by citizens who have allegedly been harmed by revenue‑producing activities. David v. National Lampoon, Inc. (D.C.S.C. 1977) 432 F.Supp. 1097.

Tobacco product manufacturer, a foreign corporation, against whom State brought action to enforce Tobacco Escrow Fund Act had minimum contacts with the United States as a whole and, thus, via the stream of commerce theory, had minimum contacts with the state such that forum state had personal jurisdiction over manufacturer; evidence showed that manufacturer sold 6,868,000 cigarettes in the state in one year, and that it marketed its brand as one containing an “American blend.” State v. NV Sumatra Tobacco Trading, Co. (S.C. 2008) 379 S.C. 81, 666 S.E.2d 218, rehearing denied. Courts 13.5(7)

8. Practice and procedure

Party seeking to invoke personal jurisdiction over a nonresident defendant via state long‑arm statute bears the burden of proving the existence of personal jurisdiction. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Courts 35

The party seeking to invoke personal jurisdiction over a nonresident defendant via the long‑arm statute bears the burden of proving the existence of personal jurisdiction. Sullivan v. Hawker Beechcraft Corp. (S.C.App. 2012) 397 S.C. 143, 723 S.E.2d 835, rehearing denied, certiorari dismissed. Courts 35

Denial of injured plaintiff’s motion to permit further jurisdictional discovery in order to make prima facie case of personal jurisdiction over nonresident defendants was not abuse of discretion, where plaintiff made only conclusory assertions based on bare, unsupported allegations in response to defendants’ specific denials that they did not conduct business in South Carolina, that they did not engage in persistent course of conduct in South Carolina, and that they did not derive substantial revenue from goods used or consumed or services rendered in South Carolina. Sullivan v. Hawker Beechcraft Corp. (S.C.App. 2012) 397 S.C. 143, 723 S.E.2d 835, rehearing denied, certiorari dismissed. Pretrial Procedure 27.1

A plaintiff is not required to plead that he will be meritorious on personal jurisdiction; rather, he must demonstrate enough facts to support a prima facie showing. Sullivan v. Hawker Beechcraft Corp. (S.C.App. 2012) 397 S.C. 143, 723 S.E.2d 835, rehearing denied, certiorari dismissed. Courts 32.5(2); Courts 35

The allegations of the complaint are normally sufficient to warrant the court’s exercise of jurisdiction. It is only when the complaint does not demonstrate jurisdiction that the plaintiff must supply other evidence of jurisdiction. Springmasters, Inc. v. D & M Mfg. (S.C.App. 1991) 303 S.C. 528, 402 S.E.2d 192.

Since nonresident party failed to challenge by way of exception a Circuit Court’s ruling that personal jurisdiction was conferred by Sections 36‑2‑803(1)(a) and 36‑2‑803(1)(b), the ruling became the law of the case. Ashy v. WeCare Distributors, Inc. (S.C.App. 1986) 289 S.C. 526, 347 S.E.2d 123.

9. Negotiation or solicitation within state

Jurisdiction under South Carolina’s long arm jurisdiction statute is established where defendants in unlawful sale of security, unfair trade practice, fraud, breach of fiduciary duty, conspiracy and RICO actions sent several letters and promotional brochures to plaintiff in South Carolina before entering into agreement for purchase of art master, actively sought to enter into distribution and licensing agreement with plaintiff, and where defendants actively sought to do business with plaintiff and solicited his business in South Carolina. Faircloth v. Jackie Fine Arts, Inc., 1988, 682 F.Supp. 837, affirmed in part, reversed in part 938 F.2d 513.

Out of state art dealer’s sending several letters and promotional brochures to resident of state, and actively seeking to enter into distribution and licensing agreement with resident of state, shows that dealer’s commercial efforts were “purposely directed” toward resident of state, so that absence of physical contacts does not defeat personal jurisdiction in state. Faircloth v. Jackie Fine Arts, Inc., 1988, 682 F.Supp. 837, affirmed in part, reversed in part 938 F.2d 513.

Defendant’s advertisements and solicitation of business from South Carolina residents and its various other activities on the South Carolina side of the border line through the lake satisfy the test for jurisdiction to attach. Bass v. Harbor Light Marina, Inc. (D.C.S.C. 1974) 372 F.Supp. 786.

Negotiations taking place within a given state and looking toward the formation of a contract constitute a significant contact with that state and are a significant factor to be considered in determining whether the nonresident individual or corporation is subject to the jurisdiction of the courts of that state. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742.

To satisfy the enduring relationship requirement of general jurisdiction, the nonresident defendant’s contacts must be continuous and systematic as well as so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely different from those activities. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Courts 13.3(7)

If an individual has an enduring relationship with the forum state, he may be sued there pursuant to a court’s general jurisdiction even if the cause of action did not arise in the forum state. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Courts 13.3(7)

Inspecting engineer was acting as agent for construction lender, which was a foreign corporation, when he gave false assurances of payment to contractor, and thus evidence was sufficient on motion to dismiss to support long‑arm jurisdiction, where project director for construction contractor stated that he dealt regularly with lender’s inspecting engineer at project site, that inspecting engineer approved contractor’s pay requests and processed them for payment, and that contractor relied on inspector’s assurance of payment in continuing to work on project after loans went into default. M.B. Kahn Const. Co., Inc. v. Three Rivers Bank & Trust Co. (S.C. 2003) 354 S.C. 412, 581 S.E.2d 481. Pretrial Procedure 684

A defendant’s motion for dismissal, based on a lack of personal jurisdiction, was properly denied where the record showed that the defendant, a North Carolina resident, was employed as a stockbroker, communicated with a resident of South Carolina soliciting participation in an out of state venture, set the framework within which the transaction was consummated, and would be compensated by a commission derived therefrom; the defendant’s actions satisfied the requirements of Section 36‑2‑803 and were of sufficient frequency and duration to satisfy the minimum contact requirements of due process. Clark v. Key (S.C. 1991) 304 S.C. 497, 405 S.E.2d 599.

10. Prima facie showing of jurisdiction

In declaratory judgment action involving non‑infringement and invalidity of patent, alleged patent infringer failed to make prima facie case for exercise of personal jurisdiction by South Carolina District Court over patent holder based on evidence that patent holder’s attorney had sent letter to alleged infringer concerning design of a particular product, and that patent holder’s licensee had sold several devices containing patented part within South Carolina. Such evidence was insufficient to confer personal jurisdiction, since letter mailed into forum state neither caused any alleged patent infringement nor created any cause of action on part of alleged infringer, and licensee’s sale of devices containing patented part within forum state was not relevant to any patent infringement issue. Ryobi America Corp. v. Peters, 1993, 815 F.Supp. 172, 26 U.S.P.Q.2d 1878.

Court lacked personal jurisdiction over individual defendants where plaintiff failed to back up conclusory jurisdictional allegations with specific supporting facts and failed to show how defendants subjected selves to personal jurisdiction in South Carolina, whereas defendants asserted that none of defendants had ever lived in South Carolina or personally maintained office, telephone listing, bank account, employed any individual or agent, entered into contract to be performed in, or solicited or operated personal business, in state. Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc., 1992, 784 F.Supp. 306.

At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits. Sullivan v. Hawker Beechcraft Corp. (S.C.App. 2012) 397 S.C. 143, 723 S.E.2d 835, rehearing denied, certiorari dismissed. Courts 35

Injured plaintiff’s mere recitation of long‑arm statute, without any allegations of facts showing that nonresident defendants did business in South Carolina, engaged in persistent course of conduct in South Carolina, or derived substantial revenue from goods used or consumed or services rendered in South Carolina, was insufficient to establish prima facie showing of personal jurisdiction over nonresident defendants, in plaintiff’s action arising out of plane crash. Sullivan v. Hawker Beechcraft Corp. (S.C.App. 2012) 397 S.C. 143, 723 S.E.2d 835, rehearing denied, certiorari dismissed. Courts 32.5(2)

The repeating of the long‑arm statute is insufficient to support a finding of personal jurisdiction over a nonresident defendant. Sullivan v. Hawker Beechcraft Corp. (S.C.App. 2012) 397 S.C. 143, 723 S.E.2d 835, rehearing denied, certiorari dismissed. Courts 32.5(2)

A prima facie showing of personal jurisdiction can be made through factual allegations in the complaint or through affidavits that establish a basis for the court to assert jurisdiction over an out‑of state‑defendant. Sullivan v. Hawker Beechcraft Corp. (S.C.App. 2012) 397 S.C. 143, 723 S.E.2d 835, rehearing denied, certiorari dismissed. Courts 35

At the pretrial stage, burden of proving personal jurisdiction over nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits; if the complaint supplies sufficient evidence of jurisdiction, courts need not look at any affidavits. International Mariculture Resources v. Grant (S.C.App. 1999) 336 S.C. 434, 520 S.E.2d 160. Courts 32.5(2)

Investors in oil and gas ventures sufficiently alleged agency relationship between their investment advisor and sellers of the interests to support prima facie showing of personal jurisdiction over the sellers. Brown v. Investment Management and Research, Inc. (S.C. 1996) 323 S.C. 395, 475 S.E.2d 754. Courts 13.6(2); Courts 32.5(2)

A distributor made a sufficient prima facie showing of personal jurisdiction over an Australian corporation where the complaint alleged that the corporation was an integral part of the distribution system, that it was contacted with orders from an importer who received orders from distributors, that it shipped goods directly to the distributor F.O.B. from Australia with the expectation that the goods would be used in South Carolina, and that it was a wholly owned subsidiary of a company which owned 50 percent of the importer. Mid‑State Distributors, Inc. v. Century Importers, Inc. (S.C. 1993) 310 S.C. 330, 426 S.E.2d 777. Courts 13.5(7); Courts 13.6(9)

In order to find personal jurisdiction based on Section 36‑2‑803(1)(g), it is not necessary to determine that a binding contract existed, but rather, only a prima facie showing that the trial court should exercise jurisdiction is required. White v. Stephens (S.C. 1990) 300 S.C. 241, 387 S.E.2d 260. Courts 13.3(10); Courts 32.5(1)

Plaintiffs failed to make a prima facie showing of a contract to be performed in South Carolina, so as to invoke jurisdiction under Section 36‑2‑803(1)(g), where the complaint alleged that an agreement was made between the parties at the request of the defendant but did not allege that the contract was formed in South Carolina or that it was to be performed in South Carolina. White v. Stephens (S.C. 1990) 300 S.C. 241, 387 S.E.2d 260.

Plaintiff made a prima facie showing that Georgia real estate agents, by associating a South Carolina broker in order to complete a real estate transaction in South Carolina, transacted business in South Carolina and also entered into a contract to be performed in whole or in part in South Carolina, such acts being sufficient to bring them within Section 36‑2‑803(1)(a) and (g). Berkeley PG Corp. v. Southbank Inv. Group, Inc. (S.C.App. 1987) 291 S.C. 315, 353 S.E.2d 305. Courts 32.5(2)

Trial court is not required to first determine whether there is binding contract between plaintiff and nonresident corporate defendant before court can find personal jurisdiction based on Section 36‑2‑803(1)(g). At pretrial stage of determination of jurisdiction, plaintiff need only make prima facie showing by his pleadings and affidavit that trial court should exercise personal jurisdiction. Askins v. Firedoor Corp. of Florida (S.C.App. 1984) 281 S.C. 611, 316 S.E.2d 713.

11. Criteria for jurisdiction

In determining whether specific jurisdiction is appropriate under South Carolina’s long‑arm statute, the district court must examine three factors: (1) the extent to which the defendant purposefully availed itself of the privileges of conducting activities in South Carolina and thus invoked the benefits and protections of its laws, (2) whether the plaintiff’s claims arise out of those South Carolina‑related activities, and (3) whether the exercise of jurisdiction is constitutionally reasonable. E.E. by and through Epsey v. Eagle’s Nest Foundation, 2016, 200 F.Supp.3d 626. Constitutional Law 3965(9); Federal Courts 2750

In determining whether assertion of personal jurisdiction of a nonresident defendant under Section 36‑2‑803 comports with fair play and substantial justice such that standards of due process are satisfied, court considers the following: (1) relative burden on, and interest of, the party; (2) interest of forum state; (3) interest of interstate judicial system in obtaining most efficient resolution of controversy; and (4) shared interest of several states in furthering fundamental substantive social policies. Umbro U.S.A., a Div. of Stone Mfg. Co., Inc. v. Goner, 1993, 825 F.Supp. 738.

In determining personal jurisdiction, court uses two‑part analysis, first determining whether South Carolina’s long‑arm statute authorizes exercise of jurisdiction, and if exercise of jurisdiction is statutorily authorized, then deciding whether assertion of jurisdiction comports with constitutional standards of due process. Umbro U.S.A., a Div. of Stone Mfg. Co., Inc. v. Goner, 1993, 825 F.Supp. 738. Constitutional Law 3964; Federal Courts 2721

In determining personal jurisdiction, court uses two‑part analysis, first determining whether South Carolina’s long‑arm statute authorizes exercise of jurisdiction, and if exercise of jurisdiction is statutorily authorized, then deciding whether assertion of jurisdiction comports with constitutional standards of due process. Umbro U.S.A., a Div. of Stone Mfg. Co., Inc. v. Goner, 1993, 825 F.Supp. 738. Constitutional Law 3964; Federal Courts 2721

A two‑step analysis is required to determine whether South Carolina federal district court may exercise personal jurisdiction over nonresident defendant; first, court must determine if nonresident defendant’s conduct meets the requirements of South Carolina’s long‑arm statute, and second, court must determine if nonresident defendant had sufficient contacts with South Carolina, as forum state, to meet constitutional standards of due process. Young v. Jones, 1992, 816 F.Supp. 1070, affirmed 103 F.3d 1180, certiorari denied 118 S.Ct. 329, 522 U.S. 928, 139 L.Ed.2d 255.

Under statute, state’s jurisdiction extends to due process limits. It is therefore unnecessary to go through two‑step formula of examining first validity of service under statute of forum state, inquiry of court being limited to whether exercise of jurisdiction over each individual defendant under circumstances is consistent with due process, since test of amenability under state law and under constitutional test are identical. Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc., 1992, 784 F.Supp. 306.

Defendant’s status as publisher held not to entitle it to higher jurisdictional standard under First Amendment, since its First Amendment rights would receive ample protection when merits of case were reached, and considering them at jurisdictional stage would only serve to cloud valid issues. David v. National Lampoon, Inc. (D.C.S.C. 1977) 432 F.Supp. 1097.

The United States District Court in the district of South Carolina, in deciding if it has personal jurisdiction over a foreign corporation, must first consider whether jurisdiction exists under the law of South Carolina and if that question is answered in the affirmative, whether the exercise of jurisdiction would violate due process. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742. Federal Courts 2732

The test for jurisdiction is whether or not the subjection to suit would offend traditional notions of fair play and substantial justice. Other considerations include a sensible application of the doctrine forum non conveniens and the corporation’s “nexus” with the State. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742.

Whether due process is satisfied must depend upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742.

A condition of personal jurisdiction under this section is that the death or injury for which suit is brought occur within the jurisdiction of this State. Jenrette v. Seaboard Coast Line R. Co. (D.C.S.C. 1969) 308 F.Supp. 642.

The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two‑step analysis: the trial court must (1) determine whether the South Carolina long‑arm statute applies and (2) whether the nonresident’s contacts in South Carolina are sufficient to satisfy due process. Sullivan v. Hawker Beechcraft Corp. (S.C.App. 2012) 397 S.C. 143, 723 S.E.2d 835, rehearing denied, certiorari dismissed. Constitutional Law 3964; Courts 13.2

Courts employ a due process analysis to determine if specific jurisdiction over a nonresident defendant is proper. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3964

Courts may have specific jurisdiction over a cause of action arising from a nonresident defendant’s contacts with the state pursuant to the long‑arm statute. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Courts 13.3(8)

A court may assert general jurisdiction if the nonresident defendant has an enduring relationship with the forum state. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Courts 13.3(7)

Exercise of personal jurisdiction over nonresident restaurant and restaurant owners individually was not reasonable or fair under due process clause, and thus forum state did not have specific personal jurisdiction over them in restaurant manager’s breach of contract action, where restaurant’s activity within the state was brief, parties knew manager would actually perform his duties under contract at restaurant’s principal place of business outside forum state, principal place of business was merely two miles from forum state, and forum state had little interest in exercising jurisdiction. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Constitutional Law 3965(5); Constitutional Law 3965(10); Courts 13.5(3); Courts 13.6(8)

Under the fairness prong of the due process analysis employed to assert specific jurisdiction over a nonresident defendant, the court must consider the following factors: (1) the duration of the defendant’s activity in the forum state; (2) the character and circumstances of its acts; (3) the inconvenience to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the forum state’s interest in exercising jurisdiction. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Constitutional Law 3964

To satisfy the power prong of the due process analysis to support specific jurisdiction over a nonresident defendant, with minimum contacts providing court with the power to adjudicate the action, the court must find the defendant directed his activities to residents of the forum state and that the cause of action arises out of or relates to those activities. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Constitutional Law 3964

To determine whether an exercise of jurisdiction over non‑resident defendant would comport with this due process standard of traditional notions of fair play and substantial justice, a number of factors must be considered, including: (1) the duration of defendant’s activity in the state, (2) nature and circumstances of defendant’s acts, (3) inconvenience to the parties by either the exercise or refusal to exercise jurisdiction, and (4) state’s interest in exercising jurisdiction over the action. QZO, Inc. v. Moyer (S.C.App. 2004) 358 S.C. 246, 594 S.E.2d 541, rehearing denied, certiorari denied. Constitutional Law 3964

Assertion of personal jurisdiction, in South Carolina, over out‑of‑state bank holding company would be unfair, for due process purposes, in action by franchisor, corporate franchisee, and corporate franchisee’s owner, relating to loan from bank holding company’s subsidiary to franchisee and liquidation of collateral pursuant to subordination agreement between subsidiary and franchisor; the loan was executed and performed in North Carolina and it provided that North Carolina law controlled any disputes arising from it. Builder Mart of America, Inc. v. First Union Corp. (S.C.App. 2002) 349 S.C. 500, 563 S.E.2d 352. Banks And Banking 528; Constitutional Law 3965(7)

The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two‑step analysis: (1) the trial judge must determine that the long‑arm statute applies, and (2) the trial judge must determine that the nonresident’s contacts with state are sufficient to satisfy due process requirements. International Mariculture Resources v. Grant (S.C.App. 1999) 336 S.C. 434, 520 S.E.2d 160. Constitutional Law 3964; Courts 13.2

The determination of whether a court may exercise personal jurisdiction over a nonresident involves a 2‑step analysis. First, in order for the courts to have statutory authority to exercise jurisdiction, the nonresident’s conduct must meet the requirements of South Carolina’s long‑arm statute. Second, the nonresident must have sufficient contacts with South Carolina so that the constitutional standards of due process are not violated. White v. Stephens (S.C. 1990) 300 S.C. 241, 387 S.E.2d 260.

Considerations relevant to the inquiry as to whether Georgia real estate agents had minimum contacts within South Carolina to meet due process requirements include duration of nonresidents activity in the state, the character of the acts giving rise to the suit and the circumstances of their commission, and the balancing of the inconvenience to the parties of a trial in South Carolina or the nonresident’s state. Berkeley PG Corp. v. Southbank Inv. Group, Inc. (S.C.App. 1987) 291 S.C. 315, 353 S.E.2d 305. Constitutional Law 3964

Factors that South Carolina courts will look to in determining whether due process is being complied with in asserting jurisdiction over a non‑resident defendant under Section 36‑2‑803 include: (1) the duration of the activity of the non‑resident in South Carolina; (2) the character and circumstances of the commission of the non‑resident’s acts; and (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the non‑resident. Also, courts often look to the interest of the state in exercising its jurisdiction over non‑residents. When the plaintiff lives in the forum state and the cause of action arises from the defendant’s activities in the state, the length and duration of the non‑resident’s activity need only be minimal. Atlantic Soft Drink Co. of Columbia, Inc. v. South Carolina Nat. Bank (S.C. 1985) 287 S.C. 228, 336 S.E.2d 876. Constitutional Law 3964

The question of in personam jurisdiction over a foreign corporation is one which must be resolved upon the facts of each particular case. Engineered Products v. Cleveland Crane and Engineering (S.C. 1974) 262 S.C. 1, 201 S.E.2d 921. Appeal And Error 1010.1(11); Courts 13.4(3)

12. Performance of contract within state

In a breach of contract action brought by a North Carolina corporation against one of its employees with whom it contracted to market the corporation’s automobile warranty plans to dealers in North and South Carolina, the South Carolina courts could retain personal jurisdiction over defendant, even if he were not a South Carolina resident at the time of his alleged wrongdoing, since the court based its jurisdiction finding on the contract aspects of Section 36‑2‑803(1)(a)‑(c), (g). This statute has been construed to reach as far as due process allows and the contract in question was to be performed at least in part in South Carolina. In re Nine Mile Ltd., 1982, 692 F.2d 56.

In action brought against New York broker and its employee by a corporation, which asserted breach of brokerage agreement to find buyer for corporation’s excess inventory, corporation failed to establish case for South Carolina district court’s exercise of personal jurisdiction over broker or its employee under Section 803(1)(g) of South Carolina’s long‑arm statute based upon corporation’s shipment of inventory from South Carolina; under Section 36‑2‑803(1)(g), which authorizes court to exercise personal jurisdiction over person who acts as to a cause of action arising from the person’s entry into a contract to be performed, in part, by either party within the forum state, corporation’s shipment of inventory from South Carolina was not sufficient to confer personal jurisdiction since shipment did not constitute performance of contract as contemplated within this section given that the sale of and shipping of inventory was merely condition precedent to performance by corporation under brokerage agreement; thus, shipment was not performance required by contract, under which circumstance broker would have been brought within long‑arm jurisdiction. Umbro U.S.A., a Div. of Stone Mfg. Co., Inc. v. Goner, 1993, 825 F.Supp. 738.

Where the contracts in question are to be performed “in part” in both North Carolina and South Carolina, then jurisdiction of a controversy arising out of such contracts could be maintainable in either jurisdiction under the “long‑arm” statute of this section. Deering Milliken Research Corp. v. Textured Fibres, Inc. (D.C.S.C. 1970) 310 F.Supp. 491, 165 U.S.P.Q. 56.

An out‑of‑state licensee had sufficient contacts with South Carolina to permit the exercise of state court jurisdiction under Section 36‑2‑803 in an action brought by a South Carolina licensor of a computer software system to recover money due under a license agreement where the licensor’s employees worked on an implementation study for the licensee with much of the work being done in the licensor’s South Carolina office, the licensor continually developed enhancements to the software system at its South Carolina offices which were provided to the licensee, technical information bulletins developed in South Carolina were shipped to the licensee, educational classes were prepared and planned in South Carolina and were conducted at the offices of the licensee and the licensor, on several occasions the licensee sent over a dozen employees to the licensor’s South Carolina office for software training, and the agreement provided that it was deemed entered into and executed in South Carolina and should be construed to be performed and enforced in accordance with South Carolina law. Policy Management Systems Corp. v. Consumers Ins. Co. (S.C.App. 1988) 294 S.C. 506, 366 S.E.2d 33.

Allegation that employee of in‑state company owned by foreign national entered into stock option agreement with foreign national, agreement was signed in state, and contemplated sale and transfer of stock in state, option was partially exercised in state and stock issued in state, shares of stock were kept in state, and employee’s tender of repurchase of stock was made in state, was sufficient to make prima facie showing that foreign national entered into contract to be performed in whole or in part in this state sufficient to render personal jurisdiction over him, and exercise of jurisdiction over foreign national is consonant with due process, as foreign national’s activity in state constitute minimum contacts sufficient to satisfy due process. Fields v. INA Filtration Corp. (S.C.App. 1987) 292 S.C. 614, 358 S.E.2d 160.

Subjecting Georgia real estate agents to personal jurisdiction of the South Carolina court would not violate due process, where the agents had entered into a brokerage contract to be performed within South Carolina which would inure to their personal benefit, and there was no showing that to force them to defend a suit in South Carolina would impose any undue hardship. Berkeley PG Corp. v. Southbank Inv. Group, Inc. (S.C.App. 1987) 291 S.C. 315, 353 S.E.2d 305.

In an action brought by a South Carolina silver dealer against a New York resident for breach of an oral contract to purchase silver, jurisdiction in South Carolina pursuant to Section 36‑2‑803 was proper since evidence showed that defendant entered into a contract that was to be partly performed in South Carolina and since the silver was to be shipped to the plaintiff’s company in South Carolina. Atlantic Wholesale Co., Inc. v. Solondz (S.C.App. 1984) 283 S.C. 36, 320 S.E.2d 720.

Trial court did not err in finding that parties entered into contract to be performed in whole or in part in South Carolina, for purposes of Section 36‑2‑803(1)(g), where items were to be shipped F.O.B. job site in Florence, South Carolina and resident plaintiff was required by state law to make payment against tender of required bills of lading or shipping documents. Furthermore, execution of contract in South Carolina, together with defendant’s other purposeful activities performed in fulfillment of contract, amply support finding that defendant transacted business in South Carolina. Askins v. Firedoor Corp. of Florida (S.C.App. 1984) 281 S.C. 611, 316 S.E.2d 713. Courts 13.5(7)

Because significant events took place in South Carolina in performance of the terms of the contract, which formed the basis of plaintiff’s first cause of action, events which both parties contemplated would take place here when they entered into the contract, the trial judge correctly held that defendant foreign corporation is subject to the jurisdiction of the courts of this State by virtue of subsection (1)(g) of this section [Code 1962 Section 10.2‑803]. Engineered Products v. Cleveland Crane and Engineering (S.C. 1974) 262 S.C. 1, 201 S.E.2d 921. Courts 13.5(3)

13. Due process

Because Nevada has authorized its courts to exercise jurisdiction over persons on any basis not inconsistent with the Constitution of the United States, the Supreme Court, in order to determine whether a federal district court in Nevada is authorized to exercise jurisdiction over a nonresident petitioner, asks whether the exercise of jurisdiction comports with limits imposed by federal due process on State of Nevada. Walden v. Fiore, 2014, 134 S.Ct. 1115, 188 L.Ed.2d 12, on remand 748 F.3d 1304. Constitutional Law 3964

Subjecting defendants to in personam jurisdiction of South Carolina courts did not violate due process where defendant manufacturer had no contacts with South Carolina other than occasionally making direct sales to customers within the state and contributing to distributor’s advertising budget, and defendant distributor had no contacts with the state other than advertising manufacturer’s products in publications which reached subscribers in South Carolina and making at least 42 direct sales to customers within the state. Hardy v. Pioneer Parachute Co., Inc. (C.A.4 (S.C.) 1976) 531 F.2d 193.

South Carolina courts may exercise specific jurisdiction over a defendant pursuant to the state long‑arm statute, depending upon the defendant’s contacts with South Carolina; because the South Carolina long‑arm statute is coextensive with the Due Process Clause, the sole question on a motion to dismiss for lack of personal jurisdiction is whether the exercise of personal jurisdiction would violate due process. Callum v. CVS Health Corporation, 2015, 137 F.Supp.3d 817. Constitutional Law 3964; Courts 13.3(8)

Because, under South Carolina law, the state’s long‑arm statute was coextensive with the due process clause, the sole question on motion to dismiss for lack of personal jurisdiction was whether the exercise of personal jurisdiction would violate due process. Tuttle Dozer Works, Inc. v. Gyro‑Trac (USA), Inc., 2006, 463 F.Supp.2d 544. Constitutional Law 3964; Federal Courts 3025(4)

Where a corporation failed to demonstrate statutory authority under South Carolina’s long‑arm statute supporting court’s exercise of personal jurisdiction in an action brought against New York broker and its employee for alleged breach of brokerage agreement to find buyer for corporation’s excess inventory, facts of case also failed to establish that exercise of personal jurisdiction in South Carolina over broker satisfied the standards of due process, where broker and its employee did not make any purposeful effort to develop market, or to solicit business, in South Carolina; rather, broker conducted its dealings with corporation in New York, and all contacts that broker or its employee had with South Carolina were in response to corporation’s requests in connection with enlisting services of broker. Umbro U.S.A., a Div. of Stone Mfg. Co., Inc. v. Goner, 1993, 825 F.Supp. 738.

Long‑arm statute is construed in South Carolina to extend jurisdiction to limits of due process; therefore, since extent of statute and relevant constitutional tests are the same, in declaratory judgment action involving non‑infringement and invalidity of patent, court’s inquiry with respect to patent holder’s assertion that court lacked personal jurisdiction was simply whether exercise of jurisdiction over patent holder would violate his rights to due process. Ryobi America Corp. v. Peters, 1993, 815 F.Supp. 172, 26 U.S.P.Q.2d 1878.

Exercise of personal jurisdiction under this part did not violate the due process principles of the Federal Constitution. Howard v. Allen (D.C.S.C. 1973) 368 F.Supp. 310, affirmed 487 F.2d 1397, certiorari denied 94 S.Ct. 2611, 417 U.S. 912, 41 L.Ed.2d 216.

Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Duplan Corp. v. Deering Milliken, Inc. (D.C.S.C. 1971) 334 F.Supp. 703, 171 U.S.P.Q. 742.

For purposes of meeting due process requirements to assert jurisdiction over nonresident defendant, it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3964

For a forum state to exercise specific jurisdiction over a non‑resident defendant, due process requires that there exist minimum contacts between the defendant and the state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Delta Apparel, Inc. v. Farina (S.C.App. 2013) 406 S.C. 257, 750 S.E.2d 615. Constitutional Law 3964

Courts apply a two‑pronged analysis when determining whether a defendant possesses due process minimum contacts with the forum state such that maintenance of suit pursuant to a court’s specific jurisdiction does not offend traditional notions of fair play and substantial justice; the court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the power to adjudicate the action, and (2) find the exercise of jurisdiction is reasonable or fair. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Constitutional Law 3964

Courts employ a due process analysis to determine whether specific jurisdiction over a nonresident defendant is proper. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Constitutional Law 3964

Due process mandates that the defendant possess sufficient minimum contacts with the forum state, so that he could reasonably anticipate being haled into court there; without minimum contacts, the court does not have the power to adjudicate the action. State v. NV Sumatra Tobacco Trading, Co. (S.C. 2008) 379 S.C. 81, 666 S.E.2d 218, rehearing denied. Constitutional Law 3964

Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. State v. NV Sumatra Tobacco Trading, Co. (S.C. 2008) 379 S.C. 81, 666 S.E.2d 218, rehearing denied. Constitutional Law 3964

Because the state treats its long‑arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process. State v. NV Sumatra Tobacco Trading, Co. (S.C. 2008) 379 S.C. 81, 666 S.E.2d 218, rehearing denied. Constitutional Law 3964; Courts 13.2

For purpose of personal jurisdiction inquiry, the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state, but whether defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there; this theory of personal jurisdiction is known as the “stream of commerce theory.” State v. NV Sumatra Tobacco Trading, Co. (S.C. 2008) 379 S.C. 81, 666 S.E.2d 218, rehearing denied. Constitutional Law 3965(4)

Due process as applied to personal jurisdiction requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state. Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E.2d 476. Constitutional Law 3964

While Section 36‑2‑803 must be construed to extend jurisdiction to the limits imposed by the due process clause, it is subject to the bounds of constitutional due process in that a party must have had such minimal contacts with South Carolina so that maintenance of the action does not offend traditional notions of fair play and substantial justice. Ashy v. WeCare Distributors, Inc. (S.C.App. 1986) 289 S.C. 526, 347 S.E.2d 123.

The South Carolina long‑arm statute, Section 36‑2‑803, is subject to the bounds of constitutional due process, and it may be applied only when the defendant had such minimum contacts with South Carolina that maintenance of the action does not offend traditional notions of fair play and substantial justice. Atlantic Soft Drink Co. of Columbia, Inc. v. South Carolina Nat. Bank (S.C. 1985) 287 S.C. 228, 336 S.E.2d 876.

14. Minimum or substantial contacts test—In general

Georgia police officer lacked minimal contacts with Nevada required for Nevada federal district court to exercise personal jurisdiction over him consistent with due process, in airline passengers’ Bivens action alleging officer violated their Fourth Amendment rights by, inter alia, seizing cash from them in Georgia during their return trip to Nevada, even if officer knew that his allegedly tortious conduct in Georgia would delay return of funds to passengers with connections to Nevada, passengers’ Nevada attorney contacted officer in Georgia, some of the cash seized in Georgia “originated” in Nevada, and funds were eventually returned to passengers in Nevada, where officer approached, questioned, and searched passengers, and seized cash, in Georgia airport, passengers alleged that officer later helped draft false probable cause affidavit to a Georgia office, and officer never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. Walden v. Fiore, 2014, 134 S.Ct. 1115, 188 L.Ed.2d 12, on remand 748 F.3d 1304. Constitutional Law 3965(11); Federal Courts 2756(8)

New Hampshire corporation and its chief executive officer lacked sufficiently continuous and systematic contacts with South Carolina to justify district court’s exercise of general in personam jurisdiction, under South Carolina’s long‑arm statute; although South Carolina sought to vindicate interest of its own citizens and 26 of corporation’s customers resided in South Carolina, all were mail order customers and corporation did not service them in South Carolina, corporation maintained no sales representatives or other agents in South Carolina, and business attributable to corporation’s South Carolina customers constituted less than one‑tenth of one percent of its nationwide sales volume. ESAB Group, Inc. v. Centricut, Inc. (C.A.4 (S.C.) 1997) 126 F.3d 617, 44 U.S.P.Q.2d 1490, certiorari denied 118 S.Ct. 1364, 523 U.S. 1048, 140 L.Ed.2d 513. Federal Courts 2743(1)

Knowledge, on the part of New Hampshire corporation and its chief executive officer, that, by conducting business with Florida resident, they might gain competitive advantage and make sales that South Carolina competitor would otherwise make was insufficient to show that corporation availed itself of privilege of conducting activities in South Carolina, intentionally targeted or focused on South Carolina, or entered South Carolina in some fashion, as would permit exercise of specific jurisdiction under South Carolina’s long‑arm statute. ESAB Group, Inc. v. Centricut, Inc. (C.A.4 (S.C.) 1997) 126 F.3d 617, 44 U.S.P.Q.2d 1490, certiorari denied 118 S.Ct. 1364, 523 U.S. 1048, 140 L.Ed.2d 513. Federal Courts 2732

In an action by a South Carolina resident against a Texas corporation for breach of a contract calling for part performance in South Carolina, minimum contacts sufficient to subject the corporation to the jurisdiction of the South Carolina courts were provided where 5,034 South Carolina residents had charge accounts with the corporation, these charge account customers were all mailed the corporation’s 1977 Christmas catalogs, they presumably also received at least some of the 25 other catalogs and customer mailings sent by the corporation in 1977‑78, and mail orders to the corporation from South Carolina customers in 1977 totaled $59,234; the exercise of personal jurisdiction over the corporation under these circumstances did not offend traditional notions of fair play and substantial justice. Kimbrel v. Neiman‑Marcus (C.A.4 (S.C.) 1981) 665 F.2d 480.

Manufacturer of an allegedly defective airplane engine, a citizen of Delaware and Alabama, had sufficient contacts with South Carolina, where the airplane struck and killed a jogger, to support the court’s exercise of specific personal jurisdiction over the manufacturer, pursuant to South Carolina’s long‑arm statute, in an action brought by the administrator of the jogger’s estate; the manufacturer had sold at least 400 engines directly to South Carolina purchasers for a total revenue of approximately $1,600,000, it advertised in South Carolina through aviation magazines and maintained ongoing relationships with at least 11 stores/service centers in South Carolina airports, and it may have been necessary to apportion liability among multiple claimants and defendants, which could only be done in a single forum. Smith v. Teledyne Continental Motors, Inc., 2012, 840 F.Supp.2d 927. Federal Courts 2743(2)

For purposes of federal statute permitting venue in a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, Georgia tire company was not subject to personal jurisdiction under South Carolina long‑arm statute, and exercise of such jurisdiction would offend due process; products liability complaint did not allege that company transacted any business in South Carolina, entered into any contract to be performed in whole or in part in South Carolina, contracted to supply goods or services in South Carolina, or manufactured or distributed any goods which were used in South Carolina, and did not allege that company committed any tortious act in whole or in part in South Carolina. Butler v. Ford Motor Co., 2010, 724 F.Supp.2d 575. Constitutional Law 3965(4); Federal Courts 2788

Placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed to the forum state for purposes of South Carolina long‑arm statute; there must be some additional conduct to demonstrate an intent to serve the market of the forum state. Butler v. Ford Motor Co., 2010, 724 F.Supp.2d 575. Federal Courts 2743(1)

Texas law firm that associated with South Carolina law firm in asbestos litigation filed in Texas courts had minimum contacts with South Carolina, as required for South Carolina federal court to exercise personal jurisdiction over Texas firm in South Carolina firm’s action alleging breach of contract and other claims; the two firms had worked together on three groups of cases for over 19 years, and Texas firm had visited South Carolina in furtherance of representation of clients in such litigation. Motley Rice, LLC v. Baldwin & Baldwin, LLP, 2007, 518 F.Supp.2d 688. Federal Courts 2746

In an action to pierce the corporate veil and find a corporate director liable for causing his corporation to break its promise to pay the debt of another corporation, a federal court sitting in South Carolina had personal jurisdiction over the nonresident director under Section 36‑2‑803(1), which confers jurisdiction over nonresidents who transact business in the state, even though challenged decisions were made while the nonresident director was outside of the state. Springs Industries, Inc. v. Gasson, 1996, 923 F.Supp. 823.

Defendant pecan grower had sufficient contacts to confer personal jurisdiction on South Carolina courts where: defendant knew that plaintiff was located in South Carolina; defendant knew that a breach of contract would cause injury to plaintiff’s South Carolina business; hoping to elicit a full order, defendant supplied plaintiff with a sample; based on the sample, plaintiff did place an order; and defendant arranged for shipment of the order to South Carolina. The mere fact that plaintiff paid the actual freight costs directly to the shipper could not defeat defendant’s knowledge that its pecans would enter South Carolina. Orangeburg Pecan Co., Inc. v. Farmers Inv. Co., 1994, 869 F.Supp. 351, supplemented 869 F.Supp. 359. Federal Courts 2743(1)

An out‑of‑state licensing board’s single act of mailing a file to South Carolina was insufficient to establish personal jurisdiction under the long arm statute. Jarrett v. State of N.C., 1994, 868 F.Supp. 155.

A Bahamian accounting firm did not have sufficient contacts with South Carolina to satisfy due process requirements for South Carolina’s exercise of personal jurisdiction of nonresident defendant under Section 36‑2‑803, where investors from Texas brought action against Bahamian accounting firm and firm’s United States affiliate, alleging that they lost over a half‑million dollars after investing in company that had its sole asset located in South Carolina, making the investment in reliance upon an unqualified audit letter concerning financial statement of company, which letter was issued by Bahamian accounting firm after its audit of statement; nonresident defendant’s single act of preparing audit letter did not supply sufficient contact with South Carolina to confer personal jurisdiction. Young v. Jones, 1992, 816 F.Supp. 1070, affirmed 103 F.3d 1180, certiorari denied 118 S.Ct. 329, 522 U.S. 928, 139 L.Ed.2d 255.

Although Section 36‑2‑803 provided statutory authority for assertion of personal jurisdiction over defendant manufacturer of circuit boards, Fourteenth Amendment barred haling defendant into court in South Carolina where defendant was located in and only did business in Illinois and had only supplied circuit boards to plaintiff in South Carolina after contacts initiated by plaintiff. Wells American Corp. v. Sunshine Electronics, 1989, 717 F.Supp. 1121.

Single contact with South Carolina is sufficient to give forum personal jurisdiction over defendant when contact gives rise to, or figures prominently in, cause of action under consideration. Long v. Baldt (D.C.S.C. 1979) 464 F.Supp. 269. Federal Courts 2726(3)

Given publisher’s ongoing, purposeful contacts with State of South Carolina: its active attempts to develop national market in readership, its distribution of large numbers of magazines in state, its use of South Carolina circulation figures to, in some degree, attract other advertisers to the magazine; and given the fact that alleged cause of action arose directly from said contacts, it would be imminently unfair to allow defendant to avoid jurisdiction in this state. David v. National Lampoon, Inc. (D.C.S.C. 1977) 432 F.Supp. 1097.

Distribution of 4,266 magazines per month in addition to “special” issues within state is in and of itself quite substantial contact with State of South Carolina. David v. National Lampoon, Inc. (D.C.S.C. 1977) 432 F.Supp. 1097. Federal Courts 2743(1)

The power of state courts to exercise personal jurisdiction over nonresident defendants is limited to the extent that certain “minimal contacts” within the forum state remain a prerequisite to the exercise of that power. Bass v. Harbor Light Marina, Inc. (D.C.S.C. 1974) 372 F.Supp. 786.

Jurisdiction over a foreign corporation does not attach upon a single sale in South Carolina. Bass v. Harbor Light Marina, Inc. (D.C.S.C. 1974) 372 F.Supp. 786.

That products manufactured by a defendant foreign corporation and bearing its trade name pass through the channels of trade into South Carolina and are resold by independent merchants, is not sufficient to constitute transacting business. Bass v. Harbor Light Marina, Inc. (D.C.S.C. 1974) 372 F.Supp. 786. Courts 13.5(7)

The “minimum contacts” test has been held applicable to individuals as well as to corporations. Segars v. Gomez (D.C.S.C. 1972) 360 F.Supp. 50.

The injury or death must occur in this State to support jurisdiction under subsection (1)(d) and to establish that essential minimal contact of the suit with the local jurisdiction. Jenrette v. Seaboard Coast Line R. Co. (D.C.S.C. 1969) 308 F.Supp. 642.

Publisher of book regarding explosion of gun turret on U.S. Navy battleship had sufficient minimum contacts with state and commercial presence in state to satisfy due process requirements to assert personal jurisdiction in libel action brought by various persons involved in incident; publisher actively sold and disseminated books in state to book stores, educational institutions and public libraries, and publisher’s employees covered state as sales representatives. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3965(8); Courts 13.5(9)

Nonresident author of book and producer of television segment regarding explosion of gun turret on U.S. Navy battleship did not have sufficient minimum contacts with state to satisfy due process requirements to assert personal jurisdiction in libel action brought by various persons involved in incident, even though television program aired in state, author had personal contacts in state, and book was sold in state; incident was of national concern and book and program were not directed to residents of state, author had two minor personal contacts with state, and book and movie arrived in state through efforts of others. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3965(8); Courts 13.5(9)

Nonresident contributor to book regarding explosion of gun turret on U.S. Navy battleship did not have sufficient minimum contacts with state to satisfy due process requirements to assert personal jurisdiction in libel action brought by various persons involved in incident; assistance to author as source was provided outside state, and contributor had no other contacts with state. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3965(8); Courts 13.5(9)

A single act that causes harm in the state may create sufficient minimum contacts to satisfy due process requirements in order to assert jurisdiction over a nonresident defendant where the harm arises out of or relates to that act. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3964

Although a single act may support jurisdiction over a nonresident defendant without violating due process requirements, it must create a “substantial connection” with the forum. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3964

A single transaction in the state is sufficient to confer jurisdiction over a nonresident defendant if due process requirements of traditional notions of fair play and substantial justice are met. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3964

Slovenian publisher of online and print newspaper in Slovene language did not have requisite minimal contacts with South Carolina to warrant exercise of personal jurisdiction in suit by corporation arguing that the publisher maliciously published articles that contained falsities regarding Slovenian businessman associated with the corporation; publisher did not have any subscribers in the state and did not direct any online business activity towards the state, publisher did not publish any articles in English language, and mere accessibility of the articles via internet by someone located in state was not sufficient. Hidria, USA, Inc. v. Delo (S.C.App. 2016) 415 S.C. 533, 783 S.E.2d 839. Courts 13.5(9)

For a forum state to exercise specific jurisdiction over a non‑resident defendant, due process mandates that the defendant possess sufficient minimum contacts with the state, so that he could reasonably anticipate being haled into court there. Delta Apparel, Inc. v. Farina (S.C.App. 2013) 406 S.C. 257, 750 S.E.2d 615. Constitutional Law 3964

If a non‑resident defendant does not have minimum contacts with the forum state sufficient for its exercise of specific jurisdiction over him, the trial court does not have the power to adjudicate the action against the defendant. Delta Apparel, Inc. v. Farina (S.C.App. 2013) 406 S.C. 257, 750 S.E.2d 615. Courts 13.3(8)

Negotiating or executing a contract in a forum state, without more, is not enough to establish sufficient minimum contacts by a non‑resident defendant with the state, as required for the state to exercise specific jurisdiction over him; rather, the contracting parties’ prior negotiations, the consequences of their actions as contemplated by the parties, the terms of the contract, and the parties’ actual course of dealings must be considered in evaluating whether a defendant purposefully established minimum contacts within the state. Delta Apparel, Inc. v. Farina (S.C.App. 2013) 406 S.C. 257, 750 S.E.2d 615. Courts 13.3(11)

Non‑resident former manager of corporation’s Honduran textiles plant did not have sufficient minimum contacts with South Carolina, as required for South Carolina to exercise specific jurisdiction over him in corporation’s action against him alleging that manager breached employment agreement and made fraudulent representations to Honduran court in connection with prior action between manager and plant; although manager may have spoken with officers who worked in corporation’s South Carolina offices, there was no evidence to show that manager ever traveled to South Carolina for those conversations, manager worked in Honduras during his employment, manager’s severance settlement with corporation was executed and filed in Georgia, and California Tax Board sent its requests to withhold money from manager’s paychecks to corporation’s Georgia offices. Delta Apparel, Inc. v. Farina (S.C.App. 2013) 406 S.C. 257, 750 S.E.2d 615. Courts 13.5(3); Courts 13.5(10)

Nonresident restaurant owners had sufficient due process minimum contacts with forum state to support specific personal jurisdiction in restaurant consultant’s breach of contract action, where owners met with manager in forum state regarding his interest in helping start a new restaurant, owners met with consultant in forum state regarding consultant’s interest in starting a new restaurant, and owners met with architect for restaurant in forum state. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3965(10); Courts 13.6(8)

Nonresident restaurant had sufficient due process minimum contacts with forum state to support specific personal jurisdiction over restaurant in restaurant consultant’s breach of contract action, where part of consultant’s contract was to be performed in forum state, and cause of action arose from the breach of that contract. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3965(5); Courts 13.5(3)

To satisfy the power prong of the due process analysis to support specific jurisdiction over a nonresident defendant, with minimum contacts providing the court with the power to adjudicate the action, the court must find the defendant directed his activities to residents of the forum state and that the cause of action arises out of or relates to those activities. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3964

Courts apply a two‑pronged analysis when determining whether a nonresident defendant possesses due process minimum contacts with the forum state such that maintenance of suit pursuant to a court’s specific jurisdiction does not offend traditional notions of fair play and substantial justice; the court must find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the power to adjudicate the action, and find the exercise of jurisdiction is reasonable or fair. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3964

Due process requirement for the exercise of specific jurisdiction mandates that a nonresident defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being haled into court there. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3964

Due process requires that a nonresident defendant possess minimum contacts with the forum state such that maintenance of suit pursuant to court’s specific jurisdiction does not offend traditional notions of fair play and substantial justice. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3964

Nonresident restaurant and restaurant owners individually had sufficient due process minimum contacts with forum state to support specific personal jurisdiction in restaurant manager’s breach of contract action, where restaurant was present in forum state via its owners, restaurant directed its activities toward forum state by soliciting and contracting with manager, and restaurant hired some service providers from forum state to assist with constructing restaurant in different state. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Constitutional Law 3965(5); Constitutional Law 3965(10); Courts 13.5(3); Courts 13.6(8)

Nonresident restaurant and restaurant owners individually did not have sufficient due process minimum contacts with forum state based solely on contract with restaurant manager to support the exercise of specific personal jurisdiction in manager’s breach of contract action, where manager knew restaurant was located in a different state and that his work would occur in a different state, and manager knew that restaurant’s principal place of business was in a different state. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Constitutional Law 3965(5); Constitutional Law 3965(10); Courts 13.5(3); Courts 13.6(8)

Due process requirement for the exercise of specific jurisdiction mandates that a nonresident defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being haled into court there. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Constitutional Law 3964

Due process requires that a nonresident defendant possess minimum contacts with the forum state such that maintenance of suit pursuant to a court’s specific jurisdiction does not offend traditional notions of fair play and substantial justice. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Constitutional Law 3964

Courts may have specific jurisdiction over a cause of action arising from a nonresident defendant’s contacts with the state pursuant to the long‑arm statute. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 475, 676 S.E.2d 706. Courts 13.3(8)

Although not controlling, a choice of law provision in a contract is relevant in deciding whether to exercise personal jurisdiction. Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E.2d 476. Courts 25

Patients’ payment on the contract in South Carolina was insufficient to justify the exercise of specific personal jurisdiction over non‑resident physician and his fertility clinic in suit brought by patients whose baby conceived through in vitro fertilization (IVF) and implanted as an embryo was born with Down Syndrome, alleging failure to inform patients of availability of pre‑implantation genetic testing. Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E.2d 476. Courts 13.5(11)

Issue of South Carolina physician’s agency relationship with North Carolina physician and clinic was not preserved on appeal from dismissal for lack of personal jurisdiction; nothing in the record indicated that issue of agency was ever considered or ruled upon by the trial judge. Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E.2d 476. Appeal And Error 169

Allegation that out‑of‑state bank holding company owned 100 percent of the stock of its subsidiary did not establish minimum contacts with South Carolina, as element under due process for exercising personal jurisdiction over the bank holding company pursuant to the long‑arm statute, in action by franchisor, corporate franchisee, and corporate franchisee’s owner, relating to loan from subsidiary to franchisee and liquidation of collateral pursuant to subordination agreement between subsidiary and franchisor. Builder Mart of America, Inc. v. First Union Corp. (S.C.App. 2002) 349 S.C. 500, 563 S.E.2d 352. Banks And Banking 528; Constitutional Law 3965(7)

The issuance of a letter of credit by a Florida bank did not establish the minimum contacts necessary to subject the bank to South Carolina’s long‑arm statute, Section 36‑2‑803, merely by naming a South Carolina company as beneficiary where the letter was requested by a Florida Company with whom the South Carolina company wished to do business. Southern Plastics Co. v. Southern Commerce Bank (S.C. 1992) 310 S.C. 256, 423 S.E.2d 128.

A Texas partnership purposely established sufficient minimum contacts in South Carolina to satisfy the requirements of due process for exercising personal jurisdiction over the partnership, where the partnership voluntarily contracted with a South Carolina corporation, and it knew that the corporation was located in South Carolina, that South Carolina law applied to the contract, and that a breach of contract would cause injury to a South Carolina resident. Springmasters, Inc. v. D & M Mfg. (S.C.App. 1991) 303 S.C. 528, 402 S.E.2d 192.

An Oklahoma corporation, which allegedly entered into a contract with a South Carolina broker to sell an aircraft, did not have sufficient minimum contacts with South Carolina to satisfy due process requirements for the exercise of personal jurisdiction over the corporation, where the corporation’s president merely signed a letter in Oklahoma and returned it to the broker at the broker’s request, every communication between the corporation and the broker was initiated by the broker, and the corporation merely acquiesced to the broker’s unilateral, unsolicited attempt to sell the corporation’s plane. Aviation Associates and Consultants, Inc. v. Jet Time, Inc. (S.C. 1991) 303 S.C. 502, 402 S.E.2d 177. Constitutional Law 3965(4); Courts 13.5(3)

A nonresident defendant had sufficient minimum contacts with South Carolina to satisfy due process requirements, such that South Carolina’s exercise of personal jurisdiction over the defendant under Section 36‑2‑803 was proper, where the defendant participated in a transaction involving South Carolina parties for several months, the pleadings alleged that the plaintiff was the object of tortious conduct which resulted in a financial benefit to the defendant, the defendant participated extensively in the transaction which involved the formation of a corporation, the plaintiff was a major investor and would have been a necessary party to ongoing business transactions involving the defendant, and the by‑laws of the corporation stated that Spartanburg, South Carolina was to be the principal place of business and Spartanburg was listed on the corporate stationery. Thus, the defendant’s motion to dismiss under Rule 12(b)(2) of the South Carolina Rules of Civil Procedure for lack of jurisdiction was properly denied. Hammond v. Butler, Means, Evins & Brown (S.C. 1990) 300 S.C. 458, 388 S.E.2d 796, certiorari denied 111 S.Ct. 373, 498 U.S. 952, 112 L.Ed.2d 335.

A nonresident did not have sufficient “minimum contacts” with South Carolina, such that the exercise of personal jurisdiction over the nonresident would comport with due process, where the nonresident’s only contacts with South Carolina were that she attended the closing on the sale of her mother’s home in South Carolina, she tended to the sale of some of her mother’s furniture, she was given a power of attorney which was executed and recorded in South Carolina and authorized her to transact business in South Carolina but was never exercised in this state, she made 2 trips to South Carolina since 1983 without explaining the purpose of the trips, and she allegedly made an oral trust agreement with the plaintiffs, but there was no allegation that the agreement was formed in South Carolina or that it was to be performed in South Carolina. White v. Stephens (S.C. 1990) 300 S.C. 241, 387 S.E.2d 260.

A court’s exercise of personal jurisdiction over a Hawaii corporation in a breach of contract action satisfied Section 36‑2‑803 and the constitutional due process requirements where the Hawaii corporation’s contact with a South Carolina corporation was deliberate and extended over at least a 10‑month period, the Hawaii corporation conducted 2 inspections of goods in South Carolina, and the contract between the parties incorporated the applicable laws of any state. Colite Industries, Inc. v. G.W. Murphy Const. Co., Inc. (S.C. 1989) 297 S.C. 426, 377 S.E.2d 321. Constitutional Law 3965(4); Courts 13.5(3)

There were sufficient minimum contacts to satisfy the due process clause and to allow personal jurisdiction to be exercised over a national bank whose principal place of business was in New York where the national bank issued a letter of credit which produced significant consequences in South Carolina, a South Carolina corporation relied on the letter of credit in its transaction with a customer of the national bank, the letter of credit was valid for approximately six weeks, the national bank retained a continuing course of contact with a South Carolina bank throughout the entire period that the letter of credit was in effect, the national bank issued explicit instructions regarding the letter of credit, was responsible for the ultimate acceptance or rejection of drafts on the letter of credit, and ultimately paid the first draft on the letter of credit, and where the South Carolina corporation received payment on the first draft in South Carolina by way of a cashier’s check issued by the South Carolina bank at the national bank’s instruction. Atlantic Soft Drink Co. of Columbia, Inc. v. South Carolina Nat. Bank (S.C. 1985) 287 S.C. 228, 336 S.E.2d 876.

In an action for breach of warranty in the sale of an engine, there were sufficient minimum contacts in South Carolina to subject the seller of the engine, a Florida corporation, to South Carolina jurisdiction under Section 36‑2‑803 where the seller communicated with a South Carolina corporation and gave the South Carolina corporation instructions with respect to warranty coverage, inspection, and repair of the engine, and relied on information from the South Carolina corporation in making the decision that additional repairs were not covered by the warranty. Hammond v. Cummins Engine Co., Inc. (S.C. 1985) 287 S.C. 200, 336 S.E.2d 867.

Under Section 36‑2‑803, South Carolina courts had in personam jurisdiction over a foreign bank in an action brought on a check on which the bank had stopped payment since the bank had accounts with three large retail chain stores of different natures operating in the state, since the accounts were on‑going, continuous relationships with businesses in the state, since the bank had contracted directly with a South Carolina corporation, and since there were numerous other minor contacts with the state such as loans, security agreements, and various depositors. Krell v. Carolina Bank (S.C.App. 1984) 283 S.C. 5, 320 S.E.2d 491. Banks And Banking 18

Foreign food‑processing corporation was subject to in personum jurisdiction where business consisted of shipment of over 25,000 cases of food stuffs to wholesale and retail distributors in South Carolina, and a substantial portion of this business was negotiated by a broker in this state. Troy H. Cribb & Sons, Inc. v. Cliffstar Corp. (S.C. 1979) 273 S.C. 623, 258 S.E.2d 108.

Bank had sufficient contacts with South Carolina to permit exercise of state court jurisdiction in action for breach of contract under Section 36‑2‑803, where bank had received and loaned money in South Carolina county and thus was branch banking in that county within meaning of 12 USCA Section 36(f). Southland Mobile Homes of South Carolina, Inc. v. Associates Financial Services Co., Inc. (S.C. 1978) 270 S.C. 527, 244 S.E.2d 212, certiorari denied 99 S.Ct. 266, 439 U.S. 900, 58 L.Ed.2d 248.

Minimal contacts necessary to constitutionally subject architect to reach of South Carolina jurisdiction were found to exist where building located in State allegedly by collapsed due to negligent design (causing intestate’s death), since, (1) although architect came to South Carolina on only one occasion, his activities in designing building took place over extended period of time, during which he was constantly in touch by telephone with owners of property in South Carolina concerning construction, (2) it was reasonable to conclude that most witnesses in case would be located in South Carolina, and (3) South Carolina had interest in protecting its citizens from negligently designed buildings. Parker v. Williams & Madjanik, Inc. (S.C. 1978) 270 S.C. 570, 243 S.E.2d 451.

14.3. —— Power, minimum or substantial contacts test

Under the power prong of due process analysis for personal jurisdiction over a nonresident defendant, a minimum contacts analysis requires a court to find that the defendant directed its activities to residents of the state and that the cause of action arises out of or relates to those activities. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3964

Under the power prong for assertion of personal jurisdiction pursuant to the long‑arm statute, the court must determine whether the defendant’s minimum contacts with the forum state are sufficient to satisfy due process, by focusing on the contacts generated by the defendant, not the unilateral actions or letters of the plaintiff. Builder Mart of America, Inc. v. First Union Corp. (S.C.App. 2002) 349 S.C. 500, 563 S.E.2d 352. Constitutional Law 3964; Courts 13.3(3)

14.6. —— Fairness, minimum or substantial contacts test

It was not reasonable to subject North Carolina non‑profit educational organization to the district court’s jurisdiction, as would support finding that district court lacked specific jurisdiction under South Carolina’s long‑arm statute in student’s ADA action, where organization not have a systematic and continuous presence in South Carolina and where student’s causes of action arose largely from actions taken by organization in North Carolina. E.E. by and through Epsey v. Eagle’s Nest Foundation, 2016, 200 F.Supp.3d 626. Federal Courts 2740

For a forum state to exercise specific jurisdiction over a non‑resident defendant, the trial court must find that the exercise of jurisdiction is reasonable or fair. Delta Apparel, Inc. v. Farina (S.C.App. 2013) 406 S.C. 257, 750 S.E.2d 615. Courts 13.3(8)

Exercise of specific personal jurisdiction over nonresident restaurant owners in restaurant consultant’s breach of contract action was reasonable and fair, as required under due process clause, where owners hired forum state businesses and met with them in forum state, the character and circumstances of owners’ negotiations and meetings in forum state were essential to restaurant’s successful opening, it was not a significant inconvenience to either party to adjudicate the suit in forum state given restaurant’s proximity, and forum state had an interest in providing redress for its citizens and enough business was conducted within the state to warrant adjudication of the suit. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3965(10); Courts 13.6(8)

Exercise of specific personal jurisdiction over nonresident restaurant in restaurant consultant’s breach of contract action was reasonable and fair, as required under due process clause, where restaurant’s activities within the forum state were continuous, consultant performed part of his contract in forum state, it was not a significantly inconvenience to either party adjudicate the suit in the forum state, and state had an interest in providing redress for its citizens. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3965(5); Courts 13.5(3)

Under the fairness prong of the due process analysis employed to assert specific jurisdiction over a nonresident defendant, the court must consider the following factors: (1) the duration of the defendant’s activity in the forum state; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the forum state’s interest in exercising jurisdiction. Cribb v. Spatholt (S.C.App. 2009) 382 S.C. 490, 676 S.E.2d 714. Constitutional Law 3964

Under the fairness prong of the personal jurisdiction analysis, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident’s acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State’s interest in exercising jurisdiction. State v. NV Sumatra Tobacco Trading, Co. (S.C. 2008) 379 S.C. 81, 666 S.E.2d 218, rehearing denied. Courts 13.3(1); Courts 13.3(3)

In addition to establishing existence of minimum contacts necessary to exercise personal jurisdiction over a nonresident defendant, the court must also find that the exercise of jurisdiction is reasonable or fair; if either prong fails, the exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process. State v. NV Sumatra Tobacco Trading, Co. (S.C. 2008) 379 S.C. 81, 666 S.E.2d 218, rehearing denied. Constitutional Law 3964; Courts 13.3(2)

Non‑resident former corporate officer’s contacts with state were such that exercise of jurisdiction would comport with due process requirements of minimum contacts and not offend traditional notions of fair play and substantial justice, in action by corporation alleging officer planned to operate competing business in violation of Trade Secrets Act; officer could reasonably anticipate being haled into court by owning and operating business in state, having formerly worked for corporation in state, and allegedly committing wrongful acts in state. QZO, Inc. v. Moyer (S.C.App. 2004) 358 S.C. 246, 594 S.E.2d 541, rehearing denied, certiorari denied. Constitutional Law 3965(10); Courts 13.5(2)

Under the fairness prong of the due process inquiry regarding assertion of personal jurisdiction pursuant to the long‑arm statute, the defendant’s minimum contacts with the forum state must be sufficient so that the defendant would reasonably anticipate being haled into court in the forum state, or the defendant must have purposefully availed itself of activities within the forum state. Builder Mart of America, Inc. v. First Union Corp. (S.C.App. 2002) 349 S.C. 500, 563 S.E.2d 352. Constitutional Law 3964

Under the fairness prong of the due process inquiry regarding assertion of personal jurisdiction pursuant to the long‑arm statute, the court examines such factors as the burden on the defendant, the extent of the plaintiff’s interest, South Carolina’s interest, efficiency of adjudication, and the several States’ interest in substantive social policies. Builder Mart of America, Inc. v. First Union Corp. (S.C.App. 2002) 349 S.C. 500, 563 S.E.2d 352. Constitutional Law 3964

15. Corporations, shareholders, officers and employees

An action against a nonresident corporate director, who allegedly caused his corporation to renege on its obligation to pay a debt owed by a second corporation to a South Carolina creditor, did not offend traditional notions of fair play and substantial justice, especially as the director was already involved with South Carolina corporations and had already appeared in South Carolina court. Springs Industries, Inc. v. Gasson, 1996, 923 F.Supp. 823.

The court could exercise personal jurisdiction over a corporation’s president where: the president was a part owner of a South Carolina warehouse rented by the corporation; he traveled to South Carolina twice a year as president of the corporation; he allegedly made numerous phone calls to South Carolina to discuss the transaction; and he allegedly discussed the transaction with the plaintiffs while in South Carolina. Sheppard v. Jacksonville Marine Supply, Inc., 1995, 877 F.Supp. 260.

The court could not exercise personal jurisdiction over a corporation’s vice‑president where the vice‑president was a part owner of a South Carolina warehouse rented by corporation but rarely traveled to South Carolina and did not negotiate the relevant transaction with the plaintiffs. Sheppard v. Jacksonville Marine Supply, Inc., 1995, 877 F.Supp. 260.

Corporate employee is not protected by fiduciary shield doctrine and will fall under District Court’s jurisdiction for tortious acts committed outside state on behalf of corporation if such employee has reason to foresee responsibility in state for such acts. It is inconceivable that employee who cleverly refrains from committing tortious acts in forum state can be allowed to evade being brought into court there while less savvy employee who commits acts in forum state may be brought into court there, where both are acting on behalf of employers with purpose of injuring plaintiff residing in forum state. Thus on basis of plaintiff’s numerous specific allegations against defendant corporate officers showing direct, personal involvement in some decision or action causally related to plaintiffs’ alleged injuries, defendants are amenable to suit in South Carolina. Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc., 1992, 784 F.Supp. 306.

In addition to having personal jurisdiction over railroad, which was a foreign corporation, under long‑arm statute, trial court also had jurisdiction over railroad under statute allowing jurisdiction over person doing business in state, and thus trial court had discretionary authority to change venue based on convenience of witnesses and ends of justice in locomotive engineer’s action, which was brought under Federal Employer’s Liability Act (FELA) and federal Locomotive Inspection Act (LIA) and which arose from injuries that engineer allegedly suffered as result of exposure to excessive heat in locomotive cab; evidence indicated that railroad conducted business in state, owned property in state, and had agent for service of process in state. Whaley v. CSX Transp., Inc. (S.C. 2005) 362 S.C. 456, 609 S.E.2d 286, rehearing denied. Courts 13.5(1); Venue 52(1)

An insurance pool in Georgia, which provided benefits owed to insureds by insurers who became insolvent, was amenable to suit in a South Carolina workers’ compensation proceeding pursuant to the long‑arm statute, Section 36‑2‑803, where an insurer whose obligations had been assumed by the pool had contracted with a Georgia employer to insure risk in South Carolina, thus making the insurer subject to in personam jurisdiction, and the pool subject to such jurisdiction as the insurer’s alter‑ego or agent. Bell v. Senn Trucking Co. of Newberry (S.C. 1992) 308 S.C. 364, 418 S.E.2d 310, rehearing denied. Workers’ Compensation 1187

Exercise of jurisdiction over nonresident sole shareholder of corporation was consonant with due process because nature of shareholder’s activity in State constituted minimum contacts sufficient to satisfy due process; shareholder had purposely entered into stock purchase agreement in State, to be partly performed in State; State had legitimate interest in providing means for its citizens to seek redress against foreign parties who allegedly breached contracts with its citizens; and, shareholder had not demonstrated any undue hardship in requiring him to defend suit in State. Fields v. INA Filtration Corp. (S.C.App. 1987) 292 S.C. 614, 358 S.E.2d 160.

Trial court properly found personal jurisdiction over sole shareholder of corporation pursuant to Section 36‑2‑803(1)(g) where corporation’s former president, in his complaint and affidavit, demonstrated that stock option agreement was actually signed by both parties in South Carolina and contemplated sale and transfer of stock in South Carolina; option was at least partially exercised in South Carolina early in 1982, and stock was issued in South Carolina; it was also alleged that tender of repurchase of stock was made in State. Fields v. INA Filtration Corp. (S.C.App. 1987) 292 S.C. 614, 358 S.E.2d 160.

A foreign corporation doing business in this State through an agent is subject to in personam jurisdiction as if the corporation itself was doing business. Engineered Products v. Cleveland Crane and Engineering (S.C. 1974) 262 S.C. 1, 201 S.E.2d 921.

15.5. Non‑profit organizations

Offer letter mailed to student in South Carolina regarding position at North Carolina non‑profit organization’s summer camp, which student signed and mailed back to organization, along with payment for the position, did not establish due process minimum contacts sufficient to subject organization to specific personal jurisdiction under South Carolina’s long‑arm statute in student’s ADA action following organization’s rescission of offer, where student’s participation as counselor was to have been performed in North Carolina, student initiated contact by first applying to be a counselor, parties’ communications concerning the job application and the subsequent contract were not extensive, and organization’s decision that student could no longer be counselor was partially formed in South Carolina. E.E. by and through Epsey v. Eagle’s Nest Foundation, 2016, 200 F.Supp.3d 626. Courts 13.3(8)

Under South Carolina’s long‑arm statute, specific jurisdiction over North Carolina non‑profit education organization that was a defendant in student’s ADA action did not arise from organization’s contact in South Carolina through its collaboration with a camp representative in South Carolina, who was student’s mother, where tuition discounts mother received from organization and used for student’s tuition to organization’s program were not used for programs that were the subject of the ADA action, and student’s ADA claims did not relate to his mother’s service as a camp representative. E.E. by and through Epsey v. Eagle’s Nest Foundation, 2016, 200 F.Supp.3d 626. Federal Courts 2750

16. Co‑conspirators

Under provisions of Section 36‑2‑803(1) which confer long‑arm jurisdiction when a tort is committed in South Carolina, a federal district court had personal jurisdiction over a nonresident corporate director who allegedly conspired with another director to cause their corporation to renege on its promise to pay the debts of a second corporation, where the alleged wrongful action was taken by the director’s conspirator in South Carolina. Springs Industries, Inc. v. Gasson, 1996, 923 F.Supp. 823. Federal Courts 2756(9)

Allegations contained in a plaintiff’s pleadings and affidavits were sufficient to invoke the long‑arm statute under the provisions of Section 36‑2‑803(1)(c) where the plaintiff alleged that a non‑resident conspired with South Carolina residents to defraud him, that the plan was carried out by delay and misrepresentations, and that as a result of this alleged conspiracy he had been injured, since in certain instances, an out‑of‑state defendant may be subject to jurisdiction under a long‑arm statute on the theory that his or her co‑conspirator conducted activities in a particular state pursuant to the conspiracy. Hammond v. Butler, Means, Evins & Brown (S.C. 1990) 300 S.C. 458, 388 S.E.2d 796, certiorari denied 111 S.Ct. 373, 498 U.S. 952, 112 L.Ed.2d 335. Courts 13.6(7)

17. Trusts and trustees

In an action alleging trust mismanagement, defendant trustees’ motion to dismiss for lack of personal jurisdiction would be denied where, inter alia, repeated visits to the state by one defendant, continuous financial transactions with several state residents, as well as defendants’ ownership interests in property in the state provided proper statutory and constitutional bases for personal jurisdiction. Long v. Baldt (D.C.S.C. 1979) 464 F.Supp. 269.

In action charging mismanagement of trust funded by income from stock in corporation of which trustees were officers, directors, and controlling stockholders, jurisdictional requirements of Code 1976 Section 36‑2‑803 were met where trustee made many trips to South Carolina involving combination of trust and corporate business, and visits appeared to be connected with transactions forming major part of cause of action. Long v. Baldt (D.C.S.C. 1979) 464 F.Supp. 269.

18. Partnerships and partners

Partner’s acts brought him within scope of South Carolina’s long‑arm statute, where partner entered into contract to be performed partly in South Carolina when he signed partnership agreement, partnership of which he was member transacted business and supplied accounting services in South Carolina for over 2 years, and partnership also contracted to provide retirement benefits to retiring partners, and provided these benefits to plaintiff in South Carolina for more than 2 years. Lackey v. Treadwell (S.C.App. 1984) 282 S.C. 81, 316 S.E.2d 724.

19. Real estate

In an action for a deficiency judgment brought by a holder of a second mortgage on real estate against a purchaser of the land who had assumed two mortgages on the property, the circuit court had personal jurisdiction under Section 36‑2‑803 since the purchaser had an interest in the land which gave rise to the cause of action. Bartles v. Livingston (S.C.App. 1984) 282 S.C. 448, 319 S.E.2d 707.

20. Banks

In an action by a South Carolina plaintiff against a Chicago bank, alleging that the bank induced him to enter into a scheme promoted by others to invest in cattle, by representing that the bank would finance the promoters, where the plaintiff’s only connection with the bank was the promoters’ showing plaintiff a message from the bank containing information about the venture and a call by the plaintiff to the bank’s Chicago office, and where the bank had no connection with the promoters, the bank had insufficient contact with South Carolina to submit to its jurisdiction. Anthony v. Drovers Nat. Bank of Chicago (D.C.S.C. 1975) 405 F.Supp. 626.

Bank is subject to jurisdiction of South Carolina under 28 USCA Section 1348, and venue is proper under Section 12 USCA Section 94, in county of South Carolina where bank had received and loaned money through affiliated financial institution. Southland Mobile Homes of South Carolina, Inc. v. Associates Financial Services Co., Inc. (S.C. 1978) 270 S.C. 527, 244 S.E.2d 212, certiorari denied 99 S.Ct. 266, 439 U.S. 900, 58 L.Ed.2d 248.

21. Particular cases

Cypriot company was not subject to personal jurisdiction in South Carolina in action arising from massive Ponzi scheme characterized by fraudulent loans secured by borrowers’ publicly traded stock, even though its chief executive officer (CEO) and legal advisor conducted some business in relation to loan scheme while employed by company, including contacting businesses and individuals in South Carolina using its fax machines and email accounts, where company was engaged in business of distributing health and beauty products outside of United States, there was no indication that they were acting within scope of their employment, and plaintiffs never argued that no state could exercise personal jurisdiction over company. Grayson v. Anderson (C.A.4 (S.C.) 2016) 816 F.3d 262. Federal Courts 2760(1)

Unaccompanied by other evidence, fact that South Carolina corporation felt lost sales due to New Hampshire corporation’s business dealing with Florida resident was too unfocused to justify personal jurisdiction under South Carolina’s long‑arm statute. ESAB Group, Inc. v. Centricut, Inc. (C.A.4 (S.C.) 1997) 126 F.3d 617, 44 U.S.P.Q.2d 1490, certiorari denied 118 S.Ct. 1364, 523 U.S. 1048, 140 L.Ed.2d 513. Federal Courts 2732

Manufacturers of ocean‑going vessel and cargo winch installed on vessel could not be haled into court in South Carolina under state’s long‑arm statutes where manufacturers were located in Wisconsin and Michigan respectively and circumstances leading to accident in South Carolina did not comport with “stream of commerce” theory of acquiring jurisdiction. Federal Ins. Co. v. Lake Shore Inc. (C.A.4 (S.C.) 1989) 886 F.2d 654.

District court in South Carolina did not have general personal jurisdiction over holding company of store operator in discrimination action; holding company was incorporated in Delaware, holding company’s principal place of business was in Rhode Island, and holding company did not have any enduring relationship with South Carolina. Callum v. CVS Health Corporation, 2015, 137 F.Supp.3d 817. Federal Courts 2750

District court in South Carolina did not have specific personal jurisdiction over holding company of store operator in customer’s action alleging, inter alia, race and disability discrimination; holding company’s alleged South Carolina activities included guaranty of lease on property in South Carolina and payment of settlement to state of South Carolina, neither of which related to customer’s causes of action. Callum v. CVS Health Corporation, 2015, 137 F.Supp.3d 817. Federal Courts 2750

South Carolina courts had personal jurisdiction over a plastic bag manufacturer based on evidence that the bags were present in South Carolina and that defendant had purposefully shipped them into South Carolina through an established distribution channel. Sonoco Products Co. v. Inteplast Corp., 1994, 867 F.Supp. 352.

A Bahamian accounting firm did not have sufficient contacts with South Carolina to satisfy due process requirements for South Carolina’s exercise of personal jurisdiction of nonresident defendant under Section 36‑2‑803, where investors from Texas brought action against Bahamian accounting firm and firm’s United States affiliate, alleging that they lost over a half‑million dollars after investing in company that had its sole asset located in South Carolina, making the investment in reliance upon an unqualified audit letter concerning financial statement of company, which letter was issued by Bahamian accounting firm after its audit of statement; nonresident defendant’s single act of preparing audit letter did not supply sufficient contact with South Carolina to confer personal jurisdiction. Young v. Jones, 1992, 816 F.Supp. 1070, affirmed 103 F.3d 1180, certiorari denied 118 S.Ct. 329, 522 U.S. 928, 139 L.Ed.2d 255.

In legal malpractice action brought in District Court sitting in South Carolina against members of Tennessee law firm, contacts required to establish in personam jurisdiction over defendants are sufficient where individual member of law firm, acting on behalf of firm, served more than 10 years as legal counsel to South Carolina corporation in which plaintiffs hold stock, throughout 10 year period, corporation was doing business in South Carolina and defendant was required to make numerous trips to South Carolina to attend corporate meetings and furnish legal advice; defendant is considered to have contracted to perform services as corporate counsel of South Carolina corporation, services were to have been performed, at least in part, in South Carolina, and defendant came to South Carolina on numerous occasions in order to transact business in furtherance of such contract. Turner v. Pemberton (D.C.S.C. 1983) 558 F.Supp. 1065.

Publisher of book regarding explosion of gun turret on U.S. Navy battleship had sufficient minimum contacts with state and commercial presence in state to satisfy due process requirements to assert personal jurisdiction in libel action brought by various persons involved in incident; publisher actively sold and disseminated books in state to book stores, educational institutions and public libraries, and publisher’s employees covered state as sales representatives. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3965(8); Courts 13.5(9)

Nonresident author of book and producer of television segment regarding explosion of gun turret on U.S. Navy battleship did not have sufficient minimum contacts with state to satisfy due process requirements to assert personal jurisdiction in libel action brought by various persons involved in incident, even though television program aired in state, author had personal contacts in state, and book was sold in state; incident was of national concern and book and program were not directed to residents of state, author had two minor personal contacts with state, and book and movie arrived in state through efforts of others. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3965(8); Courts 13.5(9)

Nonresident contributor to book regarding explosion of gun turret on U.S. Navy battleship did not have sufficient minimum contacts with state to satisfy due process requirements to assert personal jurisdiction in libel action brought by various persons involved in incident; assistance to author as source was provided outside state, and contributor had no other contacts with state. Moosally v. W.W. Norton & Co., Inc. (S.C.App. 2004) 358 S.C. 320, 594 S.E.2d 878, on remand 2004 WL 5203317. Constitutional Law 3965(8); Courts 13.5(9)

Slovenian publisher of online and print newspaper had no manifest intent to target South Carolina readers, as could justify exercise of personal jurisdiction under effects test, in suit by corporation arguing that the publisher maliciously published articles that contained falsities regarding Slovenian businessman associated with corporation; newspaper was published only in Slovene language and was directed at citizens in Slovenia regarding matters of local and national interest, publisher distributed no hard copies of paper in state, web traffic from state was insignificant, and articles in question concerned business activities and lifestyle of Slovenian businessman with only passing references to corporation. Hidria, USA, Inc. v. Delo (S.C.App. 2016) 415 S.C. 533, 783 S.E.2d 839. Courts 13.5(9)

The unilateral assertion by franchisor, in its letter to subsidiary of out‑of‑state bank holding company, that liquidation of franchisee’s collateral pursuant to subordination agreement between subsidiary and franchisor would require performance of the subordination agreement in South Carolina, did not establish minimum contacts with South Carolina, as element under due process for exercising personal jurisdiction over the bank holding company pursuant to the long‑arm statute, in action by franchisor, corporate franchisee, and corporate franchisee’s owner, relating to loan from subsidiary to franchisee and liquidation of collateral. Builder Mart of America, Inc. v. First Union Corp. (S.C.App. 2002) 349 S.C. 500, 563 S.E.2d 352. Banks And Banking 528; Constitutional Law 3965(7)

Letter from president of out‑of‑state bank holding company to out‑of‑state owner of out‑of‑state corporate debtor, expressing concern about the loan by bank holding company’s subsidiary to debtor, did not provide a basis for personal jurisdiction over bank holding company pursuant to the long‑arm statute, in action relating to the loan and liquidation of collateral. Builder Mart of America, Inc. v. First Union Corp. (S.C.App. 2002) 349 S.C. 500, 563 S.E.2d 352. Banks And Banking 528

A trial judge erred in exercising personal jurisdiction over an Oklahoma corporation, since the corporation did not transact business in South Carolina or enter into a contract to be performed in whole or in part in South Carolina, where a contract was entered into, if at all, when a letter was signed by the corporation’s president in Oklahoma, and the letter neither contemplated nor required any action to take place in South Carolina. Aviation Associates and Consultants, Inc. v. Jet Time, Inc. (S.C. 1991) 303 S.C. 502, 402 S.E.2d 177. Courts 13.5(3)

The mere receipt of a power of attorney did not constitute the transaction of business for jurisdictional purposes under Section 36‑2‑803. Additionally, the making of an oral trust agreement did not constitute the transaction of business in South Carolina where it was not alleged that the contract was entered into or that it was to be performed in South Carolina. White v. Stephens (S.C. 1990) 300 S.C. 241, 387 S.E.2d 260.

In an action brought by a former wife to increase the alimony and child support payments to be paid by her former husband, the former husband had the requisite minimum contacts with South Carolina to satisfy due process where the parties were married in South Carolina, then immediately left the state and resided in various other states where their 2 children were born, but the parties and their children were last together as a family in South Carolina, and the former wife and the children had resided in South Carolina ever since the parties separated. Keller v. Keller (S.C.App. 1988) 296 S.C. 411, 373 S.E.2d 692.

In a medical malpractice action against a South Carolina physician, a North Carolina clinic and two of its staff physicians, even though the North Carolina physicians attempted by mail and telephone to provide follow‑up care to defendant in South Carolina, the physicians were merely fulfilling their professional responsibilities to provide medical services to a patient in need, and therefore, the assertion of personal jurisdiction over the physicians was unreasonable under the circumstances of the case. Hume v. Durwood Medical Clinic, Inc. (S.C.App. 1984) 282 S.C. 236, 318 S.E.2d 119, certiorari granted 284 S.C. 417, 327 S.E.2d 322, certiorari dismissed 285 S.C. 377, 329 S.E.2d 443, certiorari denied 106 S.Ct. 141, 474 U.S. 848, 88 L.Ed.2d 117.

Owner of aircraft is subject to personal jurisdiction under Section 36‑2‑803 where pilots were employed by owner of aircraft to fly plane from Colorado to Costa Rica and these pilots were operating plane when it crashed in South Carolina, although owner of aircraft contends that pilots, both killed in crash, had stolen plane and flight over South Carolina was unauthorized. McComb v. Tiburon Aircraft, Inc. (S.C. 1981) 276 S.C. 683, 281 S.E.2d 482. Courts 13.6(2)

Architect transacted business within State, and contracted to supply services or things in state within meaning of Section 36‑2‑803(1)(a) and (b), when he agreed to design building to be located in State, thus bringing him in direct contact with particular construction project carried out according to plans prepared by him. Parker v. Williams & Madjanik, Inc. (S.C. 1978) 270 S.C. 570, 243 S.E.2d 451.

22. Tolling of limitation of actions

Statute tolling limitations period for cause of action against any person who is out of state did not toll six‑year statute of limitations for former wife’s fraudulent conveyance claim against former husband and his sister, both of whom were not residents of South Carolina, where wife knew residence of and could easily locate both parties after conveyance and before she brought claim, and South Carolina court could have acquired personal jurisdiction over husband and sister through notice by publication or long‑arm statute. Meyer v. Paschal (S.C. 1998) 330 S.C. 175, 498 S.E.2d 635, rehearing denied. Limitation Of Actions 87(3)

Nonresident defendant’s amenability to personal service under long‑arm statute or other methods which bring defendant within personal jurisdiction of courts prevents application of statute tolling statute of limitations for cause of action against any person who is out of state; language of statute referring to defendant who is “out of the State” describes defendant who is beyond personal jurisdiction and process of court and not simply defendant who is physically absent from state and purposes of statute is to toll limitations period to prevent statute of limitations from expiring on valid claims when defendant is out of state and personal jurisdiction is severely restricted; overruling, Cutino v. Ramsey, 285 S.C. 74, 328 S.E.2d 72, Harris v. Dunlap, 285 S.C. 226, 328 S.E.2d 908. Meyer v. Paschal (S.C. 1998) 330 S.C. 175, 498 S.E.2d 635, rehearing denied. Limitation Of Actions 87(3)

Under the express language of the tolling statute, Section 15‑3‑30, and in the absence of specified exceptions, the tolling statute is not rendered inapplicable by virtue of the fact that the defendant is amenable to personal service under the long‑arm statute, Section 36‑2‑803. Harris v. Dunlap (S.C. 1985) 285 S.C. 226, 328 S.E.2d 908.

23. Torts

Under provisions of Section 36‑2‑803(1) which confer long‑arm jurisdiction when a tort is committed in South Carolina, a federal district court had personal jurisdiction over a nonresident corporate director who was being sued personally for having reneged on his obligation to pay the debt of another corporation, even though any decisions made by the director were made while he was outside of South Carolina, as he had reason to foresee that his actions would cause injury in South Carolina. Springs Industries, Inc. v. Gasson, 1996, 923 F.Supp. 823. Federal Courts 2745; Federal Courts 2756(2); Federal Courts 2756(7)

In action charging trust mismanagement, proper statutory and constitutional bases for personal jurisdiction under Code 1976 Sections 15‑9‑440 and 36‑2‑803 existed, where defendants engaged in continuous financial transactions with several South Carolina residents, committed allegedly tortious activities in whole or in part in state, and owned interests in property in state, and one defendant made repeated visits to state, all such contacts appearing to be connected with underlying cause of action. Long v. Baldt (D.C.S.C. 1979) 464 F.Supp. 269.

Section 36‑2‑803 is not applicable to personal injury suit alleging negligence where defendants’ contacts with South Carolina (limited partnership and ownership of property) had no connection with cause of action arising in Missouri when plaintiff fell down flight of stairs at defendants’ residence. Nelepovitz v. Boatwright (D.C.S.C. 1977) 442 F.Supp. 1336.

Tortious injury for purposes of long‑arm statute allowing court to exercise specific personal jurisdiction if non‑resident defendant caused tortious injury in state occurred in North Carolina where in vitro fertilization and embryo implantation occurred, not where the patients, whose baby was born with Down Syndrome, resided. Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E.2d 476. Courts 13.5(11)

Long‑arm statute did not allow for service of process on Chilean member of British corporation’s board of directors, in shareholder’s action against board member for breach of fiduciary duty, fraud, and civil conspiracy stemming from purchase of corporate assets at substantially less than market value; only connections between South Carolina and alleged torts were that one of corporation’s two assets was a subsidiary that was a South Carolina corporation doing business in South Carolina and that alleged co‑conspirator was a resident of South Carolina, and corporation did not allege any injury to South Carolina subsidiary as result of alleged torts or that any actions in furtherance of conspiracy were done in South Carolina. International Mariculture Resources v. Grant (S.C.App. 1999) 336 S.C. 434, 520 S.E.2d 160. Courts 13.6(7)

For purposes of long‑arm statute, the commission of a tortious act in whole or in part in the state applies to in‑state injuries resulting from out‑of‑state acts or omissions. International Mariculture Resources v. Grant (S.C.App. 1999) 336 S.C. 434, 520 S.E.2d 160. Courts 13.5(4)

Phrase commission of tortious act “in whole or in part in this State” applies to in‑state injuries resulting from out‑of‑state acts or omissions. Parker v. Williams & Madjanik, Inc. (S.C. 1978) 270 S.C. 570, 243 S.E.2d 451.

Architect subjected himself to jurisdiction of South Carolina court by commission of tortious act wholly or partly in this State where he designed building he knew was to be constructed on Hilton Head Island, South Carolina, and building allegedly collapsed due to negligent design, causing intestate’s death. Parker v. Williams & Madjanik, Inc. (S.C. 1978) 270 S.C. 570, 243 S.E.2d 451.

24. Review

The Supreme Court is bound by the finding of a circuit court that a non‑resident corporate defendant is personally subject to its jurisdiction, unless the circuit court’s decision is found to be influenced by an error of law or unsupported by the evidence. Atlantic Soft Drink Co. of Columbia, Inc. v. South Carolina Nat. Bank (S.C. 1985) 287 S.C. 228, 336 S.E.2d 876.

The Supreme Court of South Carolina is bound by a circuit court’s finding that a non‑resident defendant is subject to its jurisdiction absent a determination that the circuit court ruling is without evidentiary support or controlled by an error of law. Hammond v. Cummins Engine Co., Inc. (S.C. 1985) 287 S.C. 200, 336 S.E.2d 867. Appeal And Error 840(2)

**SECTION 36‑2‑804.** Service outside the State.

When the exercise of personal jurisdiction is authorized by this section, service may be made outside the State.

HISTORY: 1962 Code Section 10.2‑804; 1966 (54) 2716.

CROSS REFERENCES

Service by publication or out of state generally, see Sections 15‑9‑710 to 15‑9‑750.

LAW REVIEW AND JOURNAL COMMENTARIES

Jurisdiction Over a Foreign Corporation. 19 S.C. L. Rev. 806.

South Carolina’s Uniform Commercial Code—The Demise of its Long Arm Provisions. 24 S.C. L. Rev. 474.

United States Supreme Court Annotations

State regulation of judicial proceedings as violating commerce clause (Art I, Section 8, cl 3) of Federal Constitution—Supreme Court cases. 100 L Ed 2d 1049.

NOTES OF DECISIONS

Construction and application 1

1. Construction and application

Exercise of personal jurisdiction under this part did not violate the due process principles of the Federal Constitution. Howard v. Allen (D.C.S.C. 1973) 368 F.Supp. 310, affirmed 487 F.2d 1397, certiorari denied 94 S.Ct. 2611, 417 U.S. 912, 41 L.Ed.2d 216.

**SECTION 36‑2‑805.** Other bases of jurisdiction unaffected.

A court of this State may exercise jurisdiction on any other basis authorized by law.

HISTORY: 1962 Code Section 10.2‑805; 1966 (54) 2716.

United States Supreme Court Annotations

State regulation of judicial proceedings as violating commerce clause (Art I, Section 8, cl 3) of Federal Constitution—Supreme Court cases. 100 L Ed 2d 1049.

**SECTION 36‑2‑806.** Manner and proof of service.

(1) When the law of this State authorizes service outside this State, the service, when reasonably calculated to give actual notice, may be made:

(a) by personal delivery in the manner prescribed for service within the State;

(b) in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction;

(c) by registered or certified mail as provided in Rule 4(d)(8) of the South Carolina Rules of Civil Procedure addressed only to the person to be served and requiring a return receipt showing the acceptance by the defendant. Entry of default and default judgments shall be subject to the conditions of Rule 4(d)(8); or

(d) as directed by the court.

(2) Proof of service outside this State may be made by affidavit of the individual who made the service or in the manner prescribed by law of this State, the order pursuant to which the service is made, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. When service is made pursuant to item (c) of subsection (1) of this section, proof of service shall include a receipt signed by the addressee.

HISTORY: 1962 Code Section 10.2‑806; 1966 (54) 2716; 1993 Act No. 42, Section 3.

CROSS REFERENCES

Applicability of this section to a proceeding for determination of paternity, see Section 63‑17‑20.

Service of papers generally, see SCRCP Rules 3 to 6.

United States Supreme Court Annotations

State regulation of judicial proceedings as violating commerce clause (Art I, Section 8, cl 3) of Federal Constitution—Supreme Court cases. 100 L Ed 2d 1049.

NOTES OF DECISIONS

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Validity 1

1. Validity

So‑called long arm statute was not shown to be unconstitutional upon argument that it relates to two subjects, in violation of the state constitution, since homogeneous terms of statute relate to one subject only and details of Title could be disregarded as surplusage, if necessary to sustain constitutionality. Thompson v. Hofmann (S.C. 1974) 263 S.C. 314, 210 S.E.2d 461.

2. Retroactive application

Service of process was effective to confer jurisdiction on the federal district court in that this part, being procedural in nature and neither creating new rights nor destroying vested rights, may be retroactively applied to causes of action arising before its effective date where the suit was brought after its effective date. Howard v. Allen (D.C.S.C. 1973) 368 F.Supp. 310, affirmed 487 F.2d 1397, certiorari denied 94 S.Ct. 2611, 417 U.S. 912, 41 L.Ed.2d 216.

3. Service by mail

The service of a Summons and Complaint on a non‑resident was effective where the documents were mailed to the defendant’s out‑of‑state address via certified mail with unrestricted delivery, the return receipt was signed by a secretary for a corporation with which the defendant was affiliated, and, although an acknowledgement of service was not signed or returned, the defendant disclosed in a letter that he had received the documents; although Rule 4, SCRCP, requires that service by mail be restricted to the addressee, Section 36‑2‑806 merely requires evidence of service to the addressee which is satisfactory to the court. Jacobson v. Sternberg (S.C. 1991) 305 S.C. 337, 408 S.E.2d 245.

The trial court properly denied a motion to vacate a default judgment entered against a foreign corporation where the evidence established that the summons and complaint had been mailed to the corporation but the latter had refused to accept it and the unopened envelope had been returned to the plaintiffs’ attorney; although the requirement of proof of service was irregular in that the affidavit had been signed but the maker had inadvertently failed to have his signature notarized, an amendment, though permissible and proper, was not necessary where any material prejudice to the corporation was the result of its own refusal of service. Patel v. Southern Brokers, Ltd. (S.C. 1982) 277 S.C. 490, 289 S.E.2d 642.

Service on a New York corporation by registered mail was sufficient to confer jurisdiction and was not limited by Section 36‑2‑809 where attempts to serve the corporation through the New York City Sheriff’s Department had been unsuccessful, the letter of service had been receipted for by an employee of the corporation, and the corporation had minimum, substantial business contacts in South Carolina. Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc. (S.C. 1981) 275 S.C. 556, 274 S.E.2d 287.

4. Misnomer of defendant

Service of process by mail to the name under which a bank operated a consumer credit business was sufficient to bring the bank before the court in an action to avoid an unsecured consumer loan, even though the name was a misnomer and did not represent either an individual or a corporate entity, where the borrower dealt with the bank only by the misnomer, and the bank admittedly received the process which had been addressed to the misnomer, and thus it was not prejudiced. Griffin v. Capital Cash (S.C.App. 1992) 310 S.C. 288, 423 S.E.2d 143.

5. Person receiving service

Proper service is accomplished pursuant to Section 36‑2‑806(1)(c), notwithstanding defendant’s contention that he was not properly served because suit papers were received by 13‑year‑old boy who was not person of discretion. Aetna Cas. & Sur. Co. v. Jenkins (S.C.App. 1984) 282 S.C. 107, 317 S.E.2d 460.

6. Tolling limitation of actions

Under Section 36‑2‑806(1)(c) and (2), service is not complete until the date of delivery; since an action is not commenced under South Carolina law until the summons and complaint are filed and served, the applicable date for tolling the statute of limitations is the date of receipt and, therefore, mailing a summons and complaint does not toll the statute of limitations. Dandy v. American Laundry Machinery Inc. (S.C. 1990) 301 S.C. 24, 389 S.E.2d 866.

7. Service on out of state defendant

Products liability plaintiff did not serve Minnesota defendant in accordance with Minnesota procedure law, as required to have valid service of process in South Carolina, when plaintiff served complaint on Minnesota Secretary of State without establishing absence of any representative who could be served within state. Hawes v. Cart Products, Inc., 2005, 386 F.Supp.2d 681. Corporations And Business Organizations 3269(4)

**SECTION 36‑2‑807.** Individuals eligible to make service.

Service outside this State may be made by an individual permitted to make service of process under the law of this State or under the law of the place in which the service is made or who is designated by a court of this State.

HISTORY: 1962 Code Section 10.2‑807; 1966 (54) 2716.

CROSS REFERENCES

Service of papers generally, see SCRCP Rules 3 to 6.

NOTES OF DECISIONS

Retroactive application 1

1. Retroactive application

Service of process was effective to confer jurisdiction on the federal district court in that this part, being procedural in nature and neither creating new rights nor destroying vested rights, may be retroactively applied to causes of action arising before its effective date where the suit was brought after its effective date. Howard v. Allen (D.C.S.C. 1973) 368 F.Supp. 310, affirmed 487 F.2d 1397, certiorari denied 94 S.Ct. 2611, 417 U.S. 912, 41 L.Ed.2d 216.

**SECTION 36‑2‑808.** Individuals to be served; special cases.

When the law of this State requires that in order to effect service one or more designated individuals be served, service outside the State under this section must be made upon the designated individual or individuals.

HISTORY: 1962 Code Section 10.2‑808; 1966 (54) 2716.

**SECTION 36‑2‑809.** Other provisions of law unaffected.

This chapter does not repeal or modify any other law of this State permitting another procedure for service.

HISTORY: 1962 Code Section 10.2‑809; 1966 (54) 2716.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Auctions and Auctioneers Section 20, Conduct of Auction Sales Under South Carolina Uniform Commercial Code.

S.C. Jur. Damages Section 70, Personal Property and Sale of Goods.

Forms

South Carolina Litigation Forms and Analysis Section 2:26 , Long Arm Jurisdiction.

NOTES OF DECISIONS

In general 1

1. In general

Service on a New York corporation by registered mail was sufficient to confer jurisdiction and was not limited by Section 36‑2‑809 where attempts to serve the corporation through the New York City Sheriff’s Department had been unsuccessful, the letter of service had been receipted for by an employee of the corporation, and the corporation had minimum, substantial business contacts in South Carolina. Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc. (S.C. 1981) 275 S.C. 556, 274 S.E.2d 287.

Where all parties knew, by the terms of a contract for design and manufacture of steel joists within the state, that significant portions were to be performed in the state, they were subject to the jurisdiction of the courts by virtue of the long‑arm statutes. Nucor Corp. v. Faneuil Const. Inc. (S.C. 1975) 264 S.C. 458, 215 S.E.2d 634.