

70. “But if the concept ‘game’ is uncircumscribed like that, you don’t really know what you mean by a ‘game.’” — When I give the description: “The ground was quite covered with plants” — do you want to say I don’t know what I am talking about until I can give a definition of a plant? . . .

71. One might say that the concept ‘game’ is a concept with blurred edges. — “But is a blurred concept a concept at all?” — Is an indistinct photograph a picture of a person at all? Is it even always an advantage to replace an indistinct picture by a sharp one? Isn’t the indistinct one often exactly what we need?

Wittgenstein’s notion of “family resemblances” may be an incomplete solution to the problem he raises, but it does provide a provocative backdrop against which to think about the problem under discussion. For our purposes, it is especially useful to reflect upon the questions raised in § 71 of Wittgenstein’s text. **Why would it be an advantage for the UCC to employ an indistinct or blurred concept of “transaction in goods?”** What disadvantages can you see?

Our long march through this digression ends at last. Now you are ready to begin by reading some Uniform Commercial Code sections and applying them to problems dealing with the expectation interest.

2. The Expectation Interest: The Substitute Contract as the Preferred Means to the End

Contract remedies generally are based on encouraging the aggrieved party to enter a substitute contract and then awarding damages to make up any loss remaining. Suppose Seller promises to sell **100 shares of Hot Property Software Corporation stock** to Buyer for \$10 a share. Seller breaches the contract. Buyer then immediately purchases 100 shares of this stock from someone else for \$12 a share. Had the Seller/Buyer contract been performed, Buyer would have paid \$1000 for 100 shares of stock. Because of the breach, Buyer had to pay \$1200. A court would award Buyer damages of \$200. Assuming no transaction costs, Buyer then will have paid \$1000 ($\$1200 - 200 = \1000) for the 100 shares — that is, Buyer will be where he or she would have been had the contract been performed. The expectation interest is protected.

We will illustrate this principle in more detail by a series of examples of how the Uniform Commercial Code has codified this simple approach. As so often is the case, complexity lurks at the margins of a seemingly simple idea. In each instance, ask yourself not only what is the proper answer under the applicable statutes, but whether it is a sensible answer. First, read **§§ 2-703, 2-706, and 2-708** of the Uniform Commercial Code as well as the **relevant Official Comments**. Then answer the following questions:¹⁷

¹⁷ The dollar amounts in these problems keep the math simple, but probably make a lawsuit impractical because of the cost of litigation. In such circumstances it is unclear to what extent legal analysis will affect any dispute resolution by the parties. However, if the contract were for 100,000 crates of apples, a threat of litigation could be credible, and in that case, predicting how a court would resolve any litigation would likely have an impact on any settlement discussions between the parties.

Advantages: An indistinct concept of transaction in goods allows more flexibility for a court to apply the UCC to novel situations without a new statute or an amendment. The indistinct term allows for judge made development much like the common law decision process, albeit grounded in a statute.

Disadvantages: An indistinct concept of transaction in goods leads to uncertainty, complicating planning; it makes judges act like legislators; the common law decision process takes time, potentially leading to inconsistent decisions (particularly with 50 versions of the UCC enacted across the U.S.).

Is this sale transaction subject to Article 2 of the UCC? Read the definition of “good”. Do you think this type of transaction should require a writing of some sort as a condition to its enforceability?

Note that these sections deal with remedies available to a Seller of goods. Separate and somewhat different sections address remedies for a Buyer.

The default rule in the United States is that each party must pay its own legal fees. This default rule may be changed by contract: a clause might provide that the losing party pay the legal fees of the prevailing party. Further, some statutes provide that a losing party must pay legal fees of the prevailing party.

(1) On June 1st, Seller contracted to sell 100 crates of apples to Natural Foods at \$8/crate. The crates of apples were to be delivered to Natural Foods on July 1st. On July 1st, Seller arrived at Natural Foods with 100 crates of apples that met the quality the contract required. However, Natural Foods Produce Manager breached the contract by refusing to accept or pay for the apples. Seller returned to his farm and kept the apples. The market price for this quality and type of apples on July 1st was \$7.10/crate. How much, if anything, should Seller recover under the UCC?

Read UCC s. 2-708 for this problem.

Comment 1

(2) Suppose we learned that the market value of apples of this type and quality on both June 1st and July 1st was \$7.10/crate. Would this change the result? Why or why not?

Comment 2

(3) Suppose the facts are as stated in question (1), except that Seller had resold the apples on July 1st at \$7/crate to a supermarket located near Natural Foods' place of business. The owner of the supermarket was Seller's neighbor and close personal friend. How much, if anything, would Seller recover from Buyer?

Comment 3

(4) Suppose the facts are as stated in question (1), except that Seller upon leaving Natural Foods' place of business parked his truck by the side of the road and resold all the apples at \$7.50/crate to people who stopped. How much, if anything, would Seller recover from Buyer?

Comment 4

Problem (4) is much more difficult than it looks. The UCC does not provide a clear answer, and scholars have debated the issue. You can find a summary of the contending positions in a leading authority on the interpretation of the UCC: WHITE & SUMMERS, THE UNIFORM COMMERCIAL CODE, at pp. 362-66 (6th ed., 2010). However, at this point in the course your task is simply to articulate what might be contending interpretations of the UCC relevant to the solution of problem (4).

B. THE EXPECTATION INTEREST: OF INFERIOR SUBSTITUTES, OTHER ENDS, AND OTHER MEANS

The contract-price/market-price approach offers a simple solution to many cases. However, it won't always work. For example, go back once again to our apple case. Suppose the Produce Manager at Natural Foods refuses to take the apples because there is a glut, and apples are so plentiful that one can buy them at every roadside for a penny an apple. Commercial buyers are not purchasing apples from anyone, and one cannot sell them to consumers at roadsides at prices adequate to pay for the gasoline burned to drive the truck there. Section 2-709 makes it clear that "if the seller is unable after reasonable effort to resell [the goods] at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing," then the seller may recover the contract price from the buyer. The seller must hold the goods for the buyer unless resale becomes possible.

The next three cases illustrate some of the difficulties in the application of the expectation principle.

The point of this fact is that the Seller did nothing to mitigate damages--such as attempting to sell the apples to a third party. Does this failure to attempt mitigation deprive Seller of a remedy under the UCC?

See, e.g. Tesoro Petroleum Corp. v. Holborn Oil Co., Ltd., 547 N.Y.S.2d 1012 (1989).