

The Buyer's Remedy of Cover

In developing this issue's column, I surveyed a number of young attorneys to see if they knew the legal definition of "cover." One person thought that I was referring to the entry fee to a nightclub. Another thought that it meant picking up the bar tab for a friend. Yet another young attorney guessed that it had something to do with secret surveillance. (I clarified that I was *not* asking about going "under cover.")

Finally, I found a young attorney who did not look at me like I had three heads. He said, "Oh! I remember learning about that in the first year of law school. You mean 'cover' as in the remedy available to a buyer under the Uniform Commercial Code?"

Exactly.

I, too, learned about cover in contracts class during the first year of law school. I am gratified that they still teach the subject, because it is an important remedy for an aggrieved purchaser of goods in a commercial transaction. Thus, this article offers a comprehensive overview of cover and how it affects plumbing contractors, vendors, and purchasers who engage in everyday commerce involving plumbing supplies and materials. (As an added benefit, this article will enlighten any law students who slept through the cover discussion in contracts class and never took an upperclass course in sales transactions.)

DEFINITION OF COVER

The definition of cover is found in Article 2 of the Uniform Commercial Code (UCC), which governs the sale of goods. This is an important caveat to keep in mind: Everything discussed in this article pertains only to the sale of *goods*; it has nothing to do with the *provision of services*. Although the UCC has been adopted in one form or another by every state in the country, this article refers to the New York version of the statute, N.Y. U.C.C. § 2-712, entitled "Cover; Buyer's Procurement of Substitute Goods." The statute provides:

"After a breach...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.

"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...but less expenses saved in consequence of the seller's breach.

"Failure of the buyer to effect cover within this section does not bar him from any other remedy."

PURPOSE OF COVER

As described, cover provides the purchaser with a remedy that allows him to acquire the needed goods after the seller fails to deliver them in accordance with the parties' agreement (i.e., after the seller breaches the parties' contract). In other words, after a breach by the seller, a buyer is permitted to go out and purchase commercially reasonable, substitute (but not necessarily identical) goods (known as "cover"). The buyer then can recover as damages from the seller the difference between the cost of cover and the contract price, plus incidental or consequential damages, less expenses saved flowing from the seller's breach.

The theory behind the right to cover, as described by Summers and White in their UCC treatise, is to "put [the] buyer in the identical economic position that performance would have." As the Uniform Laws Comment to Section 2-712 states, "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 of cover used was not the cheapest or most effective."

While the statute seems fairly straightforward on its face, a closer look illustrates its fuzzy contours and ambiguous terms.

NONEXCLUSIVE REMEDY

Perhaps the clearest part of the statute is subsection 3. In short, the remedy of cover is not mandatory for the aggrieved buyer. The UCC—specifically Section 2-713—provides other damages for nondelivery of goods by a seller. Section 2-713 discusses how the buyer's damages are calculated when the buyer elects not to cover. These damages are "the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental or consequential damages...but less expenses saved in consequence of the seller's breach."

Again, this calculation (which could be the topic of an entirely separate article) offers a complete alternative to covering, and it only applies to the extent that the buyer has not covered.

REQUIREMENT OF BREACH

Turning back to Section 2-712, a prerequisite for the buyer's right to cover is the seller's breach of contract. In the sale of goods, this often takes the form of a seller not delivering the goods at all or failing to deliver them timely as promised. The timing of delivery invites mischief by shrewd buyers.

For example, assume a seller is delayed in delivery, and the buyer, upon learning of the delay, goes out and covers at a higher price than his original contract price. Assume further that the buyer also decides to accept the delayed delivery and resells those goods at a profit. Commentators examining this hypothetical agree that the buyer must deduct this profit from his cover damages.

GOOD FAITH

To avoid, or perhaps to minimize, shenanigans by the shrewd buyer who seeks to profit unfairly by the right to cover, subsection 1 of the statute imposes a good-faith requirement. While the definition of "good faith" is murky in and of itself—and the issue gets muddied further when you consider subjective vs. objective standards of good faith—Summers and White offer a simple test: "Presumably the covering buyer acts in good faith unless it knowingly and without reason avoids a less expensive market in favor of a more expensive one."

UNREASONABLE DELAY

The unreasonable delay requirement is not intended to limit the time necessary for the buyer to look around and decide as to how he may best effect cover. Rather, it is designed to prevent the buyer from taking advantage of the situation and effectively using Section 2-712 and intentional delays to place himself in a superior economic position than performance would have. However, this does not mean that the buyer cannot act reasonably and exercise his right to cover in a manner that may leave him better off than if the seller had originally performed.

As Official Comment 2 to the statute says, "The test of proper cover is whether at the time and place the buyer acted in good faith and in a

The application and impact of laws can vary widely based on the specific facts involved. Nothing in this column should be considered legal advice, recommendations, or an offer to perform services. The reader should not act upon any information provided in this column, including choosing an attorney, without independent investigation or legal representation. As such, this column should not be used as a substitute for consultation with an attorney.

reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.”

GOODS IN SUBSTITUTION

This requirement of subsection 1 contemplates “goods not identical with those involved, but commercially usable as reasonable substitutes under the circumstances of the particular case.” Sellers in cover cases frequently complain that the substitute goods are so different from the original contract goods that they cannot be considered a “reasonable substitute.” Courts will look at the quality, grade, and features of the goods in question, as well as the availability of the replacement goods.

Again, the “reasonableness” standard will govern. Did the aggrieved buyer make a reasonable effort to procure similar replacement goods?

APPLICATION

It is important to note that the buyer’s right to cover under the UCC is not unfettered. In the end, the covering buyer’s conduct directly affects the amount of damages that the breaching seller is required to pay. As one commentator points out, it would be unfair to let a buyer wait one year (while prices of goods are rising) before exercising his right to cover (unless there was some reasonable basis for the delay, such as the covering goods had to be manufactured and were not available for shipment).

In *Fred J. Miller, Inc. v. Raymond Metal Products Co.*, the Court of Appeals of Maryland held that a buyer had not met the requirements of Section 2-712(1) of that state’s UCC due to the buyer’s delay in covering. In that case, the buyer allegedly used some nonconforming dredging pipe that it received from the seller for almost one year before deciding that the pipe was unacceptable and purchasing a substitute.

CONCLUSION

The buyer’s right to cover is an important remedy when a seller fails to deliver conforming goods in accordance with the parties’ contract. However, the remedy is not without limitation. While Section 2-712 of the UCC seems deceptively simple and straightforward, its provisions are subject to a wide array of judicial interpretation. To that end, before you consider covering after a breach by a seller, check with your attorney to ensure that your prospective conduct is consistent with the buyer’s remedy under your state’s statute. **PSD**

RECOMMENDED READING

1. N.Y. U.C.C. § 2-712 (and official comments)
2. James J. White and Robert S. Summers, *Uniform Commercial Code* § 6-3 (5th ed. 2006)
3. *Fred J. Miller, Inc. v. Raymond Metal Products Co.*, 290 A.2d 527 (Md. Ct. App. 1972)

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