

CONTRACTS--ISSUE OF UCC REMEDY--SELLER'S REMEDY OF RESALE.

The (*state number*) issue reads:

"Did the plaintiff conduct the resale of (*name goods*) in good faith and in a commercially reasonable manner?"

(You will answer this issue only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the plaintiff conducted the resale of (*name goods*) in good faith and in a commercially reasonable manner.

The law provides that where the buyer [wrongfully rejects the goods] [wrongfully revokes acceptance of the goods] [fails to make a payment due on or before delivery] [repudiates the contract],<sup>1</sup> the seller may resell (the undelivered balance of) the goods concerned. If he does so, the resale must be in good faith and in a commercially reasonable manner.<sup>2</sup>

Good faith means honesty in fact in the conduct or

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<sup>1</sup>N.C.G.S. §25-2-703.

<sup>2</sup>N.C.G.S. §25-2-706(1).

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transaction concerned<sup>3</sup> (and, in the case of a merchant,<sup>4</sup> also means the observance of reasonable commercial standards of fair dealing in the trade).<sup>5</sup>

Every aspect of the resale must be commercially reasonable, including the method, manner, time, place and terms of resale.<sup>6</sup> The resale must be reasonably identified as referring to the broken contract.<sup>7</sup> (The resale may occur through one or more transactions, and in whole or multiple units.<sup>8</sup>).

[Private Resale. (Unless otherwise agreed,) the resale may be by private sale, but the seller must give the buyer reasonable notice of his intention to resell.<sup>9</sup> (The seller may

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<sup>3</sup>N.C.G.S. §25-1-201(19).

<sup>4</sup>A "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 practice 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." N.C.G.S. §25-2-104(1).

<sup>5</sup>N.C.G.S. §25-2-103(1)(b).

<sup>6</sup>N.C.G.S. §25-2-706(2).

<sup>7</sup>N.C.G.S. §25-2-706(2). However, it is not necessary that the goods be in existence or that any or all of them were identified to the contract prior to the breach. *Id.* See also N.C.G.S. §25-2-704.

<sup>8</sup>N.C.G.S. §25-2-706(2).

<sup>9</sup>N.C.G.S. §25-2-706(3).

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use the goods to fulfill an already existing sales contract and treat it as a resale.<sup>10)</sup>

[Public Resale. (Unless otherwise agreed,) the resale may be by public resale, but 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 the resale must be made at a usual place or market for public sale if one is reasonably available; and the seller must give the buyer reasonable notice of the time and place of the resale<sup>11</sup> (except in the case of goods which are perishable or threaten to decline in value speedily); and

[the goods to be sold must be within the view of those attending the resale]

[the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders].

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<sup>10</sup>N.C.G.S. §25-2-706(2).

<sup>11</sup>Failure to comply with the public sale requirements (e.g., notice to buyer of seller's intent to resell) will result in the seller being disqualified to measure his damages under N.C.G.S. §25-2-706. Instead, his measure of damages will be determined under N.C.G.S. §25-2-708 ("contract-market" damages). *Miller v. Belk*, 23 N.C. App. 1, 6, 207 S.E.2d 792, 795 (1974).

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(The seller may buy at a public resale of the goods.<sup>12</sup>)<sup>13</sup>

Finally, as to this (*state number*) issue upon which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff conducted the resale of (*name goods*) in good faith and in a commercially reasonable manner, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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<sup>12</sup>N.C.G.S. §25-2-706(4)(d). Where the public sale is by auction, however, the seller should give prior notice of his intent to bid. N.C.G.S. §25-2-328.

<sup>13</sup>N.C.G.S. §25-2-706(4).