

CONTRACTS--ISSUE OF UCC REMEDY--BUYER'S DAMAGES UPON SELLER'S
FAILURE TO MAKE DELIVERY OR TENDER.

The (*state number*) issue reads:

"What amount of money damages is the plaintiff entitled to recover from the defendant for breach of contract after the defendant failed to [deliver] [tender] the (*name good*)?"

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damage resulting from the breach.

The plaintiff may also be entitled to recover actual damages. 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, the amount of damages sustained as a result of the breach of contract after the defendant failed to [deliver] [tender] the (*name good*).

The law provides that where a seller fails to [deliver] [tender] a (*name good*) to a buyer, the buyer may cancel the contract but, whether or not he cancels, he may also recover so much of the purchase price as has been paid to the seller.¹

(plus)

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*(Select one of the two damage measures below as is
supported by the evidence--do not give both.)*

[Cover Measure. A buyer may cover for the seller's non-
conforming delivery by making a reasonable purchase of a
substitute (*name good*) in good faith and without delay. If you
find that the plaintiff reasonably covered for the defendant's
non-conforming [delivery] [tender], the plaintiff may also
recover the difference between the cost of the substitute (*name
good*) and the contract price.]²

[Contract-Market Measure. A buyer may recover damages for
the seller's failure to make [delivery] [tender]. To determine
such damages, you must first find the market price³ of the (*name
good*) at the place where [delivery] [tender] was to have
occurred and at the time the plaintiff learned of the
defendant's failure to make [delivery] [tender]. From that
market price you must subtract the parties' contract price.

¹N.C.G.S. §25-2-711(1). *Davis v. Colonial Mobile Homes*, 28 N.C. App.
13, 19, 220 S.E.2d 802, 805 (1975), *disc. rev. denied*, 289 N.C. 613, 223
S.E.2d 391 (1976).

²N.C.G.S. §25-2-711(1)(a). *Harrington Mfg. Co. v. Logan Tontz Co.*, 40
N.C. App. 496, 504-05, 253 S.E.2d 282, 287, *disc. rev. denied*, 297 N.C. 454,
256 S.E.2d 806 (1979).

³N.C.G.S. §25-2-723.

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The difference is the plaintiff's damages for the defendant's
failure to make [delivery] [tender]⁴.)

(plus)

(a buyer may also recover incidental damages proximately
resulting from the seller's breach. These include [any
commercially reasonable charges, expenses or commissions in
connection with effecting cover] [any reasonable expense
incident to delay or other breach])⁵

(plus)

(a buyer may also recover consequential damages proximately
resulting from the seller's breach. These include any loss
resulting from general or particular requirements and needs of
which the defendant at the time of contracting had reason to
know and which could not reasonably have been prevented by the
plaintiff)⁶

(less)

⁴N.C.G.S. §25-2-711(1)(b).

⁵N.C.G.S. §§25-2-711(1) and 25-2-715(1).

⁶N.C.G.S. §§25-2-711(1) and 25-2-715(2).

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(a credit to the defendant for any expenses saved or avoided by the plaintiff as a consequence of the defendant's breach).⁷

The plaintiff's damages are to be reasonably determined from the evidence presented. The plaintiff is not required to prove with mathematical certainty the extent of the financial injury in order to recover damages. Thus, the plaintiff should not be denied damages simply because they cannot be calculated with exactness or a high degree of mathematical certainty. However, an award of damages must be based on evidence which shows the amount of the plaintiff's damages with reasonable certainty. You may not award any damages based upon mere speculation or conjecture.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence the amount of damages sustained by the plaintiff for breach of contract after the defendant failed to [deliver] [tender] the (*name good*), then it would be your duty to write that amount in the blank space provided.

⁷N.C.G.S. §25-2-711(1).

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If, on the other hand, you fail to so find, then it would
be your duty to write a nominal amount such as "One Dollar" in
the blank space provided.

